HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CRIMINAL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

The practical assessment is focused on a criminal trial before a judge and jury in the Court of First Instance.

Elliott is charged –

a) with Conner and George one count of manslaughter contrary to Common Law and punishable under section 7 of the Offences Against the Person Ordinance (Cap. 212);

b) with Conner and George one count of conspiracy to rob, contrary to section 10 of the Theft Ordinance (Cap. 210) and section 159A of the Crimes Ordinance (Cap. 200); and

c) with Conner and George one count of robbery contrary to section 10 of the Theft Ordinance (Cap. 210).

Conner is charged-

a) with Elliott and George one count of manslaughter contrary to Common Law and punishable under section 7 of the Offences Against the Person Ordinance (Cap. 212);

a) with Elliott and George one count of conspiracy to rob, contrary to section 10 of the Theft Ordinance (Cap. 210) and section 159A of the Crimes Ordinance (Cap. 200); and

b) with Elliott and George one count of robbery contrary to section 10 of the Theft Ordinance (Cap. 210).

George is charged-

a) with Elliott and Conner one count of manslaughter contrary to Common Law and punishable under section 7 of the Offences Against the Person Ordinance (Cap. 212);

b) with Elliott and Conner one count of conspiracy to rob, contrary to section 10 of the Theft Ordinance (Cap. 210) and section 159A of the Crimes Ordinance (Cap. 200); and

c) with Elliott and Conner one count of robbery contrary to section 10 of the Theft Ordinance (Cap. 210).

The Indictment can be found in the attached 'Bundle of Evidential Materials'.

In order to complete the practical assessment, candidates will be required to do the following:

1. to make or oppose a High Court application for the review of the bail decision by a magistrate refusing bail; **and**

2. to participate in a mini-trial.

Your role as solicitor-advocate

When you receive these instructions, you will at the same time be advised whether you will appear as counsel for the prosecution or counsel for the defendant.

As prosecuting counsel, of course, you will rarely, if ever, have sight of the proof of evidence taken from a defendant by his legal representatives. For the purposes of this practical assessment, however, the defence materials are made available to you. This is because there is a limited time within which the required exercise (including examination-in-chief and cross-examination) is to be conducted. Accordingly, it is to be assumed that all witnesses, both for the prosecution and the defence, have given evidence in accordance with their statements except where in examination-in-chief they have diverged from or contradicted those statements. Should there be any such divergence or contradiction, for the purposes of the practical assessment, it is to be taken that they have arisen in the course of the witness's testimony. In cross-examination, therefore, it will be put to the witness that one part of his or her testimony has been contradicted by another part.

Please note that those acting as prosecuting counsel are not allowed to make use of the contents of the "instructions" part of the Defence notes of the accused.

Dress

You will be expected to dress appropriately, that is, a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate being given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into a proper factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law. That is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

BEFORE the High Court Bail Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You have been advised separately which party this is.

The Skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached authorities as you think appropriate. You do not need to attach them to the skeleton argument.

Please note that for the purpose of this assessment, your argument must be limited to the authorities which are attached.

You must email your skeleton argument in MS Word format to the Secretariat of the Higher

Rights Assessment Board at info@hrab.org.hk by **no later than 3:00p.m. of the Wednesday prior to the day of the assessment**.

Upon receipt, the Secretariat will ensure that the party opposing you in the application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton argument late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the High Court Bail Application

The application for bail is made by the defence solicitor-advocate for George and opposed by prosecuting solicitor-advocate in the High Court Bail Review proceedings. For the purpose of this application, apart from the relevant legal principles, your submission should be based on the information set out in the Summary of Prosecution Evidence, Defence notes of Elliott, Conner and George.

THE CONDUCT of the mini-trial

(1) Witnesses

Only one prosecution witness and an accused will attend the mini-trial. You will be advised of the identity of the witnesses by the Secretariat on the day of the assessment when you arrive and register.

You must therefore be prepared in a structured and analytical manner to examine and cross-examine all relevant witnesses.

(2) Prosecution witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the prosecution:

1. Cheung Fai, CCTV Technician
2. Chan Keung, GoGo Van driver
3. George (under immunity)

(3) Defence witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the defence:

1. Elliott (D1)
2. Conner (D2)

DURING the mini-trial

You can assume:

1. The witnesses will appear at the trial in the order listed above; and

2. For the purposes of the mini-trial, it is to be assumed that the evidence of all witnesses, other than those called, is to be, and has been, fully in accordance with their statements.

Opening Speech

If you are allocated the role of prosecuting counsel, you will be expected to make a brief opening speech to the jury. It will last a maximum of 5 minutes.

If you are allocated the role of defence counsel, you will be expected to make a brief speech to the jury at the opening of the defence case. It will last a maximum of 5 minutes.

Conduct of the examination-in-chief/cross-examination

If you are allocated the role of prosecuting counsel, you will be expected to conduct an examination-in-chief of one prosecution witness. It will last a maximum of 10 minutes. If you are allocated the role of defence counsel, you will be expected to conduct a cross-examination of that witness. It will last a maximum of 15 minutes.

If you are allocated the role of defence counsel, you will be expected to conduct an examination-in-chief of either the accused or the defence witness. It will last a maximum of 10 minutes. If you are allocated the role of prosecuting counsel, you will be expected to conduct a cross-examination of that witness. It will last a maximum of 15 minutes.

Interventions/Objections

You are also required to

- deal with any interventions/objections made by the advocate representing the opposing party;

- take any objections, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party; and

- deal with any judicial interventions/questions as and when they arise.

Case law

The following authorities that the candidates may find useful for the review of bail decision:

See *Archbold* Hong Kong 2023, paragraph 3-4 onwards

232) (PFO), the District Court Ordinance (Cap 336) (DCO), the Customs and Excise Service Ordinance (Cap 342), the Complex Commercial Crimes Ordinance (Cap 394) and the Hong Kong Court of Final Appeal Ordinance (Cap 484).

From the first appearance before a court of a person the subject of criminal proceedings, bail is governed by Part 1A of the Criminal Procedure Ordinance (Cap 221) which introduced new statutory bail provisions into the law of Hong Kong. Part 1A has similarities to the Bail Act 1976 (England and Wales) and case law under that Act may assist in the interpretation and application of its provisions. Prior to that first court appearance the question of bail is governed by the provisions of the Police Force Ordinance, by the Ordinance establishing the law enforcement agency conducting the investigation, or by the Ordinance creating the particular offence, for example the Prevention of Bribery Ordinance (Cap 201).

A person under investigation by the police for an alleged criminal offence may be granted police bail either during the course of the investigation or after being charged with a criminal offence. The powers of the police to grant bail are contained in the Police Force Ordinance. Where police bail is granted during the investigation, the bail is to the date upon which the suspect is required to report to the designated police station. Where bail is granted after the arrested person has been charged with a criminal offence, the bail is to appear at a designated magistrate's court on a specified date. Police bail may be with, or without, a cash recognisance.

B. COURT BAIL

(1) Summary of Part 1A of the Criminal Procedure Ordinance (Cap 221), sections 9C to 9Q

Introduction

Once a person the subject of criminal proceedings is brought before a court, bail is governed by Part 1A, sections 9C to 9Q of the Ordinance. Part 1A was added to the Ordinance in 1994 by section 2 of the Criminal Procedure (Amendment) Ordinance 1994. Part 1A was further amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 commencing on 1 July 1997. Part 1A applies to permanent and special magistrates, to the District Court and to the Court of First Instance of the High Court. Bail in all criminal proceedings before those courts is to be granted in accordance with the Ordinance: section 9D(1). The Criminal Procedure Ordinance does not affect bail granted in civil proceedings or recognisances to keep the peace or to be of good behaviour. The Ordinance applies to all persons who come before magistrates, the District Court or the Court of First Instance in criminal proceedings. It makes no difference whether those proceedings were commenced by the laying of an information followed by the issue of a summons or by an arrest followed by a charge. **3–4**

General right to bail (section 9D)

Bail must be granted by a court to a person accused of an offence, whether or not that person has been committed for trial, if none of the circumstances specified in section 9G applies. A person may be admitted to bail subject to conditions. The types of conditions which may be attached to the grant of court bail in criminal proceedings are set out in section 9D(3)(a) and (b). Conditions may not be attached to bail unless this is considered necessary for the purpose of preventing absconding, preventing the commission of an offence whilst on bail or preventing interference with witnesses or preventing the perverting or obstructing of the course of public justice. A surety may be required as one of the conditions of admission to bail. The system of taking a recognisance from persons granted bail in criminal proceedings is abolished. Courts may not now make it a condition of admission to bail that a recognisance of bail be taken from a person admitted to bail. An accused cannot be required to deposit cash as a condition of obtaining bail. A recognisance may however be required if the court considers this is necessary for securing the surrender to custody of a person granted bail. As to the Offence of absconding by a person **3–5**

released on bail, see section 9L, and as to liability to arrest for absconding or breaking conditions of bail, see section 9K.

However, the general right to bail is subject to the specific exception created by Article 42(2) of the National Security Law (NSL) passed by the Standing Committee of the National People's Congress on 30 June 2020. The legislation was listed in Annex III to the Basic Law in accordance with the procedures under Article 18 of the Basic Law.

In *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, the Court of Final Appeal considered the provisions governing the grant of bail to a person charged with an offence under the NSL.

On 2 December 2020, Mr. Lai was charged with one count of fraud. Subsequently on 12 December 2020, he was charged with one count of "collusion with a foreign country or with external elements to endanger national security" under Article 29(4) of the NSL. The Chief Magistrate refused bail in respect of both charges on the basis that there were substantial grounds for believing that the accused would fail to surrender to custody or commit an offence whilst on bail. In forming that opinion, the Chief Magistrate indicated that he had considered the nature and seriousness of the alleged offence as well as Article 42.

On 23 December 2020, on Mr. Lai's application, Alex Lee J granted bail pursuant to s.9J of the Criminal Procedure Ordinance (Cap. 221) (CPO) subject to the undertaking offered by him.

In arriving at the decision, the Judge opined that in both fraud and NSL cases, the nature and seriousness of the offence and the weight of the evidence was in favour of the defence. Further, the risk of absconding could be ameliorated by imposing suitable stringent conditions. As to the risk of committing offence whilst on bail, it was stated in *Tong Ying Kit v HKSAR* [2020] 4 HKLRD 382, that Article 42(2) was not a "no bail" provision. It was therefore considered possible to grant bail to an accused charged with a NSL offence if there are sufficient grounds for the court to believe that the accused will not commit acts endangering national security in the future if bail is granted. In this regard, it was satisfied that the undertaking offered by Mr. Lai to observe the tailored bail terms, coupled with his agreement to be confined to his residence during the entirety of the bail period, gave the Court sufficient grounds to believe that the accused will not commit acts endangering national security in the future if bail is granted.

However, immediately after the ruling, the prosecution applied for a certificate of law seeking to appeal to the Court of Final Appeal for the Judge's decision to grant bail to the accused. Leave to appeal was granted on the basis, *inter alia*, that the issue concerning the correct interpretation of Article 42(2) raised questions of great and general importance as to the ambit and effect of Article 42(2) especially in the context of other provisions, including Articles 1, 3-5, 41 and 42 as well as provisions of the CPO. It was considered arguable that the Judge may have erred in his construction or application of Article 42(2) in adopting his approach to the grant of bail in light of the requirements of that Article.

The CFA noted that central to this appeal was the specific provision made in Articles 41 and 42 regarding procedural matters with regard to bail.

NSL 41 provides that:

"(1) This law and the laws of the Hong Kong Special Administrative Region shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the Region exercises jurisdiction.

(2) No prosecution shall be instituted in respect of an offence endangering national security without the written consent of the Secretary for Justice. This provision shall not prejudice the arrest and detention of a person who is suspected of having committed the offence or the application for bail by the person in accordance with the law..."

NSL 42 provides that:

"(1) When applying the laws in force in Hong Kong Special Administrative Region concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the Region shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence.

(2) No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.

In construing Article 42(2), it was said that although the legislative intention was for the NSL to operate in tandem with the laws of the HKSAR, seeking "convergence, compatibility and complementarity" with local laws as pointed out in the Explanation of Draft NSL presented to the NPCSC on 18 June 2020 and reiterated in the Address to the NPCSC on 6 July 2020 regarding the adoption of the NSL, Article 62 provided for possible inconsistencies, giving priority to NSL provisions in such cases:

> "This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law."

Accordingly, the CFA was of the view that in light of *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provisions of the Basic Law and the procedure therein, are not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied in Hong Kong.

It was also acknowledged by the CFA that Articles 4 and 5 expressly mandates respect for and protection of human rights and freedoms and adherence to the rule of law while also safeguarding national security. It was therefore stated that Article 42(2) should be interpreted in context of the applicable human rights and rule of law principles, the rules regarding bail under HKSAR law and the provisions of the NSL read as a coherent whole.

In the aforesaid context in which NSL 42(2) exists, it was stated that Article 5(3) of the Bill of Rights is plainly relevant. It provides:

> "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgment."

Further, as both Articles 41 and 42 of the NSL provide for HKSAR laws to apply to procedural matters, including "matters such as detention and time limit for trial" which obviously cover pre-trial detention and bail, it was evidently within the contemplation of the NSL that s.9D(1) implementing Article 5(3) of the Hong Kong Bill of Rights generally creates a presumption in favour of bail. However, the presumption in favour of bail in s.9D(1) is not an unqualified right to bail; it is subject to ss.9(D)(2) an 9G.

It was concluded that by virtue of Articles 4, 5, 41 and 42 of the NSL, the aforesaid rules (and other procedural rules relating to applications for bail) are applicable to questions regarding bail in cases involving offences endangering national security, but subject to the specific exception created by Article 42(2).

Although it was noted that the subject matter of Article 42(2) overlaps with the subject matter of s.9G(1)(b) which makes the risk of committing an offence whilst on bail a basis for refusing bail, it was noted that the starting point of inquiry is significantly different.

Under s.9G(1), bail may be refused if it appears to the court that there are substantial grounds for believing that the accused person would fail to surrender to custody, commit an offence whilst on bail or interfere with witnesses or pervert or obstruct the course of justice. If such grounds are not positively made out, bail should be granted. The rule embodies the presumption in favour of bail.

However, under Article 42(2), that presumption is excluded in the first instance. The starting point is that no bail shall be granted unless the judge has sufficient grounds for believing that the accused "will not continue to commit acts endangering national security." Plainly, Article 42(2) introduces a considerably more stringent threshold requirement.

In considering whether the Court has "sufficient grounds", the judge should:

(1) consider everything that appears to the court to be relevant to making that decision, including the possible imposition of appropriate bail conditions and materials

which would not be admissible as evidence at the trial, in particular, to have regard to factors such as those set out in CPO 9G(2) in connection with the "sufficient grounds" question;

(2) take the reference to "acts endangering national security" to mean acts of that nature capable of constituting an offence under the NSL or the laws of the HKSAR safeguarding national security;

(3) regard the NSL 42(2) "sufficient grounds" question as a matter for the court's evaluation and judgment and not as involving the application of a burden of proof.

If, having taken into account all relevant matters, the judge concludes that he or she does not have sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail must be refused. If, on the other hand, the judge concludes that he or she does have sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail, applying the presumption in favour of bail. This includes consideration of whether there are substantial grounds for believing that the accused would fail to surrender to custody, or commit an offence while on bail, or interfere with a witness or pervert or obstruct the course of justice. Consideration should also be given to whether conditions aimed at securing that such violations will not occur ought to be imposed.

In the instant case, it was noted that in granting bail, Alex Lee J applied legal principles set out in *Tong Ying Kit v HKSAR* [2020] 4 HKLRD 382 and *HKSAR v Tong Ying Kit* [2020] 4 HKLRD 416. However, it was considered that the Court of First Instance in *Tong Ying Kit* erroneously treated Article 42(2) as a threshold question that is no different from the discretionary ground for refusing bail set out in s.9G(1)(b) and thus failing to recognize the different starting points, namely, "no bail unless..." versus "grant bail unless".

In adopting this approach, the Judge misconstrued Article 42(2) and misapprehended the nature and effect of the threshold requirement created. His decision to grant bail was therefore set aside. Accordingly, it is clear that the Article 42(2) as defined by CFA creates a specific exception to general rule in favour of grant of bail and introduces a considerably more stringent threshold requirement carved out from the existing bail regime for bail applications.

In *HKSAR v Ng Hau Yi Sidney* (2021) 24 HKCFAR 417, the question considered was whether the more stringent threshold requirement for the grant of bail under Art.42(2) of the NSL applied to the offence of sedition, not being an offence under the NSL.

The defendant was charged with an offence under s.10(1) of the Crimes Ordinance (Cap.200), alleging a seditious intention in conspiring with others to print, publish, sell, offer for sale, distribute, display or reproduce certain allegedly seditious publications.

In an application for review of bail refusal, the High Court, applying *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, held that the more stringent threshold for the grant of bail was applicable to the offence charged and that such threshold requirements were not met.

The defendant applied to the Court of Final Appeal for leave to appeal. The Appeal Committee considered: (i) whether the construction adopted in the Lai case should be revised so that the phrase "acts endangering national security" should be held to apply only to offences created by the NSL; and (ii) if not so limited, whether the offence charged in the present case was one of the non-NSL offences covered so as to attract the more stringent bail threshold.

In dismissing the application, it was held that viewed purposively, the intent of the NSL was plainly for national security to be safeguarded by the complementary application of the laws which it created together with the existing laws of the HKSAR, such as those contained in Part II of the Crimes Ordinance (Cap.200). Construing Art.42(2) in the context of the NSL as a whole supported the conclusion that the construction adopted in Lai case applied both to offences safeguarding national security created by the NSL and offences existing under HKSAR law. The combined effect of Art.23 of the Basic Law, which requires the HKSAR to enact (among other laws) laws to prohibit any act of sedition, and Art.7 of the NSL, which requires the HKSAR to complete legislation for safeguarding national security as stipulated in the Basic Law, was to make it clear that a prohibited act of sedition,

including an offence contrary to s.10(1)(c) of the Crimes Ordinance (Cap.200), qualified as an offence endangering national security. Accordingly, the proposed appeal was not reasonably arguable and leave to appeal was dismissed.

Relief from obligation as a surety (section 9E)

3–6 Under section 9D(3)(b)(viii), a surety may be required as a condition of bail. Section 9E enables a surety to be relieved of the obligations of a surety where the surety has reasonable cause to believe that the bailed person will not surrender to custody as required by the terms of the bail.

Prohibition against agreements to indemnify surety (section 9F)

3–7 Section 9F renders void any agreement to indemnify a surety. Any person who agrees to indemnify a surety commits a criminal offence and is liable on summary conviction to a fine of HK$75,000 and to imprisonment for six months and upon conviction on indictment to a fine of any amount and to imprisonment for 12 months.

An accused person may be refused bail in particular circumstances (section 9G)

3–8 Bail may be refused if there are substantial grounds for believing an accused will fail to surrender to their bail, commit an offence on bail or interfere with a witness or pervert or obstruct the course of justice. The matters to be considered by the court in forming its opinion are set out in section 9G(2). Section 9G sets out other circumstances where accused persons need not be admitted to bail, for example persons subject to suspended sentences of imprisonment or to hospital orders. Persons charged with murder or treason are only to be admitted to bail upon the order of a Justice of Appeal, a judge of the Court of First Instance or a deputy judge of the Court of First Instance. Where a person is refused bail, the court must consider the question of bail at each subsequent hearing but, on the second or subsequent occasion after that when bail was refused, the court need not hear any argument about bail which it has previously heard. Bail can only be refused in the circumstances set out in section 9G. Assertions from the prosecution that the offence is serious, that there is a long history of offending and that the defendant faces a long period of imprisonment are not valid objections to bail. They are factors that may go to the belief that the defendant will fail to surrender to bail, but that is very different to their being objections to bail *per se*. It seems that this distinction is not always, or fully, appreciated by prosecutors.

Application by Secretary for Justice for review of admission to bail by a District Judge or a magistrate (section 9H)

3–9 Before the enactment of section 9H, the Court of First Instance could not revoke bail granted by a magistrate or by a judge of the District Court: *Chung Tse-ching v Commissioner of Correctional Services* [1988] 2 HKLR 389. Section 9H provides a limited opportunity for the Secretary for Justice to challenge bail granted by a District Judge or by a magistrate by applying to a judge of the Court of First Instance to review the grant of bail. The application is made by summons, supported by an affidavit, to a judge in chambers. On the hearing of the review, the bail may be confirmed, revoked or varied.

Custody pending review (section 9I)

3–10 This section enables the Secretary for Justice to stop a person who has been granted bail by a District Judge or by a magistrate from actually being released from custody pending a review of the grant of bail under section 9H. Once the District Judge or magistrate granting bail is notified of the intention to seek a review, the District Judge or magistrate must order that the person be detained in custody and brought before a judge. This order can only be made where the person granted bail had not yet been released on their bail. It is therefore incumbent upon the prosecutor who intends

to seek a review of the decision to grant bail to inform the court immediately so that the defendant is not released. A notification of intention to seek a review is not a precondition to that review but keeping the defendant in custody facilities the service of the summons and supporting affidavit required by section 9H. A person detained under this section must be brought before a judge as soon as practicable and in any event within 48 hours. The judge can then review the grant of bail in accordance with section 9H.

Review of refusal of bail or conditions of bail (section 9J)

3–11 This section provides an opportunity for a person who has either been refused bail by a District Judge or a magistrate or granted bail subject to conditions to apply to a judge in chambers for bail or to remove the conditions attaching to bail. The judge can confirm, vary or revoke the original decision and make such other order as is considered appropriate.

Arrest of persons admitted to bail (section 9K)

3–12 This section enables a police officer to arrest a person granted bail where there are reasonable grounds for believing that any bail condition has been, or is likely to be, broken or where a surety for bail has given written notification to the police of their belief that the bailed person is likely to fail to surrender to custody. Once arrested the person bailed must be brought before a magistrate within 24 hours of the arrest or as soon as practicable thereafter for an inquiry. If it then appears a condition of bail has been, or is likely to be, broken the person can either be detained in custody or released on bail either with the same conditions or with additional conditions. If it does not appear that a condition of bail has been, or is likely to be, broken the person must be released on the same conditions as attached to the original bail.

Offence of failing to surrender to custody as shall have been appointed (section 9L)

3–13 This section makes it a criminal offence to fail to surrender to custody in accordance with the terms of bail without reasonable cause. The offence is punishable on summary conviction by a fine of HK$75,000 and imprisonment for six months and upon conviction on indictment by a fine of any amount and 12 months' imprisonment. What is, or is not, a reasonable cause for the failure to surrender will depend upon the facts of the particular case. Errors or misunderstanding by an accused about the time or place of surrender are unlikely to be accepted as reasonable cause for failing to surrender.

Forfeiture on failure to surrender to custody as shall have been appointed (section 9M)

3–14 This section enables a court to order forfeiture of a recognisance entered into by a surety or cash deposited with the court as a condition of being admitted to bail where the person admitted to bail has, without reasonable cause failed to surrender to bail.

Procedure in bail proceedings (section 9N)

3–15 This section indicates the scope of the evidence that may be put before a court when it is considering the question of bail. Realistically it will be for the prosecution to put relevant material in support of the objection to bail before the court. The court hearing the application for bail can itself make whatever inquiries about the person seeking bail as it considers desirable. This does not, however, extend to the person seeking bail being examined by the court or by anyone else about the alleged offence with which they are charged.

Aids in proof (section 9O)

This is a formal section relating to certificates by a clerk of the court admitting a person to bail. 3–16

Restrictions on reports of bail proceedings (section 9P)

This section limits the information that may be published or broadcast in any report of bail proceedings. Reports must not contain anything other than such formal information as the name of the person the subject of the proceedings, the name of their legal representative and the result of the bail proceedings. The purpose of the section is to ensure a fair trial by limiting the information in the public domain at this stage of the proceedings. Any report must not go into the facts of the case or reveal details of any previous convictions that may have been put before the court during the bail application. A breach of the section is a criminal offence punishable by a fine of HK$50,000 and imprisonment for six months. A wide definition is given to "publish" and to "broadcast" and to the persons caught by the section. 3–17

Record of bail proceedings (section 9Q)

This section deals with the records that must be kept of bail proceedings and to whom those records are available. These records include the reason for the grant or refusal of bail and for any conditions attached to bail (see the Criminal Procedure (Record of Bail Proceedings) Rules (Cap 221 sub leg)). 3–18

(2) Statute

Meaning of "admitted to bail in criminal proceedings"

Criminal Procedure Ordinance, s 9C

Interpretation

9C.—In this Part 3–19

"admitted to bail" means the release by a court of a person from detention on his undertaking that he shall surrender to custody on the day that the court may appoint;

"court" includes the District court and a magistrate;

"judge" means a Justice of Appeal, a judge of the Court of First Instance and a deputy judge of the Court of First Instance;

"surrender to custody" means appearing before the court on being called on the day as shall have been appointed by the court.

Criminal Procedure Ordinance, s 9D

Right of accused person to be admitted to bail

9D.—(1) Subject to this section and section 9G, a court shall order an accused person to be admitted to bail, whether he has been committed for trial or not, when— 3–20

(a) he appears or is brought before a court in the course of or in connection with proceedings for the offence of which he is accused; or

(b) he applies to the court before which he is accused to be admitted to bail; or

(c) he applies to a judge under section 9J to be admitted to bail.

(2) An order under subsection (1) may be subject to such conditions as appear to the court to be necessary to secure that the person admitted to bail will not—

(a) fail to surrender to custody as the court may appoint; or

(b) commit an offence while on bail; or

(c) interfere with a witness or pervert or obstruct the course of justice.

(3) Without affecting the generality of subsection (2), the court—

(a) may not make it a condition of admission to bail that a recognizance of bail be taken from the person so admitted but may make it a condition, for the

purpose only of securing the surrender of that person to custody as the court may appoint, that a recognizance of bail be taken from a surety;

(b) may make it a condition of admission to bail that the person so admitted—

(i) shall surrender to the court any passport or travel document;

(ii) shall not leave Hong Kong;

(iii) shall report to a police station or the offices of the Independent Commission Against Corruption as the court may specify;

(iv) shall reside at a specified address and be present therein between such times as the court may specify;

(v) shall not enter any place or premises as the court may specify;

(vi) shall not go within such distance of any place or premises as the court may specify;

(vii) shall not contact directly or indirectly such person as the court may specify;

(viii) or any person on his behalf or he and any such person shall, for the purpose only of securing the surrender to custody of the person admitted to bail as the court may appoint, deposit with the court such reasonable sum of money as the court may require.

(4) In considering the suitability of a surety for a proposed recognizance of bail under subsection (3)(a), the court shall have regard to—

(a) the surety's financial resources;

(b) any other matter that appears to the court to be relevant, and any recognizance of bail taken from a surety under that subsection may, if an order under subsection (1) so directs, be taken before any magistrate or before the Commissioner of Correctional Services, the Deputy Commissioner of Correctional Services or a Senior Superintendent or Superintendent of Correctional Services.

Conditions for Bail

3–21 Conditions need not be imposed upon the grant of bail. Given that bail is a right and not a privilege, the court should first consider unconditional bail. The court will only need to consider conditions of bail if unconditional bail is ruled out. The court should then consider whether bail might still be granted, but subject to conditions. The conditions that may be imposed are listed in s 9D(3)(b). One or more of those conditions may be imposed if the court granting bail considers it is necessary to do so for either or all of the purposes specified in ss 9D(2)(a), (b) or (c). The use of the word "necessary" implies that conditions should only be imposed where there is perceived to be a real risk of one of the specified events occurring. No conditions other than those in s 9D(3)(b) may be imposed. The condition in s 9D(3)(b)(ii) – not to leave Hong Kong, may be justified in a given case only if there are clear indications of a genuine public interest which outweigh the person's right to freedom of movement: *Miazdzyk v Poland* (ECHR App No 23582/07, [35]).

In *HKSAR v Chung Hung Pan* (CACC 242/2012 [2013] HKEC 514) the applicant was ordered to surrender his driving licence as a condition of bail eight months before he pleaded guilty to one charge of causing death by dangerous driving. He applied for leave to appeal against his sentence both in relation to the length of the term of imprisonment and the length of the period of disqualification. It was argued, inter alia, that there was no power to impose such a condition as a term of bail. However, the Court of Appeal was of the view that there is power under s 9D(2)(b) of the Criminal Procedure Ordinance to impose such a condition, which is in fact commonly made a term of bail in cases such as this. That subsection provides that an order admitting an accused person to bail under s 9D(1) may be subject to such conditions as appear to the court to be necessary to secure that the person admitted to bail will not commit an offence while on bail. Requiring a person charged with causing death by dangerous driving to surrender his driving licence as a condition of bail is clearly aimed at preventing the commission of a similar offence while the accused is on bail.

Similarly, the question of whether the condition was necessary for the prevention of commission of an offence by the defendant while on bail was considered in *Tam Tak Chi*

v HKSAR (HCMP 3118, 3119, 3120 and 3121/2014, [2014] HKEC 2001) where four applicants, who had participated in public demonstration, appealed the magistrate's order that they shall not enter a designated area in Mong Kok except when on transport or in transit. The magistrate had indicated in the bail form that such a condition was necessary to secure that the applicants would not "commit an offence while on bail".

In determining the application, D Pang J firstly considered the statutory framework which was regarded as immediately relevant to the core contention of these applications and observed (at paras 2–4) that:

"2. Section 9D(2)(b) of the CPO provides that conditions may be imposed which "appear to the court to be necessary to secure that the person admitted to bail will not commit an offence while on bail". Section 9D(3)(b)(v) of the same ordinance provides that the court may make it a condition that the person admitted to bail "shall not enter any place or premises as the court may specify."

3. Sections 9N(a), 9N(d) and 9N(e) provide that in any bail proceedings, the court may "make inquiries of and concerning the person being the subject of those proceedings", "take into consideration any relevant matters agreed upon by the informant or prosecutor and the person being the subject of those proceedings or his counsel" and "receive and take into account any other material or representation which it considers credible or trustworthy in the circumstances."

4. In Part IA of the CPO, there is no provision on the taking of "evidence" except section 9N(c) whose relevance is confined to the "proof" of an exhausted list of circumstances concerning the person pending bail – whether he has previous conviction; whether he is charged with and awaiting trial on another offence; and whether he has a history of absconding. "Evidence" may also be admitted to show the circumstances of a present offence particularly as they relate to the likelihood of that person to be convicted of that offence."

It was noted that a similar scheme was considered in an English decision of *R v Mansfield Justices ex parte Sharkey* [1985] 1 QB 613. Paragraph 8(1) of Schedule 1 to the Bail Act 1976 provides that where a defendant is granted bail, no conditions shall be imposed unless "it appears to the court that it is necessary to do so" for the purpose of preventing the occurrence of a number of events one of which is that the defendant would "commit an offence while on bail". Its judgment was then mentioned (at para 6) as follows:

"6. The Divisional Court comprising Lord Land CJ and Stuart-Smith and Leggatt JJ observed that (pages 625D–626C):

> '... the question the justices should ask themselves is a simple one: "Is this condition necessary for the prevention of the commission of an offence by the defendant when on bail?" *They are not obliged to have substantial grounds. It is enough if they perceive a real and not a fanciful risk of an offence being committed.* This section 3(6) and paragraph 8 give the court a wide discretion to inquire whether the condition is necessary.

It is conceded that there is no requirement for formal evidence to be given: see In *re Moles* [1981] Crim LR 170. It was for example sufficient for the facts to be related to the justices at secondhand by a police officer.

The nub of the problem is how far, if at all, the justices were entitled to have regard to what was described by counsel as the matrix of events which brought these defendants before the court. The answer in our judgment is that they were certainly entitled to use their knowledge of events at local collieries during the preceding weeks, because it was only on the basis of that knowledge, inter alia, that they could properly reach a conclusion as to the necessity of imposing a condition ... ' (*emphasis added*)"

Applying the principle, it was decided that the magistrate was entitled to have regard to the broader context in which the arrests of the applicants came about. Case law confirms that he had a wide discretion under section 9N(e) to rely on material of what provenance for so long as it is "credible or trustworthy".

In the instant case, it was considered that the materials or representations that could be properly received under section 9N(e) showed that the first three applicants' committed position to take their cause to the street and the fourth applicant's likely deposition to violence. There is no requirement at this stage for the prosecution case to be shown to be strong. These materials alone are enough to give rise to the perception that there is a real risk of a fresh offence being committed.

It was emphasized that "necessary" in the present context means that there is a real risk as interpreted in *Mansfield Justices* above, hence, there was a need for the condition. Further, given the wholly exceptional situation that was then ongoing, it was considered that the volatility of the situation required an order that was clear and not easily given to argument over the true meaning of its terms. Accordingly, it was satisfied that the size of the area designated in the condition was proportional. The applications are therefore dismissed.

Recognisance for bail and Sureties

3–22 Section 9D(3)(a) expressly prohibits a court from making it a condition of admission to bail that a recognisance of bail be taken from the person admitted to bail. This removes the concept of "cash bail" under which a person would be admitted to bail but only upon deposit of a cash sum. This discriminated against defendants without means. However a person other than the defendant may be required as a surety to ensure that the defendant complies with the obligation to surrender to custody in accordance with the bail. If the defendant does not so surrender, the surety risks the forfeiture of all or part of the amount either deposited in court as cash or pledged by way of recognisance. It follows therefore that the surety must be sufficiently sound financially to answer for the sum in which they are bound.

The obligations of a surety are to ensure that the bailed person answers to the bail. The surety must realistically be in a position to exercise control and influence over the person bailed. Whether or not to accept a proposed surety is a matter for the discretion of the judge or magistrate in the particular case: *R v Saunders* (1849) 2 Cox 249. The proposed surety may be examined upon oath as to means and indeed as to suitability to be a surety. The court or magistrate may, at their discretion, give the prosecution time to inquire into the suitability of the proposed surety and, where appropriate, to object to the suitability of the surety or to the amount to be deposited or pledged by the proposed surety. Persons in custody cannot be a surety. An infant similarly cannot be a surety. A person with a criminal record will not normally be an acceptable surety. A person who has been indemnified by the defendant is not acceptable as a surety. For the offence of agreeing to indemnify sureties in criminal proceedings, see para. 3–7, above and para. 3–26, below.

The Criminal Procedure Ordinance does not limit the type of security that might be required under s 9D. However, by analogy with the reasoning in *R (Stevens) v Truro Magistrates' Court, The Times*, July 27, 2001, what must have been intended was to provide for the lodging of some asset, whether in cash or kind, which could be readily forfeited on the defendant's non-appearance; but security could be given in less simple form if the justice of the case demanded it and it could be readily forfeited, in the event of nonappearance, without complicated disputes about third party rights.

Where a defendant has deposited cash with the court as a recognisance for bail under s 9D(3)(b)(viii), issues may subsequently arise about the application of all or part of those monies towards payment of a fine, costs or compensation. In *HKSAR v Ngai Wing Keung* (HCMA 110/2004, [2004] HKEC 610) the Appellant appealed a sentence of 10 months' imprisonment and a fine of HK$20,000, payable forthwith with three months' consecutive imprisonment in default of payment. After imposing the fine and ordering immediate payment, the magistrate was advised that payment could not be paid from the cash recognisance of HK$25,000, as that was borrowed from the Appellant's brother who had himself borrowed it from a third party. After hearing evidence from the Appellant and the brother, the magistrate did not accept the money had been borrowed as alleged and made the default order. In quashing the fine and the imprisonment in default, Beeson J. confirmed that the defendant's agreement should be sought regarding use of the cash deposited to pay the fine. If the defendant declined to agree, enquiries should be made as to whether or not time to pay was needed or should be given. This case confirms that cash deposited under s 9D(3)(b)(viii) goes to securing that the defendant answers the bail. Nothing should be done to give the impression that a defendant who declines to use the bail money for the fine is being punished for that refusal: the cash is security for attendance, not a security for a fine.

3–22A Conflicting claims for the payment out of cash bail may be resolved by interpleader proceedings as was the case in *Registrar, District Court v Li Kai and Andrew PC Lam*

trading as Andrew Lam & Co [2005] 2 HKLRD 144. A firm of solicitors ("the firm") acted for two clients in a District Court criminal case. Each client put up a cash bail of HK$50,000 and assigned their interest in that money to the firm. The clients executed powers of attorney in favour of the firm and deposited the receipts for the bail money with the firm. The clients instructed another firm shortly before their trial. At their trial the clients were convicted and ordered to pay compensation to the victim. They both agreed that the bail money could be applied to the compensation orders. Both the firm and the victim claimed payment out of the bail money and the Registrar of the District Court took out proceedings asking the Court to resolve the dispute between the firm and the victim. It was held that the firm had an equitable interest in the bail money whereas the victim's interest in the bail money was conferred by an order which the Court was entitled to make under the law. Because the order for compensation was made according to law, the victim's interest superseded the firm's equitable interest and he was therefore entitled to payment out of the bail money.

Having made that order the Court went on, though it was not strictly necessary, to address the practice of clients assigning their interest in bail money to solicitors on account of legal costs. Concern was expressed that such practice could defeat the object of requiring defendants in criminal cases to provide bail money as was discussed in *R v Webster* 94 CCC (3d) 562 in which it was stated that the assignment of bail monies to the solicitor could impart upon the incentive of the defendant to attend court. Re-iterating the adverse comments about such practice expressed in that case, the Court was of the view that the kind of practice that had occurred in this case should not be encouraged.

The second claimant appealed the decision in *Registrar, District Court v Li Kai and Andrew P C Lam & Co* to the Court of Appeal: *Registrar, District Court v Li Kai and Andrew P C Lam* [2006] 2 HKLRD 499. The Court of Appeal examined s 73(3) of the Criminal Procedure Ordinance, and held at para 27: "the basic principle of imposing conditions of bail, such as cash bail, was to ensure the accused surrendered to custody."

A payment into court of cash bail was, as far as the court was concerned, a payment by the accused irrespective of who actually provided the monies. Neither the CPO nor any other Ordinance recognised anyone other than the accused who is granted bail as the person paying the money into court. As the Court noted, section 73(3) was added to the CPO in 2002. This section enables a court to apply any money paid into court by an accused as cash bail towards any compensation awarded to a victim of the criminality. Prior to the enactment of that provision there was no power to order compensation to be paid from bail money unless the accused consented: see *R v Yeung Mau Lam* [1991] 2 HKC 296; *HKSAR v Ngai Wing Keung* (HCMA 110/2004, [2004] HKEC 610).

3–22B On the issue of the priority of the claims to the bail money, Ma CJHC (at paragraph 27(3)) observed that where an accused purported to divest himself of his interest in the bail money, the money still remained in court. Nothing in the CPO permitted a change of ownership or interest in the cash bail. An assignment of the interest in the cash bail was an assignment of a chose in action: there was no change in ownership of the cash as far as the court was concerned. The person putting up cash bail had a right to recover the money providing it was not otherwise legitimately disposed of by the court. As one of the defendants in the case (P) had been made the subject of a compensation order, that took precedence over his claim for the return of the cash bail. The second claimant could not acquire a better right over the bail money than P had and the order for compensation prevailed over the second claimant's interest in P's cash bail. The position was somewhat different as far as the cash bail of the second defendant was concerned. No order for compensation had been made against her. There was therefore no jurisdiction to make a section 73(3) order. No order had in fact been made; the learned trial judge had merely acknowledged that the second defendant wanted her cash bail to be used towards the compensation P had been ordered to pay. Whether or not there existed a better claim to her cash bail was not a matter which concerned the trial judge at the time of sentence. The assignment had however given the second claimant a better right to those monies than she had. The second claimant's appeal was allowed to the extent of the second defendant's cash bail of HK$50,000.

The Court also addressed HH Judge Lok's observations about the undesirability of assignments of bail money. As the court did not hold bail money as a trustee, any divestment of interest in bail money could only be a divestment of a chose in action.

It saw no difficulty as a matter of principle in an accused being able freely to dispose of his cash bail once he had free access to those funds. To that extent therefore the court dissociated itself from the suggestion that assignments of cash bail could adversely impact upon the defendant's incentive to answer bail.

In *YBL v LWC (No 2)* [2017] 2 HKLRD 783, H was the successful party of the appeal in matrimonial proceedings. On the substantive appeal, H made an application by way of written submissions, inter alia, for the return of the bail money on the basis that since the bail money had served the purpose of securing his attendance, it should therefore be returned to him, as the money was held by H for his father on a *Quistclose* trust. W, on the other hand, applied under O.49 r.9 of the Rules of the High Court for the bail money to be paid to her partially to satisfy the arrears in maintenance. Rule 9(1) provides, inter alia, that where money is standing to the credit of the judgment debtor in court, the judgement creditor may apply to the Court by summons for an order that the money to satisfy the judgement sum.

In ordering to release the bail money to W, it was found that no evidence had been filed by H or his father to support the assertion of Quistclose trust. Nor was there any explanation as to the extent to which the father took account of the risk of the court exercising the power under O.49 r.9(1) when he provided the money. In the circumstances, even assuming that there could still be some kind of *Quistclose* trust, it could only be a trust subordinated to the legitimate power of the court in disposing of the bail money, including the power under O.49 r.9(1).

Whatever might be the arrangement between the immediate parties concerning the funding for bail money, as long as the money was held by the court, these parties only had a chose in action to seek the return of the money after the court had legitimately exercised its power over the sum as money of the person on bail. The subject matter of the *Quistclose* trust was the chose in action instead of the money and innate in that chose in action was the court's legitimate power to dispose of the money (including the power under O.49 r.9) other than returning the same to the person who answered bail: *Registrar District Court v Li Kai* [2006] 2 HKLRD 499 (above) followed.

3–23 *R v Scott Jervis, The Times*, 20 November 1876, QBD addresses the general inexpediency of the solicitor of the accused acting as surety. For Hong Kong, that inexpediency is addressed by Chapter 10.19 of the *Hong Kong Solicitors' Guide to Professional Conduct*, 2nd edn, which provides "it is unlawful for any person (including a solicitor) to agree to indemnify a surety for bail" and "no solicitor or his employee may act as a surety for bail for a client of the firm without the prior written consent of the Council [of the Law Society] which consent would be forthcoming only in the most exceptional circumstances." In practice, therefore, solicitors and their employees will not normally be a surety for a client of their firm.

Before a surety formally accepts the obligations imposed upon him/her, it is the practice (a) to explain to him/her exactly what the obligations involve, (b) to ensure that the obligations to be undertaken are understood, (c) to ensure that the surety is still prepared to undertake the obligations and is worth the sum involved after all debts are paid, and (d) to warn of the consequences, which include possible imprisonment, if the defendant fails to appear as required. In *R v Uxbridge JJ, Ex p Heward-Mills* [1983] 1 WLR 56, it was said that when a surety was unrepresented, the court should assist by explaining the relevant principles in ordinary language and giving the proposed surety an opportunity to call evidence and advance argument in relation to them.

Except where a magistrate commits a defendant for trial to the Court of First Instance, defendants granted bail will be bailed to a specific court date. The surety has a responsibility to ensure the defendant appears on that court date. Provided the defendant appears before the court on that date and remains there until their case is called on, the surety's responsibility in that regard is at an end. If that date is not the trial date, the defendant's bail may be extended to another date. In those situations

the court has a duty to review the position of the surety. The surety should be in court and should be asked to confirm whether or not they are prepared to continue as a surety before the defendant is released on bail subject to the same conditions, see *R v Kent Crown Court, Ex p Jodka*, 161 JP 638.

Notification of Court Dates to Sureties

3–24 Where, in committal proceedings, a defendant is committed for trial and granted bail, bail is to the date of the trial in Court of First Instance as notified by the Registrar. In line with the decision in *R v Reading Crown Court, Ex p Bello* 92 Cr App R 303, CA (Civ Div), the court should always notify sureties when a hearing date was fixed and, if no date was fixed, notify them as to the dates between which the case was likely to be listed. Such a warning should be given as far in advance as possible. A surety undertakes to ensure the appearance of the accused at court when required and that implies that the surety should be given notice of the hearing date. Ignorance of the date, however, would not always be an answer to proceedings for forfeiture. Each case would depend upon its own facts.

It was held that in entering into a recognisance, a surety had a duty to keep in touch with the bailed prisoner and to keep himself informed of the conditions of bail so as to ensure that the prisoner surrendered to his bail. Where bail was made continuous, the court had no obligation to inform a surety that it was proposing to vary the conditions of bail or to obtain his consent to a variation. Accordingly, the order varying the conditions was valid and did not affect the recognisance entered into by the applicant. However, the fact that the surety had no knowledge of a variation might be relevant to the exercise of the discretion to order forfeiture. It would be for the court considering the forfeiture of the recognisance to determine the degree of fault attributable to a surety in not knowing of the variation and to decide whether the surety would have acted differently if he had known of it.

If it was satisfied that the surety was blameless throughout, it would then be proper to remit the whole of the amount of the recognizance and in exceptional circumstances that would be the only proper course.

Criminal Procedure Ordinance, s 9E

3–25 *Relief from obligation as surety*

9E.—(1) If on application made to it by a surety from whom a recognizance of bail has been taken a court is satisfied that the surety has reasonable cause to believe that the person for whom he is surety will not surrender to custody as shall have been appointed by the court, the court may order that he be relieved of his obligations as a surety.

(2) On the making of an order under subsection (1), the court shall issue a warrant for the arrest of the person for whom the surety was provided.

Section 9E of the Criminal Procedure Ordinance emphasises the surety's continuing responsibility to be vigilant to the possibility that the bailed person will abscond from bail. At the same time it provides sureties with an opportunity to be relieved of their obligations. Where a surety becomes concerned that the bailed person will not surrender to the court on the due date, the surety can apply to the court which granted the bail to be relieved of the obligations of a surety. The section makes it clear the court has discretion in these situations. However where a surety comes before the court and alerts it to a real danger of the bailed person absconding, the surety should be taken to have discharged the obligations of a surety. The surety should also notify the prosecution in writing of the belief that the bailed person is likely to fail to surrender to custody. Where a surety is relieved of their obligations, the court must immediately issue a warrant for the arrest of the bailed person. The advantage of a surety notifying the prosecution of concern that the bailed person might breach the conditions of bail is that the bailed person might then be arrested under section 9K(1). The best course of action is, however, for the surety to seek to be relieved under section 9E(1). There is no apparent procedure as to how the surety goes about this. The surety should contact the court clerk who will then make the necessary arrangements for the surety to be heard.

Criminal Procedure Ordinance, s 9F

Prohibition against agreements to indemnify surety

3–26 9F.—(1) Any agreement indemnifying or purporting to indemnify any person against any liability which he may incur as a surety to secure the surrender to custody of a person admitted to bail shall be void.

(2) Any person who enters into an agreement of the description mentioned in subsection (1) commits an offence.

(3) An offence under subsection (2) is committed whether the agreement is entered into before or after the person to be indemnified becomes a surety and whether or not he becomes a surety and whether the agreement contemplates compensation in money or money's worth.

(4) Any person who commits an offence under subsection (2) is liable on summary conviction to a fine of $75,000 and to imprisonment for six months, and on conviction upon indictment to a fine of any amount and to imprisonment for 12 months.

Any agreement to indemnify a surety for any loss that might be incurred if the person admitted to bail breaches bail is void as an illegal agreement and one that would be contrary to public policy, see *dicta* of Brett MR in *Herman v Jeuchner* (1885) 15 QBD 561, at p 563. In *Goodpoint Holdings Limited v Seabrook* [1997] HKLRD 869 (a decision prior to Part 1A of the Criminal Procedure Ordinance) in which *Hermann v Jeuchner* was cited, Keith J suggested, at p 547G, that it was a different situation to where cash is supplied to assist a defendant raise cash bail.

Criminal Procedure Ordinance, s 9G

An accused person may be refused bail in particular circumstances

3–27 9G.—(1) The court need not admit an accused person to bail if it appears to the court that there are substantial grounds for believing, whether or not an admission were to be subject to conditions under section 9D(2), that the accused person would—

(a) fail to surrender to custody as the court may appoint; or
(b) commit an offence while on bail; or
(c) interfere with a witness or pervert or obstruct the course of justice.

(2) The court in forming an opinion under subsection (1) may have regard to—

(a) the nature and seriousness of the alleged offence and, in the event of conviction, the manner in which the accused person is likely to be dealt with;
(b) the behaviour, demeanour and conduct of the accused person;
(c) the background, associations, employment, occupation, home environment, community ties and financial position of the accused person;
(d) the health, physical and mental condition and age of the accused person;
(e) the history of any previous admissions to bail of the accused person;
(f) the character, antecedents and previous convictions, if any, of the accused person;
(g) the nature and weight of the evidence of the commission of the alleged offence by the accused person;
(h) any other thing that appears to the court to be relevant.

(3) An accused person need not be admitted to bail if it appears to the court that he should be detained in custody for—

(a) if he has attained the age of 18 years, his own protection; or
(b) if he has not attained the age of 18 years, his own protection, safety or welfare; or
(c) the purpose of further inquiry relating to the determining of the question of whether he should be admitted to bail.

(4) An accused person need not be admitted to bail if—

(a) he is detained in custody—
  (i) under a sentence of any court; or
  (ii) for or in connection with a charge of failing to surrender to custody under section 9L; or
(b) the court is satisfied that—
  (i) he has previously failed to comply with any condition of bail imposed under section 9D; or
  (ii) any other court dealing with him in the same proceedings is or has been so satisfied.

(5) An accused person need not be admitted to bail if he is the subject of a hospital order for the time being in force. 3–28

(6) An accused person need not be admitted to bail if he is the subject of an order made under section 109B (suspended sentence) for the time being in force and he is before the court under section 109D or 109E.

(7) An accused person need not be admitted to bail if he is the subject of a deportation order for the time being in force made under section 20 of the Immigration Ordinance (Cap 115).

(8) An accused person need not be admitted to bail if he is before the court under section 5 or 6 of the Probation of Offenders Ordinance (Cap 298) (breach of probation order; or commission of further offence).

(9) An accused person need not be admitted to bail if he is before the court under section 8 or 9 of the Community Service Orders Ordinance (Cap 378) (breach of community service order; or commission of further offence).

(10) An accused person charged with—

(a) murder; or

(b) treason under section 2 of the Crimes Ordinance (Cap 200),

shall be admitted to bail only upon the order of a judge.

(11) If at any hearing the court refuses to admit an accused person to bail the court shall, at each subsequent hearing while the accused remains in custody, consider the question of whether or not he ought to be admitted to bail and—

(a) on the first occasion after that upon which the court first refused to so admit, the court shall hear any argument as to fact or law put to it in support of his admission to bail, whether or not it has previously heard that argument;

(b) on the second or any subsequent occasion after that upon which the court first refused to so admit, the court need not hear any argument as to fact or law put to it in support of his admission to bail, if it has previously heard that argument.

Proper approach to objections to bail, imposition of conditions, etc

As bail is a right, it is for the prosecution to show that bail should be denied in the particular case. The words "substantial grounds for believing" in s.9G. 3–29

The factors to be taken into account when deciding whether to grant bail to foreign nationals who illegally entered Hong Kong, then charged with criminal offences and made *non-refoulement* claims while in custody was considered in *HKSAR v Vu Thang Duong* [2015] 2 HKLRD 502. In this case, D1 and D2 were Vietnamese nationals who entered Hong Kong illegally. D1 was charged with possession of obscene articles for the purpose of publication; and also, having landed in Hong Kong unlawfully, remaining without authority. D2 was charged with breach of condition of stay by overstaying; and having landed in Hong Kong unlawfully, remaining without authority. Both made *non-refoulement* claims while in custody and, pending a final determination, their respective criminal cases had been adjourned. D1 and D2, who had been in custody for 11 and 7 months respectively, applied for bail.

In deciding the applications, the Court of First Instance was of the view that, if on the information available, the court could ascertain the nature of a non-refoulement claim, there was no reason why it could not be considered with all other relevant factors set out in s 9G(2) of the Criminal Procedure Ordinance (Cap.221) in determining whether or not to grant bail. This would be particularly so if the court was satisfied that there was no substance or merit to the claim.

In the end, bail was granted to both defendants. The Court was satisfied that both defendants had been on remand for an unreasonable period taking into account the charges they faced, the status of the criminal proceedings against them and the likely inordinate delay before trial. In D2's case, he had family ties in Hong Kong and could provide a residential address. As for D1's alleged possession of obscene articles, the 11 months already spent on remand most likely would satisfy any term of imprisonment imposed on conviction after trial. That offence could have been tried separately in accordance with prosecution policy, but for some reason it was not done. He could meet an appropriate range of conditions if released from custody, including providing the residential address of a welfare-based home; and obeying all its rules

and regulations. In both cases, there were additional conditions of surrendering travel documents, residing at the address given and reporting to the police at various times during the week.

Similarly, in *HKSAR v Asif Muhammad* (HCMP 1409/2009, [2017] HKEC 2134) the issue of bail application by an illegal immigrant was again considered. The applicant was charged with remaining in Hong Kong contrary to s.38(1)(b) of the Immigration Ordinance (Cap.115) (Charge 1) and failing to surrender to custody as appointed contrary to s 9L(1) and 9L(3) of the CPO (Charge 2).

The first offence was committed back in 2009 but the proceedings had been adjourned pending outcome of the applicant's application for asylum from the United Nations High Commissioner for Refugees (UNHCR) and torture claim with the Immigration Department. The applicant subsequently pleaded guilty to Charge 2 and the sentencing of that offence was adjourned pending the outcome of Charge 1.

In considering his bail application, it was observed that the applicant had by all appearances played the system in his efforts to remain in Hong Kong and avoided the legal processes. When he was arrested in relation to Charge 1 in 2009, having failed his asylum application, he made a torture claim which was eventually rejected. When he was re-arrested in 2017 after he had failed to attend the proceedings against him for illegal remaining which was last fixed for hearing in the magistrate's court in 2011, he made a non-refoulement claim.

It was noted that in deciding whether to grant bail, guidance had been provided by s. 9G(2) of the CPO in which it was apparent from this section that the matters a court could consider on the question of bail were quite broad and focused on the nature of the offence, the risk of danger that the defendant posed to the public, and the likelihood that the trial could be affected by the defendant absconding or influencing a witness.

In the instant case, it was considered that the applicant only made his non-refoulement claim after his re-arrest and not at the earliest opportunity as one would expect if the claim was genuine and with merit. It did put into question the merits of his non-refoulement application. This was a matter that could properly be taken into account when deciding to grant bail (see: *HKSAR v Vu Thang Duong* [2015] 2 HKLRD 502). The Court was of the further view that the applicant posed a real risk of not abiding by his condition of bail as evidenced by his current conviction for failing to surrender to custody and due to his lack of local ties and connections here in Hong Kong. Besides, the evidence against the applicant in relation to Charge 1 was strong.

Nevertheless, as was discussed in *HKSAR v Vu Thang Duong* [2015] 2 HKLRD 502, the prosecution policy when dealing with a non-refoulement claimant who had been charged with an immigration offence was to adjourn his case until his claim and all appeal procedures had been concluded. It was also pointed out in that decision that this could take a long time, and at the end of the process, the policy was to drop the immigration offence if the claim was approved, or to consider the merits of the case if it were rejected. It was also pointed out that the policy did not address the issue of bail pending resolution of the claim. This policy, or the lack of it, had placed an unbearable burden on the courts because of the continued adjournments of the case by the prosecution where at the same time it also opposed the grant of bail to the defendant concerned. The uncertain status of the case made it very difficult for the courts to address the issue of bail in such circumstances.

The concerns in the instant case were therefore two-fold. First, in light of the sentencing guideline cases, the applicant would likely receive a sentence upon conviction for the two offences of between 18 to 21 months' imprisonment. As he had so far been in custody for about 11 months and taking into account the one third remission for good behaviour, he was not far from having served the likely sentence for the offences. Second, if the applicant was released on bail, there was a risk that he would abscond as he had in the past. This was due to the prosecution policy of placing his case in abeyance pending the outcome of his non-refoulement clam and the length of time it would take the authorities to process the claim. Such was the unsatisfactory and paradoxical situation that the courts had to unravel in order to properly decide bail applications of this type.

In the circumstances of the instant case, it was decided that there was a real risk that the applicant would fail to surrender to custody as the court may appoint, notwithstanding the imposition of conditions on bail, the bail application was thus refused at this stage. However, if the applicant was still in custody, he was at liberty to apply for bail before the same court in two months' time which should coincide approximately with the applicant having served the likely sentence that would be imposed upon him in relation to the two charges.

In *HKSAR v Chow Ka Shing* [2021] 4 HKLRD 109, the application of s.9G for offences in relation to National Security Law (the NSL) was considered.

Here, the defendant was charged together with 46 other defendants with one count of "Conspiracy to commit subversion", contrary to Art.22(3) of the NSL, and ss.159A and 159C of the Crimes Ordinance (Cap.200). The prosecution asserted that this was a massive and well-organised schemed by the defendant and others to achieve a common criminal purpose to undermine the "proper functioning of the Legislative Council so as to paralyse the operation of the HKSAR government, eventually compelling the Chief Executive of HKSAR to resign". The defendant's bail application was refused by the Chief Magistrate. He applied to the Court of First Instance for bail.

The prosecution opposed the defendant's bail application mainly on the ground that (i) the defendant had demonstrated a firm and persistent conviction to act in furtherance of the impugned conspiracy, there was therefore a real and substantial risk that the defendant would continue to commit acts endangering national security if bail was granted and (ii) the offence was a serious one and heavy sentence would likely be imposed in the event of a conviction, there were thus substantial grounds for believing that the defendant would fail to surrender to custody and/or commit further offence(s) while on bail.

In considering the application, it was observed that the relevant principle was stated by the CFA judgment in *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33 where it was held that Art.42(2) of the NSL creates a specific exception to the HKSAR rules and principles governing the grant and refusal of bail, and imports a stringent threshold requirement for bail applications. The CFA judgement also elucidated that in applying Art.42(2), the judge must first decide if there are sufficient grounds for believing that the suspect or defendant will not continue to commit acts endangering national security (the prohibited acts) and in doing so "the judge should consider everything that appears to the court to be relevant to making that decision, including the possible imposition of appropriate bail conditions and materials which would not be admissible as evidence at the trial".

In applying Art.42(2), it was decided that whilst the defendant did broadcast his view on certain conspiracies against the PRC government, the defendant did not directly advocate for international sanction against the PRC government or the HKSAR government. Further, the Court gave the defendant the benefit of doubt as to the interpretation of what was mentioned by him, prior to the election, in his social media. The defendant's background was also considered, in particular, the many letters attesting to his passion for nursing.

Accordingly, the Court was satisfied that, with the conditions imposed for bail, the defendant would not continue to commit any offences under the NSL if bail was granted to him. Further, having considered the second threshold under s.9G of the CPO, it was satisfied that the defendant would not fail to surrender to custody or commit an offence while on bail. Therefore, bail was granted to the defendant.

Renewed applications for bail

3–30 Prior to the coming into effect of Part 1A of the Criminal Procedure Ordinance, section 12B of the Criminal Procedure Ordinance operated to prevent persons who had been refused or denied bail by the court or by a judge from making a fresh application for bail unless there had been a material change in circumstances since bail was refused. The onus was on the applicant to show a material change of circumstances, sufficient to justify the court looking again at the issue of bail. If there had not been a material change of circumstances the application for bail would not be entertained.

It was generally considered that a court was not bound to entertain an application for bail, after it had previously been refused, unless it was satisfied that there had been a material change of circumstances. A decision to refuse bail presupposed that the court had found as a fact that there were substantial grounds for refusing bail. A later court was bound to accept that finding of fact. Unless there was a material change of circumstances the later court would not be acting as an appellate court. This could be particularly relevant to appearances before magistrates. Until a date for trial is fixed, or until the case is committed for trial or transferred to the District Court, defendants appear before Court 1 (the Principal Magistrate's Court) of a particular magistracy. Where there is a series of remands, the magistrate might not always be the same magistrate. In those situations, unless there was a restriction upon repeated applications for bail, there is an obvious danger of a subsequent magistrate acting as an appellate court.

Section 12B of the Criminal Procedure Ordinance was repealed by the new Part 1A of the Ordinance. Where a defendant has been refused bail, section 9D(1) of the Ordinance imposes a positive duty upon the court to consider the question of bail each time that defendant appears before the court. This is an inevitable corollary of bail being a right, rather than a privilege. Repeated applications for bail are, however, addressed by section 9G(11)(b). Paragraph (a) of section 9G(11) provides that at the first hearing after that at which the court decided not to grant the defendant bail, he or she may support an application for bail with any argument as to fact or law whether or not that argument has been advanced previously. Whereas, paragraph (b) of section 9G(11) provides that at hearings subsequent to the first hearing after the hearing at which the court refused bail, the court need not hear arguments as to fact or law which it has heard previously. The section limits the number of times a defendant can advance the same reasons in support of an application for bail. In *HKSAR v Siu Yat Leung* [2002] 2 HKLRD 147, Deputy Judge McCoy SC referred to section 9G(11) as "—essentially an epexegesis of the common law test. This test ensures that access to the court is not a revolving door" and, adopting the words of Deputy Judge Jones in *R v Ng Yiu Fai* [1992] 2 HKCLR 122, at p 125 that the test was "a sensible and necessary adjunct to a coherent legal system, which would otherwise be prey to a proliferation of speculative bail applications on issues already decided".

3–31 If no application for bail is made at the first hearing after that at which the court decided not to grant the defendant bail, paragraph (b) of section 9G(11) does not apply so as to confer a right to make an application at any subsequent hearing. A defendant would however have had such a right by common law: see *R v Dover and East Kent JJ, Ex p Dean* [1992] Crim L R 33, DC. In that case it was held that there was always a right to make an application for bail: whether the court was to entertain certain arguments was a separate issue. In fairness to a defendant where no application has previously been made, the court should hear relevant argument in support of bail whenever the defendant first makes an application for bail. In *HKSAR v Siu Yat Leung* (above), it was said that a general right to bail at common law is a residual jurisdiction and is not therefore parallel to Part 1A Criminal Procedure Ordinance.

3–32 What will be a change of circumstances depends on the facts of the particular case, see *HKSAR v Siu Yat Leung* (above); *R v Nottingham JJ, Ex p Davies* [1981] QB 38, 71 Cr App R 178; *R v Reading Crown Court, Ex p Malik* [1981] QB 451, 72 Cr App R 146; and *R v Slough JJ, Ex p Duncan* 75 Cr App R 384. Both the *Nottingham Justices* and the *Reading Crown Court* cases were considered in *R v Wai Yu-tsang* [1989] 2 HKLR 77, a case prior to the enactment of Part 1A of the Criminal Procedure Ordinance. The Court there followed the approach of the courts of England and Wales that on a subsequent application for bail there had to be a change of circumstances. Committal for trial *per se* does not constitute a material change of circumstances. However a committal, or an indication from the prosecution it will be seeking a committal to the Court of First Instance or a transfer to the District Court may, in context, amount to a change of circumstances. The defendant may already have been in custody for some time, the prosecution may have been tardy in proceeding with the case, the likely sentence upon conviction after trial may be relatively low, so that overall there is a danger the defendant would have served all, or the majority

of, that sentence before the trial takes place. These factors together may constitute a change of circumstances.

In *R v Brent Youth Court* [2010] EWHC 1893, the court considers the situations in which a third or subsequent bail application should be heard.

On the defendant B's third application, the conditions offered included an offer of surety and a condition of residence with his grandmother in an area not far from the locality. In June 2010, B made the fourth bail application, offering conditions that included a wider exclusion zone and residence at a distant relative's address on the other side of London.

In granting the application for judicial review, the court was of the view that in deciding whether to hear such a fresh application, the question for the court was wider than whether there was a change of circumstances; namely, whether there were any new considerations before the court that were not present when the accused was last remanded in custody. In this regard, the decision of *R v Nottingham Justices Ex p Davies* [1981] QB 38 was quoted and applied:

> "The Court considering afresh the question of bail is both entitled and bound to take account not only of the change in circumstances which has occurred since the last occasion but also all circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider than 'Has there been a change?', it is 'Are there new considerations which were not before the court when the accused was last remanded in custody?"

In the instance case, it was held that the Youth Court had erred in failing to recognise that the offer of residence at an address in a completely different part of London potentially met the objections to bail and constituted an argument of fact that it had not heard previously. Further, B's argument that the strength of the case against him might be significantly weaker than had first appeared was also capable of being an argument of law not heard previously.

Restriction on magistrate sitting after dealing with bail

3–33 Bail applications will normally be dealt with in Court No 1 of the particular magistracy in which the defendant appears. Trials are not normally conducted in Court No 1. There is therefore little risk of a magistrate who has heard details of a defendant's previous convictions hearing the subsequent trial. On the rare occasions when such occurs, a professional magistrate should be able to put these matters out of mind and concentrate upon the evidence in the case. It is, however, the better practice for a magistrate who has sat on a contested bail application in which details of the defendant's previous convictions have been given not to hear the subsequent trial, *cf R v McElligott, Ex p Gallagher and Seal* [1972] Crim L R 332.

Errors in bail applications

3–34 A judge or magistrate who has considered an application for bail and made known his decision cannot be regarded as *functus officio* immediately he or she has stopped speaking. Common sense should be applied in considering the question when in practical terms the occasion has come to an end. For example, if having just granted conditional bail, a magistrate recalled the defendant to the dock and imposed a further condition, no objection could properly be taken.

Criminal Procedure Ordinance, s 9H

3–35 *Application by Secretary for Justice for review of admission to bail by a District Judge or magistrate*

9H.—(1) Where a District Judge or magistrate has admitted any person to bail the Secretary for Justice may apply to a judge to review the decision of the District Judge or magistrate.

(2) Subject to section 9I(3), an application under subsection (1) shall be made by summons before a judge in chambers and supported by affidavit.

(3) The summons may be served on the person admitted to bail at any time before the time appointed therein for the hearing.

(4) On the hearing of the application the Secretary for Justice shall be entitled to put before the judge such relevant argument and such relevant matter as he thinks proper, whether or not the same was before the District Judge or magistrate who made the decision, and the person admitted to bail shall also be entitled to be heard.

(5) Notwithstanding subsection (4), if the person admitted to bail fails to appear a judge may hear and determine the application in the absence of the person if he is satisfied that the person has been served with the summons or has refused to accept service of the summons or that all reasonable attempts have been made to serve the summons.

(6) Where a judge has heard an application under this section in the absence of the person admitted to bail, he may rehear the application if he is satisfied that it is just to do so.

(7) Upon hearing the application, a judge may by order confirm, revoke or vary the decision of the District Judge or magistrate, and may make such other order in the matter including an order as to costs as he thinks just.

(8) On the revocation or variation of a decision of the District Judge or magistrate under subsection (7), a judge may issue a warrant for the arrest of the person admitted to bail.

(9) No appeal shall lie from the decision of a judge on an application under this section.

Whilst section 119(1) of the Magistrates Ordinance enables a magistrate to grant bail pending appeal there is no similar provision in the District Court Ordinance (Cap 336). Applications for bail pending appeal in District Court cases must be made to the Court of Appeal. In *Secretary for Justice v Wong Shu Kin* (HCMP 2577/2003, [2003] HKEC 1067) an application was made to a judge of the High Court under section 9H of the Criminal Procedure Ordinance (Cap 221) to review a decision by a Deputy Judge of the District Court to grant bail pending appeal having convicted the defendants of resisting police officers in the due execution of their duties contrary to section 36(b) of the Offences Against the Person Ordinance (Cap 212) and sentenced each of them to four months' imprisonment. The review was sought on the basis of the absence of any power for a District Court Judge to grant bail pending appeal. On the hearing of the review it was argued that, although there was no inherent jurisdiction for the District Court to grant bail pending appeal, section 83Z of the Criminal Procedure Ordinance (Cap 221) gave the District Court jurisdiction to order bail pending appeal and that therefore the decision granting bail should not be revoked.

Verina Bokhary J held that whilst a magistrate has power to order bail pending appeal under section 119(1)(a) of the Magistrates Ordinance, there was no jurisdiction for a Judge of the District Court to grant bail pending appeal. Her Ladyship ruled that section 83Z of the Criminal Procedure Ordinance (Cap 221) similarly did not confer jurisdiction to order bail pending appeal but simply set out the matters to which a court should have regard when deciding whether or not bail should be granted. There was nothing in the District Court Ordinance to provide the necessary jurisdiction and there was no inherent jurisdiction in a trial court to grant bail pending an appeal from it (*see Ex p Blyth* [1944] 1 KB 532; *Lala Jairam Das v King Emperor* [1945] 61 TLR 245, *Ex p Speculand* [1946] KB 48; *Ex p Burke* [1982] 30 SASR 278 and *Ex p Rundle* [1982] 30 SASR 282. Accordingly, the order of the Deputy District Judge granting bail pending appeal was revoked.

Criminal Procedure Ordinance, s 9I

Custody pending review

3–36 **9I.**—(1) Where a District Judge or magistrate has made an order admitting any person to bail but the Secretary for Justice states that he wishes to apply for a review of his decision under section 9H, he shall upon application by the Secretary for Justice if the person so admitted is present, order that the person be detained in custody and be brought before a judge at such time and place as the Registrar may appoint. (Amended LN 362 of 1997)

(2) Where a District Judge or magistrate makes an order under subsection (1) he shall immediately notify the Registrar who shall cause the person so detained to be brought

before a judge as soon as practicable, and in any event within 48 hours, and inform the Secretary for Justice of the time and place at which that will be done. (Amended LN 362 of 1997)

(3) When the person so detained is brought before him under this section, a judge may, if he thinks fit, dispense with the requirements of section 9H(2) and (3) and proceed to hear an application under section 9H(1).

(4) If the judge declines to dispense with the requirements of section 9H(2) and (3), he shall order the person so detained to be kept in custody for such time as he deems sufficient to enable section 9H(2) and (3) to be complied with, and may make such other order as he thinks just.

Criminal Procedure Ordinance, s 9J

Review of refusal of bail or conditions of bail 3–37

9J.—(1) Where a District Judge or magistrate has refused to admit a person to bail or has so admitted a person subject to any condition, that person may in the case of a refusal, apply to a judge to be admitted to bail or in the case of an admission to bail subject to any condition, apply to a judge to be admitted to bail without bail being subject to that condition.

(2) On the hearing of an application under subsection (1), a judge may by order confirm, revoke or vary the decision of the District Judge or magistrate, and may make such other order in the matter including an order as to costs as he thinks just.

Applications for bail to a judge of the Court of First instance were considered in *HKSAR v Siu Yat Leung* [2002] 2 HKLRD 147. The defendant was refused bail by a magistrate and sought a review of that decision by a judge of the High Court under s. 9J(1). Jackson J refused to grant bail because of the strength of the prosecution evidence and the nature and seriousness of the alleged offences. The defendant did not seek bail at subsequent appearances before the magistrate which included a committal for trial. After the committal for trial, the defendant then applied for bail, purportedly under s 9J of the Ordinance, seeking to review Jackson J's decision refusing bail. Deputy Judge G McCoy SC held there was no statutory jurisdiction under s 9J(1) to grant bail. The Court of First Instance could not review the decision of Jackson J, which was itself a review of a magistrate's decision to refuse bail. Once the decision of the magistrate refusing bail had been reviewed, the jurisdiction to review was exhausted. As, however, the defendant had been committed for trial, he would have been entitled to apply to the Court of First Instance for bail under s 9D(1)(b) in any event. The failure of the earlier review application did not bar a later application for bail to the court of trial. Accordingly the Deputy Judge amended the proceedings to allow the defendant to apply for bail under s 9D of the Ordinance and under the inherent jurisdiction of the High Court. In the event the application for bail was dismissed. Section 9G(11) applied and the applicant was unable to show there had been a material change of circumstances since the original refusal of bail.

Similarly, in *HKSAR v Singh Ramanjit* (HCCP 194/2018, [2018] HKEC 789), [2018] HKCFI 704, the applicant, who had been involved in two cases, applied for a review of the refusal of bail pursuant to s. 9J(1) of the Criminal Procedure Ordinance, having had his bail refused in the magistrates' court in relation to the second case.

In respect of the first case, the applicant was charged with the offence of handling stolen goods of a robbery that took place on 12 March 2017. On 14 March 2017, the applicant left Hong Kong and went to mainland China. He returned to 15 March 2017 and was arrested and charged in relation to this case and granted bail. In respect of the second case, it was occurred on 9 February 2018 whilst the applicant was on bail in relation to the first case. He was arrested and charged in relation to this case on 21 February 2018 and remanded into custody. He made a series of 5 appearances before the magistrates' court. On each occasion, he applied for bail which was refused.

In considering the application, Zervos J observed that under section 9D, an accused has a right to bail but it may be refused in the particular circumstances as set out in section 9G. As his Lordship stated in *HKSAR v Vu Thang Duong* [2015] 2 HKLRD 502 (see: 3-29 above), at [16]:

> "The relevant provisions allow the court to take into account a range of relevant matters when deciding whether or not to grant bail. The presumption of bail can be rebutted by the nature of the offence, the risk of danger to the public, or the likelihood that the trial could be affected by the defendant absconding or influencing a witness. An unreasonable delay in custody, in the particular circumstances of the case, may be a factor in favour of bail. Of course, such a factor would be taken into account together with all other relevant factors in deciding whether or not to grant bail."

Here, the Court of First Instance had approved high security measures to be implemented in relation to the proceedings before it to address the risk assessment of the relevant authorities for violence or escape by the applicant. It seemed that the relevant authorities had based their risk assessment on the subject matter of an Interpol Red Notice. Such a notice informed all member countries that a person was wanted based on an arrest warrant or equivalent judicial decision issued by a country or international tribunal. However, the court made it clear that such information supplied in support of the security measures sought to be put in place, and the approval of them, did not in any way have a bearing on, or influence the application for bail.

In support for this application, the court was informed that the applicant was aged 29 and came to Hong Kong with his family when he was 9 years old. He attended local schools in Hong Kong and at the time of the second case he was working as a driver for the firm of solicitors that were acting for him. He also held a Hong Kong Permanent Identity Card and resided in Hong Kong with his girlfriend and their two children. Both his parents also resided in Hong Kong and were holders of a Hong Kong Permanent Identity Card. The applicant also traveled very frequently to mainland China. Further, it was contended that the two cases alleged against the applicant were circumstantial and the evidence in both cases was weak. An alibi defence was also advanced in relation to the second case.

On the information and the circumstances before the court, however, it was not satisfied that there was little motivation or limited capacity by the applicant to abscond. It was of the view that the applicant ties to Hong Kong were not strong, and not of a kind that would keep him in the jurisdiction, especially in light of his background and particular circumstances where he traveled frequently to mainland China, and in recent times had lived abroad. The offences that the applicant faced in the two cases were serious and upon conviction, the applicant was likely to receive a substantial term of imprisonment for each offence. Whilst the strength of the evidence against the applicant in relation to the second case was under challenge, there was nevertheless a case against him for this offence.

There were two sets of allegations against the applicant with the second case having taken place whilst he was on bail for the first offence. There was therefore an unacceptable risk that he was likely to commit further offences while on bail. It was further of the view that an unacceptable risk that he was likely to interfere with witnesses, given he had previously worked for the victim company of the second case. Accordingly, the applicant's application for bail was refused.

In *HKSAR v Wong Chi Fung* [2020] 2 HKLRD 56, the issue was whether a material change in relevant circumstances was required in repeated bail review. The defendant was charged with offences related to unauthorised assembly taking place in August 2019. The magistrate granted him bail on conditions including a travel restriction that he was not to leave Hong Kong. In November 2019, the defendant applied to the magistrate for the travel restriction to be lifted between 26 November 2019 and 17 December 2019 in order to attend congressional hearings in Europe and give speeches at overseas universities. The magistrate considered the proposed trip dispensable and refused the application. The defendant's application for bail review in the High Court was also refused. In December 2019, the defendant applied to the magistrate again asking to lift the travel restriction between 9 January 2020 and 23 February 2020 in order to observe the presidential election in Taiwan, give a speech at Oxford University and promote his newly

published book in the United Kingdom. The magistrate refused the defendant's application noting that he had made the same application on the same ground, ie, to attend overseas events.

In the instant case, the defendant made the second bail review application for the variation of bail seeking permission to leave Hong Kong for a specified period. It was argued that the word "court" used in s.9G(11) should be interpreted as a reference to individual judicial officers so that an applicant could make a renewed bail application before a different judge relying on the same ground which had already been considered and rejected by another judge without a material change of circumstances. It was contended that an accused who had been refused bail has unlimited right at common law to apply to the High Court for bail under its inherent jurisdiction, even when he was unable to establish "a material change in relevant circumstances".

In deciding the issue, it was noted that on the hearing of a bail review under s.9J(1), a judge sitting on a bail review was not exercising an appellate jurisdiction but was obliged to review the matter afresh in the application: see *HKSAR v Siu Yat Leung* [2002] 2 HKLRD 147 and *Tam Tak Chi v HKSAR* (HCMP 3118, 3119, 3120 and 3121/2014, [2014] HKEC 2001). There was a significant difference between the old s.12B and the new s.9G(11): whilst the former disallowed an accused making repeated bail applications at all in the absence of any material change in circumstances, the latter does not have the effect of limiting the right of an accused to apply for bail. Nevertheless, the court hearing a bail application retained a discretion whether to entertain an argument which had already been put to it twice before without success. Where the same argument was put by a bail applicant, s.9G(11)(a) of the CPO actually required the court to hear the argument even though it had already been rejected once. However, on the second or any subsequent occasion after the court had refused to grant bail, a material change in relevant circumstances could still be relevant when the court considered whether to exercise its discretion under s.9G(11)(b), and the weight to be attached to this factor would be case and accused specific (*R v Dover and East Kent Justices Ex p Dean* [1992] Crim LR 33 referred to).

Further, the contention that the word "court" used in s.9G(11) should be interpreted as a reference to individual judicial officers was rejected. The purpose of the new statutory test under s.9G(11) was to ensure that access to the courts was not a "revolving door" and that the new statutory test was a sensible and necessary adjunct to a coherent legal system, which would otherwise be prey to a proliferation of speculative bail applicants on issues already decided (*HKSAR v Siu Yat Leung* [2002] 2 HKLRD 147; *R v Ng Yiu Fai* [1992] 2 HKCLR 122 referred to). For the purpose of this application, it was not necessary to decide what an accused's common law right regarding repeated bail applications used to be or whether the old s.12B was simply declaratory of the common law position.

It was decided that the travel restriction imposed was fully justified and that the defendant's application for variation be refused. In respect of his proposed book launch, the relevant clause in his contract with the publisher was loosely drafted that gave him a lot of flexibility whether to go to the United Kingdom. Further, the contract was signed two months after the defendant was granted bail in August 2019 with the restriction imposed. As such, the defendant could not expect that the travel restriction would be lifted when he signed the contract. If there was a risk of being sued for breach of contract, he knowingly put himself in that position. Regarding the defendant's proposed speech at the Oxford Union, the risk of absconding had not vanished although he had been given permission to leave Hong Kong before and then returned. It was not necessary for the defendant to be physically present for the speech. Further, his proposed return date from the United Kingdom being just two days before the next mention, the itinerary did not allow a sufficient buffer to cater for any contingency. The public interest in due administration of justice required that the date for plea should be kept as scheduled without delay (*Miazdzyk v Poland (23592/07)* [2012] ECHR 111 distinguished).

Criminal Procedure Ordinance, s 9K

Arrest of persons admitted to bail

3–38 9K.—(1) A police officer may without warrant arrest and detain any person admitted to bail if—

(a) the police officer has reasonable grounds for believing that any condition on or subject to which such person was admitted to bail has been or is likely to be broken; or

(b) any police officer has been notified in writing by any surety from whom a recognizance of bail has been taken for that person that the surety believes that that person is likely to fail to surrender to custody as shall have been appointed by a court and for that reason the surety wishes to be relieved of his obligations as surety.

(2) Any person arrested under subsection (1) shall be brought within 24 hours after his arrest or as soon as practicable thereafter before a magistrate except where he was so arrested within the period of 24 hours immediately preceding an occasion on which he is required by virtue of his bail to surrender to custody at any court, in which case he shall be brought before that court.

(3) If it appears to the court before which a person is brought under subsection (2) that any condition of admission to bail has been or is likely to be broken, the court may—

(a) order that that person be detained in custody; or

(b) admit that person to bail on the same conditions or on such other conditions as it thinks fit,

but if it does not so appear to that court, the court shall release that person from custody and admit him to bail on the same conditions.

This section enables the police to take "pre-emptive" action where there are reasonable grounds for believing that any condition on or subject to which a person was admitted to bail has been, or is likely to be, broken. Under the section a person admitted to bail may be arrested and brought before a magistrate before bail has been breached. The wording "reasonable grounds to believe" implies there must be something more than mere suspicion. There must be something which can be valued and assessed. That will depend upon the circumstances of each case. A person admitted to bail and arrested under this section must be brought before a magistrate within 24 hours or as soon as practical thereafter. There will then be an inquiry into the arrest. The magistrate may order detention in custody or may continue the bail, with or without additional conditions. The burden will be upon the prosecution to show good cause for the arrest.

Criminal Procedure Ordinance, s 9L

Offence of failing to surrender to custody as shall have been appointed

3–39 9L.—(1) A person admitted to bail who, without reasonable cause, fails to surrender to custody as shall have been appointed by a court, commits an offence.

(2) A person admitted to bail who, having reasonable cause therefor, has failed to surrender to custody at such time as shall have been appointed by a court, fails to so surrender as soon after that time as is reasonably practicable, commits an offence.

(3) Any person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine of HK$75,000 and to imprisonment for six months, and on conviction upon indictment to a fine of any amount and to imprisonment for 12 months.

(4) Where an offence under subsection (1) or (2) is alleged to have been committed, a court, in the exercise of jurisdiction under this section, may deal with an accused person summarily without a jury and may deal with the case without a charge having been transferred under Part IV of the Magistrates Ordinance (Cap 227) or the case having been committed for trial under Part III of that Ordinance.

"Surrender to custody"

3–40 A "surrender to custody" requires a defendant to be under the control of the court and be the responsibility of the court. This usually requires the defendant to enter the dock. However, surrender may also be accomplished by the commencement of

any hearing before the magistrate or judge where the defendant is formally identified, and whether he enters he dock or not. For example, there may be cases where a young, elderly, handicapped, or vulnerable defendant, does not enter the dock, but "surrender to custody" still takes place: *R v Evans (Scott Lennon)* [2012] 1 WLR 1192; [2012] 2 Cr App R 22. Although "surrender to custody" means surrender "at the time and place for the time appointed for him to do so" it appears that the *de minimis* principle should be applied if the defendant is only marginally late. In *R v Gateshead Justices, Ex p Usher* [1981] Crim LR 491, DC, it was held that being seven minutes late did not constitute the offence: *sed quaere*, if this occurred more than once (let alone deliberately) without excuse.

However, in *R v Scott (Casim)* (2008) 172 JP 149 the appellant appealed against a conviction for failing to surrender to bail when he arrived approximately 30 minutes late. The Court of Appeal distinguished *R v Gateshead Justices, Ex p Usher*, stating that it was influenced by a combination of other factors and thus was not a satisfactory authority and should not be taken as establishing any general principle. Whereas, it was held that the proper construction of the phrase was that surrender had to be at the appointed time and place without admitting any extra gloss to allow for some unidentified further margin. It followed that the fact that a defendant was slightly late could not afford him a defence. There could be circumstances where a defendant's late arrival at court was so marginal that to charge the offence would be *Wednesbury* unreasonable but those instances would be rare.

"Reasonable cause" for failure to surrender to custody

3–41 The burden of showing reasonable cause for the failure to surrender is upon the defendant. In *Laidlaw v Atkinson, The Times*, 2 August 1986, it was held that there was no reasonable cause for failure to surrender to custody where the defendant, because he handed his charge sheet to his solicitor without making any note of the date on which he was to surrender, mistakenly formed the opinion that he was to surrender on a later date. It was not suggested that the failure was deliberate. The reasons outlined played a part in the defendant's confusion and could be said to amount to mitigation, but there was no question of anything having arisen to prevent his attendance. The error was his responsibility. By analogy, failure to remember the court date, loss of the record of bail proceedings containing the date, place and time of the required surrender or mistaking the date will not be a reasonable cause.

It will be for the defendant to show, in terms, that something outside his control had arisen which prevented his attendance. What that might be must depend on the facts of the particular situation. Whether a mistake by a solicitor (giving the defendant the wrong date) amounted to a reasonable excuse was a question of fact to be decided in all the circumstances of the particular case: *R v Liverpool City JJ, Ex p Santos, The Times*, 23 January 1997.

Part IA of the Criminal Procedure Ordinance does not specifically address the position of a person who has attended court as required by the bail but who then leaves the court without the court's permission. However the obligation of a person on bail is to comply with the procedures of the court where he is due to appear and to report to the appropriate person. He is then in custody and under an implied obligation not to leave without consent. Leaving court without permission would mean the defendant is absent when his case was called on; arguably there has not been an effective surrender to the court and the offence of failing to surrender to custody would be committed. This construction would accord with the purposive approach to the interpretation of legislation set out in section 19 of the Interpretation and General Clauses Ordinance (Cap 1).

Where a magistrate commits a person for trial before the Court of First Instance on bail, the bail is complied with when the defendant surrenders to the Court of First Instance, whether for the purposes of arraignment or otherwise; if the Court of First Instance releases him on bail thereafter, it is duty bound to consider the suitability of any conditions afresh, including the position of a surety; if therefore, a judge granted bail "as heretofore" without considering the position of a

surety required by the magistrates, that would be ineffective for the purpose of renewing the suretyship as a condition of bail, see *R v Kent Crown Court, Ex p Jodka* 161 JP 638, DC.

It is good practice for courts to ensure that defendants, who surrender to their bail and then have to wait until their cases are called on for hearing, are aware that they must not leave the building without the consent of the court. Similarly when adjourning at lunchtime, it would be prudent for courts to inform defendant's whose cases have yet to be dealt with that their bail is extended on the same terms over the lunch break but that they must report back to the court by a specified time, see *dicta* in *DPP v Richards* [1988] QB 701.

3–42 Section 9L creates a new criminal offence of failing to surrender to custody. The scope of this offence was considered in *R v Lau Wai Leung* [1997] HKLRD 200. Lau had pleaded not guilty to attempted theft and was granted bail to the date of his trial before a magistrate. He failed to appear and the trial magistrate issued a warrant for his arrest. When brought before the trial magistrate under that arrest warrant, Lau maintained his not guilty plea to attempted theft. The magistrate then sentenced him to two months' imprisonment for failing to surrender to his bail, taking the view that as he knew that Lau had not appeared on the due date, no other proof was necessary. In essence the magistrate dealt with the failure to appear as a contempt of court under the guise of s 9L. No separate information was laid, no formal plea was taken, no evidence was heard and an inquisitorial approach was adopted. Excuses of forgetting the trial date and having insufficient funds to instruct a lawyer were held not to be reasonable cause for the failure to answer bail. Lau appealed both conviction and sentence.

In holding the proceedings were a nullity and quashing the conviction, Leonard J held that s 9L created a criminal offence and it was for the prosecution to decide whether or not to prosecute. If the decision was to prosecute, then there must be a charge or an information followed by a trial in the usual way. That trial should, ideally, take place after the disposal of the case in which the bail had been granted.

Section 9L is intended as a firm response to those who fail to surrender to their bail. Just as it is for the prosecution to show that the right of bail should be denied in the particular case, it is for the prosecution to decide whether or not to institute proceedings under the section. The new offence of failing to surrender to bail replaces the power of courts under common law to deal with a breach of bail as a contempt of court. In the event that there is a prosecution and a conviction followed by the imposition of a custodial sentence, it would be right to make sentence under s 9L consecutive to any sentence imposed on the offence for which bail was granted. As the offence of failing to surrender to custody is an offence punishable by imprisonment, its commission during the operative period of a suspended sentence would be sufficient to trigger the activation of the suspended sentence.

That courts should, and will, respond firmly to those who fail to surrender to bail was emphasised in *R v Sutton* [2006] EWCA Crim 1487.

In *HKSAR v Law Ying Kam* (CACC 183/2015, [2015] HKEC 2180), the applicant pleaded guilty in the District Court to one count of 'Trafficking in dangerous drugs' (Charge 1) and another count of 'Failing to surrender to custody without reasonable cause' (Charge 2) where the applicant failed to appear in court on the day of her plea and she was re-arrested nearly a year later.

The applicant was sentenced to 2 years' imprisonment in respect of Charge 1, and 6 months' imprisonment on Charge 2, which sentences were ordered to run consecutively with each other. She applied for leave to appeal against sentence in respect of Charge 2 only. However, her application for leave to appeal was treated as an application in respect of sentences on both charges by virtue of s 83I(2) of the Criminal Procedure Ordinance ("CPO"). The applicant submitted that the sentence on Charge 2 was unfair and unjust since concurrent sentences have been imposed in numerous other cases.

In deciding the application in respect of Charge 2, it was noted that in *HKSAR v Wong Yui Ming* (CACC 348/2003, [2004] HKEC 45), a sentence of 6 months' imprisonment on a plea of guilty for such an offence was said by the Court to be appropriate

where the applicant had failed to appear at his trial for an offence of trafficking and when he was re-arrested 21 months later. The Court held that a starting point of 9 months' imprisonment was appropriate, with a customary one-third reduction for guilty plea. The Court did not interfere with the wholly consecutive sentence.

In the instant case, the applicant had absconded for almost a year. It was considered that failing to turn up at court when entrusted with bail is a serious breach of a court order, it is therefore not reasonably arguable that a sentence of 6 months' imprisonment, made wholly consecutive to the sentence for the main offence, was manifestly excessive or wrong in principle. Accordingly, the application for leave against sentence was refused.

In the instant case, it was held that the reduced discount of 20 per cent that the judge afforded the applicant from the starting point was entirely appropriate as his plea of guilty was delayed over a year after he was re-arrested. Similarly, in *HKSAR v Wong Cheuk Fei* (CACC 499/2012, [2013] HKEC 1595), the appellant had surrendered to the police on his own initiative after he had absconded for over four years. The judge afforded the appellant a discount of one third for his pleas of guilty. The Court of Appeal stated that in affording the appellant a general discount from the starting points taken for sentence of one third the judge was extremely generous. The appellant had absconded for over four years, albeit he had eventually surrendered to the authorities. The discount of one third is afforded to those whose pleas are timely.

In *HKSAR v Wong Chun Kit* (CACC 301/2014, [2015] HKEC 1628), the applicant applied for leave to appeal against sentences following his conviction on his pleas of guilty, in respect of two charges of 'Blackmail' (Charges 1 and 3) and two charges of 'Theft' (Charges 2 and 4). He also made an application for leave to appeal against the sentence imposed in respect of his conviction on a charge of 'Failing to surrender to custody without reasonable cause' (Charge 5) where the applicant failed to attend his trial and he finally surrendered to a police station nearly 12 years later. That sentence was ordered to be served consecutively to the sentences of imprisonment imposed in respect of the other charges. Further, in light of the fact that the applicant had absconded for almost 12 years, the judge afforded the applicant a reduced discount for his pleas of guilty of 25% from that taken as a starting point for sentence in respect of Charges 1 to 4. Whereas, the judge afforded the applicant a discount of one-third from the starting point taken for sentence for Charge 5.

What the complaint advanced in respect of Charge 5 was that the judge had erred in ordering that all of the sentence of imprisonment imposed in respect of Charge 5 be served consecutively to the sentences of imprisonment imposed in respect of the other charges. It was argued that given that the applicant had been afforded a reduced discount of 25% only for his plea of guilty, the effect of ordering the resulting sentence of imprisonment to be served consecutively was, in effect, "double counting".

In considering the contention, the Court of Appeal was of the view that the criticism that the judge was subjecting the applicant to an element of "double counting" was misplaced. The denial of the full one-third discount simply reflects the fact that the applicant's pleas of guilty were not timely. They required the court to schedule two separate hearings. In those circumstances, the applicant was not entitled to a one-third discount from that taken as the starting point. The offence encompassed by Charge 5 was a separate and distinct criminal offence

It was noted that the issue was addressed in the judgment delivered by Keith JA in *HKSAR v Poon Chum Kong* (above) where the Court approved of that approach to sentence. In the course of his judgment, Keith JA said:

> "One of us was initially concerned about that approach. A person admitted to bail who fails to surrender to custody when called upon to do so commits an offence punishable with imprisonment: see s 9L of the Criminal Procedure Ordinance (Cap 221). To deny a defendant who absconded the discount for his plea of guilty which he would otherwise have been given could be said to be tantamount to punishing him for committing that offence. He is, in effect, serving an additional sentence for having absconded when he had not been charged with that. It could be said that it was wrong to treat the defendant in a way which has the effect of him receiving an additional sentence of imprisonment for an offence for which he had never been charged.

However, any initial misgivings about that approach have now been laid to rest. The reason why the discount is reduced in these circumstances is because the plea of guilty is not tendered at the earliest opportunity. Indeed, the effect of the Applicant absconding was that there had to be a second trial. He was not therefore being punished for absconding. He was being denied the discount to which he would otherwise have been entitled because of the consequences of his absconding, namely that his plea of guilty was in the circumstances a late plea and that a second trial was necessary. If one of the justifications for giving a discount for plea of guilty is the saving of the expense of a contested trial, that was to some extent neutralized in the present case by the expense of an albeit short second trial."

Whereas, a different view was held in *HKSAR v Lo Kam Fai* (CACC 374/2014, [2015] HKEC 2244) where the applicant pleaded guilty to one charge of 'Burglary' (Charge 1) and one charge of 'Failing to surrender to custody without reasonable cause' (Charge 2) where the applicant had absconded on the day when his case was fixed for trial. He was re-arrested more than three years later.

In respect of Charge 1, the judge adopted the starting point of 3 years' imprisonment. Since the applicant had absconded for more than three years, the judge did not consider his plea a timely one. He declined to accord the applicant the usual one-third discount for his guilty plea and, instead, gave him a discount of 8 months only, resulting in a sentence of 28 months.

In respect of Charge 2, the judge adopted a starting point of 6 months' imprisonment, reduced it by one-third for the applicant's guilty plea, and sentenced the applicant to 4 months' imprisonment. He ordered the sentence on Charge 2 to be served consecutively to the sentence on Charge 1, making an overall sentence of 32 months' imprisonment. The applicant filed an application for leave to appeal against sentence.

In granting leave to appeal, it was decided that there is a reasonable argument that by reducing the discount for plea on Charge 1 because of the applicant's absconding, the judge may have double-counted this factor in sentence, since failing to surrender to custody without reasonable cause was also the essence of Charge 2. Hence, it might be argued that the applicant received a penalty after plea of 8 months' imprisonment for absconding rather than 4 months; arrived at by depriving him of 4 months discount he might have been entitled to on Charge 1, whilst at the same time adding 4 months in respect of Charge 2. Accordingly, in the absence of an acknowledgment in the judge's Reasons for Sentence of the principle of totality, it seems that it is reasonably arguable that the overall sentence passed on the applicant may be excessive and/or wrong in principle.

However, in the substantive appeal in *HKSAR v Lo Kam Fai* [2016] 2 HKLRD 308, by a majority decision, the appeal against sentence was dismissed. In dismissing the appeal, Yeung V-P was of the view that the judge was entitled to give the appellant a discount, which was less than one-third on his guilty plea to the burglary charge. What the appellant did offended the very reasons for which one-third sentence discount is given for a guilty plea. The appellant had hindered the course of justice and had made it more difficult and more costly for its administration. He had wasted precious judicial resources and had caused inconvenience to the police and the victims who had the matter hanging over their heads for over 5 years.

Lunn V-P considered that a range of factors may be relevant to the appropriate discount to be afforded to a defendant where a plea of guilty is not timely to reflect the individual circumstances of the particular case: the length of time that justice has been delay; whether or not the defendant surrendered to the authorities ultimately or whether it was necessary for him to be re-arrested; the inconvenience and wasted expense and costs caused by the aborted scheduled hearing, to witnesses, counsel and the court. That is particularly the case, if witnesses have travelled to Hong Kong from overseas or remained in Hong Kong, where otherwise they would not have done so, in order to give evidence. There may be other relevant factors. The usual range of discount afforded to a defendant who has absconded is about 20% to 25%. There will be circumstances peculiar to a particular case, which will justify discounts outside that range. Within the usual range, the judge has a discretion in determining the discount appropriate to the circumstances of any particular case.

In the instant case, it was satisfied that the judge was entitled to afford the appellant a reduced discount of 22% only from that taken as the starting point. It fell squarely within the usual range of reduced discount and within the judge's discretion in such circumstances. The appellant had caused the courts to fix dates for his trial on two separate occasions, separated by more than three and a half years, had absconded on the first occasion and tendered his plea of guilty to Charge 1 only on the first day of trial, albeit that the court had been informed by a letter from the appellant's solicitors that he would plead guilty to both Charges 1 and 2 against him.

The remaining issue was whether or not the judge's order that the whole of the sentence of 4 months' imprisonment be served consecutively to the sentence of 28 months' imprisonment in respect of Charge 1, the appellant was punished twice for the same facts. It was decided that there was a logical foundation for such an approach. The remarks as stated in *HKSAR v Ko Chun Hung* (CACC 71/2007, [2007] HKEC 2099) was observed:

> "By absconding, the applicant had committed a fresh offence and had to be punished separately. By absconding, the applicant also rendered the administration of justice more costly and more time-consuming, and the judge was entitled to exercise his discretion by reducing the percentage of discount that he would otherwise obtained."

Accordingly, the overall sentence of 32 months imprisonment imposed on the appellant was not wrong in principle and on the facts of the case it was not manifestly excessive either.

In *HKSAR v Lam Chi Kwan* [2018] HKCFI 713, (HCCC 435/2017, [2018] HKEC 800), the defendant had previously been charged with offences taking a conveyance without authority (Count 1), trafficking in dangerous drugs (Count 2) possession of an identity card (Count 3), in May 2005 but after a court appearance and having admitted to bail, he had absconded from the jurisdiction. In May 2017, some 12 years later, he surrendered himself to the police station in relation to these offences. In mitigation, it was submitted on behalf of the defendant that the defendant was at the time of the offences in 2005 working for a criminal syndicate. When he was released on bail, members of the syndicate made him leave Hong Kong and go to mainland China to continue working for the syndicate there. He was eventually convicted for his drug activities in March 2009 and sentenced to 12 years' imprisonment. He was released from prison in August 2016.

In the present case, the defendant pleaded guilty to all counts including, *inter alia*, of an additional count of failing to surrender to custody without reasonable cause in June 2005 (Count 4).

In deciding the sentence, it was appreciated that although the defendant pleaded guilty to Counts 1, 2, and 3 in the magistrate's court, it was only after he had absconded and returned to Hong Kong. So on that basis, he had not entered his pleas of guilty at the earliest opportunity. That was not the case with Count 4 because that was laid against him when he returned, and he pleaded to that offence in the Magistrate's Court at the earliest opportunity. Hence, for Count 4, the defendant was entitled to a full one-third discount.

The issue to be resolved was the discount to which the defendant was entitled in relation to Counts 1, 2 and 3 for his guilty plea. In deciding the issue, the case of *HKSAR v Wong Cheuk Fei* (CACC 499/2012, [2013] HKEC 1595) was considered. In that case, the Court of Appeal was concerned with amongst other things, the discount given to the appellant by the sentencing judge of one-third discount for his pleas of guilty having absconded for over four years but eventually surrendering to the authorities which Lunn JA (as Lunn VP then was), giving the judgment of the Court, described as extremely generous given that the pleas were anything but timely. He noted that the sentencing judge would have been entitled to give a reduced discount. The cases of *HKSAR v Ngo Van Nam* [2016] 5 HKLRD 1 and *HKSAR v Lo Kam Fai* [2016] 2 HKLRD 308 were also considered.

After consideration, it was held that the court would give a discount of 25% in relation to Counts 1, 2 and 3. As to Count 4, failing to surrender to custody without reasonable cause, the Court would adopt a starting point of 6 months' imprisonment, which would be reduced by one-third for the defendant's guilty plea to 4 months'

imprisonment to which it was ordered, *inter alia*, that sentence to run consecutively with Count 2.

However, in *HKSAR v Galvis Silva Paola Andrea* [2018] HKCA 656, (DCCC 138/2017, [2018] HKEC 1276), the defendant who was a Form 8 recognizance holder, picked up two credit cards belonging to another and used the cards to complete two transactions involving $2,200 in total. Following arrest, the defendant indicated her guilty plea for one count of theft (Charge 1) and two counts of fraud (Charges 2 & 3). She was due to appear in District Court before a judge for plea and sentence. However, she failed to attend court on the return day and absconded for almost 3 months before she was re-arrested.

She was convicted upon her own pleas for the said charges and an additional count of failing to surrender to custody without reasonable cause (Charge 4). In mitigation, the court was informed, *inter alia*, that the defendant was 7 months' pregnant.

In considering the sentence of Charge 4, the case of *HKSAR v Lo Kam Fai* [2016] 2 HKLRD 308 was considered including the dissenting judgment of Macrae JA as well as two District court decisions, namely, *HKSAR v Lin Kee Shing* (DCCC 219/2016, [2016] HKEC 1314) and *HKSAR v Hung Hin Ming* (DCCC 1093/2016, [2017] HKEC 2226) submitted by the prosecution.

The court saw the force in the reasoning of Macrae JA on the issue of double-counting if a defendant was to be given a reduced discount for his guilty plea due to his absconding and at the same time be additionally penalized by an absconding charge. More importantly, it was of the view that the defendant, here, unlike those in the said cases, had all along indicated her guilty pleas and at no stage had any trial dates been fixed or wasted. In any event, the Court of Appeal in *HKSAR v Ngo Van Nam* [2016] 5 HKLRD 1 repeatedly pointed out that the discount on guilty plea was a matter which was subject to the overriding discretion of the sentencing judge.

Hence, having considered all the circumstances, it was decided to give the full one- third discount to the defendant for all charges. For Charge 4, a starting point of 6 months' imprisonment was adopted and having reduced by a one-third discount for the guilty plea that made it 4 months' imprisonment. A further 3 months' reduction for the defendant's pregnancy, the final sentence was 1 month imprisonment.

In *HKSAR v Cheung Hon Yuen* [2018] HKLRD 253, [2018] HKCA 677, the issue to be decided was whether the discount for guilty plea was reduced for absconding was appropriate. The applicant committed two robberies, both in 1988. He was arrested by the police at a police roadblock. The applicant was given bail but failed to turn up for his trial, then scheduled to commence on 10 August 1989. He surrendered to the authorities almost 28 years later in 31 May 2017. He was convicted on his own plea of two counts of "robbery" but, because he absconded and did not enter a timely plea, the Judge gave him a reduced discount of only 20% and sentenced to him a total of 9 years and 4 months' imprisonment.

The applicant applied for leave to appeal against sentence arguing, *inter alia*, that for his voluntary surrender and subsequent plea of guily in 2018, he should have been given the full one-third discount in sentence. On the second ground, he was contending that in the more serious case of *香港特別行政區 訴 張隨岭* [2018] HKCFI 630 (HCCC 405/2017, 30 January 2018) involving four counts of robbery, the defendant was sentenced to only 7 years' imprisonment.

In dismissing the application, it was observed that it was not a sentencing principle prevailing at the time of the applicant's offences that a timely plea must be met by a full one-third discount. That only became settled law until the case in *HKSAR v Yeung Kin Man* [2000] 2 HKLRD 821. In any event, such a discount was also almost always moderated by acts of absconding which necessarily made an impact on court time and resources (*HKSAR v Lo Kam Fai* [2016] 2 HKLRD 308 applied).

As for the second ground, it was of the view that whether or not the case of *香港特別行政區 訴 張隨岭* [2018] HKCFI 630 (HCCC 405/2017, 30 January 2018) gave the applicant the impression that his was a heavier sentence, that was not a valid ground of appeal. The true test was whether within the factual matrix of the applicant's case itself, the applicant had been correctly sentenced. As a basis of appeal, the parity principle did not embrace unrelated criminal conduct and "is confined in its application to co-offenders" (*HKSAR v Ng Man Yee* [2014] 4 HKC 241 applied, this case went on to the Court of Final Appeal, (2015) 18 HKCFAR 405). On the facts, it

was found that the applicant's sentence was neither wrong in principle nor manifestly excessive.

Criminal Procedure Ordinance, s 9M

Forfeiture on failure to surrender to custody as shall have been appointed

3–43 **9M.**—(1) If a person admitted to bail fails, without reasonable cause, to surrender to custody as shall have been appointed by a court, a court may, whether or not that person has been convicted of an offence under section 9L(1), order that the whole of part of any—

(a) recognizance of bail taken from a surety under section 9D(3)(a); or

(b) sum of money deposited with the court under section 9D(3)(b)(viii),

for the purpose of securing his surrender to custody shall be forfeited to the Government. [Amended 39 of 1999 s 3]

(2) Where a court makes an order under subsection (1), the payment of any sum due as security for a recognizance of bail taken from a surety under section 9D(3)(a) may be enforced as if it were a security to which section 64 of the Magistrates Ordinance (Cap 227) applies.

Estreat of recognisances

3–44 Section 9M of the Criminal Procedure Ordinance deals with the forfeiture of a recognisance taken from a surety or a sum of money deposited in court as a condition of bail where the defendant has failed to surrender to custody without reasonable cause. There is no longer a power to take a recognisance of bail from the defendant as a condition for the grant of bail. The defendant may however be required to lodge a cash sum with the court under section 9D(3)(viii) for the purpose of securing surrender to custody and a recognisance may be taken from a surety. The section is triggered by the defendant's failure to surrender to custody without just cause and is entirely distinct from section 9L. The recognisance or the cash deposit may be forfeited irrespective of whether or not there is a prosecution for the offence of failing to surrender to custody.

The court has a discretion both whether or not to order forfeiture and as to the extent of the forfeiture. The normal approach will be to order forfeiture of the full amount of the recognisance. The important factor is the failure of the person bailed to answer to their bail. The surety has taken the burden upon themselves and accordingly lack of fault on the part of the surety will have little relevance, see *dicta* of Silke JA in *R v Keung Cam-Yuen (No 2)* [1988] 1 HKLR 427. The court must however consider the merits of the case and decide as a matter of discretion whether or not to order forfeiture or whether or not to forfeit only part of the recognisance, see *R v Warwick Crown Court, Ex p Smalley* 84 Cr App R 51. This would imply an examination of the relationship between the defendant and the surety and the extent of the supervision of the defendant by the surety.

Where a court makes an order under section 9M(1) the payment of any sum due as security for a recognisance of bail taken from a surety may be enforced as if it were a security to which section 64 of the Magistrates Ordinance applies. The surety becomes a debtor to the HKSAR for the sum in which he or she is bound: *cf R v Southampton JJ, Ex p Green* [1976] QB 11, CA, per Lord Denning MR, at pp 15, 19.

The approach to forfeiture

3–45 The principles which govern the forfeiture of a recognisance were reviewed by the Court of Appeal of England and Wales (Civil Division) in *R v Maidstone Crown Court, Ex p Lever and Connell* [1996] 1 Cr App R 524. The applicants stood surety in the sums of £19,000 and £40,000 for a defendant who failed to attend his trial. The judge at first instance found that there was no culpability in either surety but ordered them to forfeit £16,000 and £35,000 respectively. The Divisional Court refused their applications for judicial review. In dismissing their appeals to the Court of Appeal, Butler-Sloss LJ said:

> "The general principle is that the purpose of a recognisance is to bring the defendant to court for trial. The basis of estreatment is not as a matter of punishment of the

> surety, but because he has failed to fulfil the obligation which he undertook. The starting point on the failure to bring a defendant to court is the forfeiture of the full recognisance. The right to estreat is triggered by the non-attendance of the defendant at court. It is for the surety to establish to the satisfaction of the trial court that there are grounds upon which the court may remit from forfeiture part or, wholly exceptionally, the whole recognisance. The presence or absence of culpability is a factor but the absence of culpability, as found in this case by the judge, is not in itself a reason to reduce or set aside the obligation entered into by the surety to pay in the event of a failure to bring the defendant to court. The court may, in the exercise of a wide discretion, decide it would be fair and just to estreat some or all of the recognisance."

Her Ladyship went on to say that reducing the financial obligation of a surety must be the exception not the rule and be granted only in really deserving cases. The court was of the view that *dicta* of Lord Denning MR *in R v Southampton JJ, Ex p Green* [1976] QB 11, and Lawton LJ in *R v Bow Street Magistrates' Court, Ex p Hall, The Times*, 27 October 1986, CA (Civ Div), were misleading in that they gave the impression that the surety's degree of culpability was the guiding principle in the exercise of the discretion. The observation of Lord Widgery CJ in *R v Southampton JJ, Ex p Corker* (1976) 120 SJ 214, was said to be particularly significant: "The real pull of bail ... is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has given surety for him to endure pain and discomfort." In *R v Horseferry Road Stipendiary Magistrate, Ex p Pearson* [1976] 1 WLR 511, it was said that the question of forfeiture should be approached

> "on the footing that the surety has seriously entered into a serious obligation and ought to pay the amount which he or she has promised unless there are circumstances in the case, relating either to means or to culpability, which make it fair and just to pay a smaller sum".

3–46 In *R v Crown Court at Wood Green, Ex p Howe* 93 Cr App R 213, it was held that reference in the authorities to consideration of means implied that the court should have some regard to ability to pay and to the consequences for the surety of ordering payment in an amount which would inevitably lead to a term of imprisonment in default. It is the invariable practice to ask an intending surety how he would raise the money in the event of default and to explain that the likely consequence of non-appearance and non-payment is imprisonment. In *Ex p Hall*, above, Lawton LJ observed also that a surety who misled the court as to his means acted in a way which caused the court to do that which it would not otherwise have done and struck at the roots of the surety system.

On that basis it could properly be observed that a surety who deliberately, or perhaps even recklessly, misleads a court about their financial situation and ability to control the defendant, with the result that bail which would other wise not have been granted, is granted, has perverted the course of public justice.

Hong Kong's courts have adopted a similar approach. In *R v Keung Cam-Yuen* (No 2) [1988] 1 HKLR 427 it was held there was a heavy obligation upon a surety to ensure that the person for whom they had become responsible attended court. Total forfeiture was appropriate unless there were circumstances relating either to means or culpability which made it just or fair to forfeit a smaller sum. The burden of showing that rested upon the surety and would be a heavy burden. In *Wan Shui-Ying v Att-Gen* [1990] 2 HKLR 139 it was held that where a cash surety was provided, the instances where that should not be forfeited in its entirety when the conditions are not met must be rare.

In *HKSAR v Asim Nadeem* [2018] HKDC 166, (DCCC 173/2017, [2018] HKEC 291), a magistrate granted bail to a defendant who was a Form 8 holder. Bail conditions included the payment of $50,000 cash bail and a cash surety in the sum of $50,000. Other bail conditions included daily reporting to a police station between 6-9 pm. K was approved as the surety, deposited the sum of $50,000 on the same day. Bail was extended with the next court's hearing day, which would have been the first day of the defendant's trial. K signed agreeing to continue acting as a surety for the defendant. The defendant failed to attend the trial hearing day as scheduled and the police

visited his address but failed to locate him. A warrant was issued for the arrest of the defendant.

At the hearing for K to show cause why his recognizance should not be forfeited, he gave evidence, in summary, that prior to the time when the defendant suddenly disappeared he had been chasing him to attend court and that the defendant did in fact attend court in the past. He further explained that whenever he saw the defendant, he would remind him to go to court and to report to the police. K said he attended the police station once or twice with the defendant and said he could only warn the defendant to attend court and the police station.

In deciding the issue after considered various cases on the issue including *R v Keung Cam Yuen, Wai Shui Ying v Attorney General, R v Maidstone Crown Court Ex p. Lever (above)* and *Choudhry and Hanson v Birmingham Crown Court* [2007] EWHC 2764, it was satisfied on the evidence that K had failed in his duty to fulfill the obligations undertaken as a surety. To simply warn the defendant to attend the police station and the court was not sufficient. At the material time when the defendant disappeared K had little, if any contact with him. The financial means of K who had borrowed money when he moved home with the expectation he would be able to repay from the surety money was also considered. It was of the view that whilst the forfeiture of the money would no doubt cause hardship to K and his family, it was satisfied that it was not very great hardship or undue hardship. K was in work buying second hand mobile phones earning on average $15,000 - $16,000 per month.

Accordingly, it was found that K had failed to establish any grounds upon which the Court could order lesser sum to be forfeited. K might well not have expected the defendant to disappear, however, by agreeing to be a surety he knew the risks involved. It was satisfied that this was not one of those rare cases where no order for forfeiture should be made or forfeiture a less sum. The sum of $50,000 deposited by K was thus forfeited.

The question of whether the Court of Appeal had jurisdiction to deal with appeals against confiscation orders of bail money made by the District Court was considered in *HKSAR v Chan Yuen Yee Carrie* [2017] 3 HKLRD 431. In that case, the appellant was charged with one count of burglary. She was granted cash bail in the sum of $40,000 pending trial in the District Court which was fixed for hearing on 13 May 2015. The appellant did not show up as scheduled and the Deputy Judge ordered a warrant of arrest.

The appellant surrendered herself to the Court the following day on 14 May 2015. She explained that she was unable to attend trial as had been appointed because she had suffered a head injury at 4 am on 13 May 2015 and went to a hospital at 5:24 am. She was admitted for observation and only discharged after 4:00 pm of the same day. She further said that she did not go to a police station to surrender herself because after she had left the hospital, she had to go back home to look after her two children. She was not able to obtain the relevant medical report to support her story because she had lost her identity card while hospitalised.

The Deputy Judge rejected the appellant's explanation and ruled that the appellant had failed to show reasonable cause for not attending the court as had been appointed and ordered the $40,000 bail money be confiscated in full (the confiscation order) under s.9M(1)(b) of the CPO.

The appellant subsequently pleaded guilty to burglary and was sentenced to 22 months' imprisonment. She had obtained leave to appeal against the confiscation order. At the hearing, the appellant adduced medical reports as new evidence which proved that on 13 May 2015, she was hospitalised until 3 pm due to head injuries and was readmitted until 6.45 pm the same day.

In considering the appeal, it was of the view that the Deputy Judge should have given the appellant the opportunity to prove her reasons for not attending trial before deciding whether or not to forfeit her bail money. The new evidence in fact substantiated her explanation. The confiscation order was inappropriate and without fair process. It should be set aside. However, it must first be resolved whether the Court of Appeal had the jurisdiction to deal with appeals against confiscation orders.

In deciding the issue, it was held that the confiscation order in the present case was to confiscate the bail money that the appellant herself had paid as she failed to attend

her trial, rather than the bail money paid by a surety. The confiscation order was part and parcel of the criminal prosecution made against the appellant and inseparable from the offence she was charged and should therefore be a criminal cause or matter (*R v Eng Bouy* [1986] HKC 427, *Wan Shui Ying v AG* [1990] 2 HKLR 139 distinguished).

However, the Court of Appeal was of the view that whether or not a confiscation order was a criminal or civil cause or matter was only relevant to appeals from judgments or orders of the Court of First Instance pursuant to s.13(3)(aa) of the High Court Ordinance (Cap.4) (the HCO). Here, the appeal was from the District Court and so the question was whether it was an appeal under Part IV of the CPO over which the Court of Appeal had jurisdiction under s.13(3)(a) of the HCO.

It was considered that the confiscation order was made for the appellant failing to surrender to custody. It was not a "sentence" imposed on her for the burglary offence after conviction on indictment under s.83G of Pt.IV of the CPO. Nor was it an "order" the Court made when dealing with her for the burglary she had committed under s.80.

Further, the confiscation order was not a sentence "for an offence for which [the appellant] was dealt with by the court" under s.83I(3) of Pt. IV of the CPO. She had already committed an offence when she failed to surrender to custody under s.9L of the CPO. S.83I(3) was only "supplemental provisions as to an appeal against sentence" appended to s.83G of the Ordinance. "An offence" therein referred only to the offence for which the appellant had been convicted under s.83G.

Accordingly, it was held that the Court had no jurisdiction to deal with the appellant's appeal against the confiscation order, the appeal was therefore dismissed (*R v Thayne* [1970] 1 QB 141 applied; *HKSAR v Chan Man Fong* (CACC 433/1997, 20 October 1998) distinguished). As the Deputy Judge was wrong in making the confiscation order and the process of doing so was unfair,, the appellant could apply for judicial review to overturn the order and the return of the bail money.

Similarly, in *Leung Yiu Fai v Secretary for Justice* [2018] HKCFI 87, (HCAL 569/2017, [2018] HKEC 2316). The applicant was granted bail by the court and when he failed to present himself at the appointed time for verdict on 7 March 2014, the matter was adjourned on 10 March 2014 whereupon the prosecution informed the court that the applicant had left Hong Kong *via* Lo Wu on 25 February 2014 and had not returned. The applicant's legal representatives also informed the court that neither they nor the applicant's family could locate the applicant. The learned judge proceeded to announce the applicant's verdict and sentenced him to three years' imprisonment and also forfeited the applicant's bail money.

Subsequently, when the applicant surrendered himself to the court on 17 March 2014, he was arrested and brought to court on 18 March 2014. On that day, he appeared in person and informed the court that he had been arrested in mainland on 26 March 2014 and was in detention when he was supposed to appear in court on 7 March and 10 March 2014. Because of his detention, he was unable to contact anyone in Hong Kong. The learned judge proceeded to inform the applicant that he had already been sentenced to three years' imprisonment and his bail money had been forfeited and that he may apply for legal aid to appeal.

Thereafter, the applicant had sought legal aid and wrote a letter to the learned judge asking for the return of his bail money. However, the learned judge informed the applicant that he had decided that he was functus on this matter of returning the bail money by a letter dated 30 December 2015.

The applicant sought by way of judicial review for the relief that an order of certiorari to bring up and quash the decisions made by the learned judge on 10 March 2014 (first decision) and 30 December 2015 (second decision) to estreat the bail money of the applicant without first hearing the applicant's explanation and the declaration that the first decision and the second decision were illegal or irrational and/or that they were made with procedural irregularity or that these were decisions which frustrated the legitimate expectation of the applicant.

In deciding the issue, it was stated that the learned judge was indeed functus at the time when he made the second decision and was correct in arriving at his decision. As it was observed that the statutory history of s. 9M which was originally enacted in the Criminal Procedure (Amendment) Bill 1993. This was introduced to implement the

recommendations as set out in the report of the Law Reform Commission of Hong Kong ("LRC"), published in December 1989, concerning the reform of the law of bail in criminal proceedings. The report summarized the existing law governing forfeiture/estreatment of recognizance and cash bail given by an applicant and his surety and pointed out that there was a "mechanism" for the court to discharge or reduce the recognizance subsequent to the stage when the court declared forfeiture of the same on the applicant's non-appearance. Thus, the LRC report proposed that the "Code" should clearly distinguish the two stages in the enforcement of recognizance – first, at which the sum was declared or has in law became forfeited and the later stage at which the sum or part of it was actually recovered. It went on to say "that the Code should discard the existing highly unsatisfactory statutory provisions and replace them with a set procedure which would provide for: - proof of default; a declaration of forfeiture; and discretion as to partial or total enforcement (incorporating an opportunity for sureties to show cause why estreatment should not follow in a particular case)"

Therefore, it was clear that the only remedy was for the applicant to apply for judicial review, as the decision to confiscate bail money did not fall within the definition of "sentence" under s 80 of the Criminal Procedure Ordinance ("CPO"), (Cap 221) and therefore fell outside the ambit of the appellate jurisdiction of the Court of Appeal under s. 80G of CPO. (*HKSAR v Chan Yuen Yee Carrie* [2017] 3 HKLRD 431 applied). Hence, judicial review was the only available process to overturn a decision for the confiscation of bail money.

On the issue whether the learned judge had failed to take into account relevant considerations when he made the first decision to estreat the bail money from the applicant, it was observed that at the time when the first decision was made, the court only knew the applicant had left Hong Kong and not returned. The learned judge was informed by the prosecution on 10 March 2014 that the applicant had not been admitted to any hospital in Hong Kong nor detained by any law enforcement agencies in Hong Kong and that according to the immigration records, the applicant had left Hong Kong *via* Lo Wu Control Point on 25 February 2014 and that he had not returned to Hong Kong. Further, the court was informed by the applicant's lawyer that the family of the applicant was not able to contact the applicant. Therefore, under the circumstances, the learned judge had cogent evidence before him at the time suggesting that the applicant's absence was without "reasonable cause".

In respect of the complaint of illegality, it was argued that the first decision of the learned judge was illegal not to return the cash bail to the applicant relying on a passage from the Crown Court Index 2017. It was considered that that was against the statutory framework in the United Kingdom under the "Bail Act 1976" and there was no similar statutory regime in Hong Kong and therefore it was not applicable.

Further, it was also complained that the learned judge had failed to give reasons for his first decision, however, it was observed that this was a very clear case of abscondment. Before the learned judge gave his first decision, he had properly made enquiries from both the prosecution and the defence as to the applicant's absence. Therefore, in such circumstances, there was no reason or necessity for the learned judge to give reasons.

It was also submitted that the applicant was asserting that the second decision, not to re-open the first decision was a breach of natural justice and that the learned judge had failed to take into account the applicant's detention in the mainland when deciding whether or not to return the bail money. However, it was considered that by the time of the second decision, the learned judge was functus in relation to his first decision. Further it was of the view that the forfeiture of the entire bail money was not disproportionate at the time when the first decision was made. It was clear that the applicant had voluntarily absented himself, not only from court but from Hong Kong.

Accordingly, it could not be found that the court was in error in forfeiting the bail money. It was therefore without hesitation in dismissing the instant application to quash the first and second decisions of the learned judge and to dismiss the application for an order of mandamus for the return of the bail money.

Similarly, in *HKSAR v Valencia Vargas Marlene* [2018] HKCA 285, (CACC 217/2017, [2018] HKEC 1221), the applicant pleaded guilty to one count of trafficking in dangerous durgs. She was sentenced to 14 years and 4 months' imprisonment. The judge also ordered that a sum of US$1,280, together with other items, be forfeited.

She appealed in person against both her sentence and forfeiture order. In her home-made ground of appeal, *inter alia*, for the application for the return of the US dollars, the applicant claimed that the US dollars were given to her by her son and it had nothing to do with the crime she had committed. The Court of Appeal noted from the outset, that being her case, any document supporting such a claim should have been obtained a long time ago, and should have been before the court when the forfeiture proceedings were heard. No valid reason had been given for the delay in obtaining such documents, therefore the application of the adjournment of the hearing for the obtaining of such documents was refused.

In deciding the application to appeal against the forfeiture order, it was considered that s 83G of the CPO Cap.221, provided that:

"A person who has been convicted of an offence on indictment may appeal to the Court of Appeal against any sentence (not being a sentence fixed by law) passed on him for the offence, whether passed on his conviction or in subsequent proceedings."

It was opined that this provisions conferred a right of appeal against sentence on persons who were convicted of an offence on indictment. However, the right of appeal was expressed in terms of being "against any sentence....passed on him for the offence." Section 83G fell within Part IV of the CPO. Section 80 of the CPO, located at the beginning of Part IV, provided a definition of sentence for the part. It provided:

"Meaning of sentence in this Part – sentence in relation to an offence, includes any order made by a court in dealing with an offender, including a hospital order."

In *R v Thayne* [1970] 1 QB 141, the English Court of Appeal was dealing with identical provisions to ss. 83G and 80(1) CPO. It held that the breadth of the s. 80(1) definition of sentence did not overcome the limiting effect of the words in s. 83G that required that the sentence be passed on the defendant for the offence. Further, it was also noted that *Chan Yuen Yee Carrie (above)* the Court of Appeal followed and applied the judgment in *Thayne*.

These two decisions therefore certainly allowed the argument that a forfeiture order was not a sentence passed on the defendant for the offence of which she had been convicted. The issue was therefore whether the Court of Appeal had jurisdiction to hear the defendant's appeal under s. 83G in respect of a forfeiture order.

The present case was further complicated by the fact that the right of appeal that the applicant was exercising was not the right of appeal contained in s. 83G as she was not convicted on indictment. She pleaded guilty in the magistracy and so was committed for sentence to the Court of First Instance.

Where a defendant was committed by a magistrate to be sentenced by a judge of the Court of First Instance of the High Court, the defendant has a right of appeal against sentence under s. 83H of the CPO. Section 83H, in referring the right of appeal, does not employ the limiting words of "passed on him for the offence". Whether this section created a separate, free-standing right of appeal different from that in s. 83G or whether it simply extended the s.83G right of appeal to persons committed for sentence by a magistrate, is a matter that would have to be fully argued.

The respondent referred to various authorities, which suggested that forfeiture orders had been treated by the Court of Appeal as part of the sentence of an offender and capable of being challenged as an appeal against sentence (see: *HKSAR v Ubah Joel Chidiebere* [2017] 4 HKLRD 263, *HKSAR v Nlkwo Nnaemeka Darlington* [2016] 1 HKLRD 692, *HKSAR v Rawe Waikama Magarya* [2015] 5 HKC 438 and *HKSAR v Otieno Millicent Akoth* (CACC 317/2016, [2017] HKEC 1092). Hence, the respondent submitted that the Court of Appeal did have the jurisdiction to deal with the forfeiture order.

However, it was of the view that the fact that the Court of Appeal had always treated a forfeiture order as part of the sentence of an offender did not mean that such an approach was correct. The making of a forfeiture order is regarded as a civil process against property and it needs not be the property of a defendant. It does not deal with the offender personally and it may take place, as happened with this applicant, after

the sentencing process had been completed. It is therefore arguable whether such an order could be construed as part of the sentence imposed by the judge on the applicant.

These were issues that it was not appropriate for the instant Court to resolve as the applicant was not legally represented and so the Court would not have had the benefit of full argument on them. The matters were merely raised at present so that on a future occasion they could be properly addressed. Furthermore, it being a matter going to the jurisdiction of the Court of Appeal, it would be desirable for the Full Court to deliver its judgment on the issue. For the purpose of disposing of the present application, it was not necessary to determine the question of jurisdiction.

Assuming, but not deciding, that the Court of Appeal did have jurisdiction, it was found that there was no merit whatsoever in the application. After having received legal advice, the applicant withdrew her objection to the respondent's forfeiture application before the judge made the order. She did so both through her lawyer and personally to the judge. In those particular circumstances, there was not any error by the judge in making the orders he did. By withdrawing her opposition to the application for forfeiture, the applicant had in effect "consented" to making of the forfeiture order to forfeit the US dollars (among other things). She did so immediately after having had a conference with her lawyer who is a very experienced criminal practitioner.

Accordingly, as it was also found that there was no merit in the applicant's application against the appeal to sentence, both her applications against sentence and for the return of US dollars to her were dismissed.

Criminal Procedure Ordinance, s 9N

Procedure in bail proceedings

9N.—In any bail proceedings— 3–47

(a) the court may, subject to paragraph (b), make such inquiries of and concerning the person being the subject of those proceedings as the court considers desirable;

(b) the person being the subject of those proceedings shall not be examined or cross-examined by the court or by any other person as to the alleged offence with which he is charged and no inquiry shall be made of him as to that offence alleged;

(c) the informant or prosecutor or any person appearing on behalf of the prosecution may, in addition to any other relevant evidence, submit evidence, whether by affidavit or otherwise—

(i) to prove that the person being the subject of those proceedings has previously been convicted of a criminal offence;

(ii) to prove that the person being the subject of those proceedings has been charged with and is awaiting trial on another criminal offence;

(iii) to prove that the person being the subject of those proceedings has previously failed to surrender to custody;

(iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the person being the subject of those proceedings;

(d) the court may take into consideration any relevant matters agreed upon by the informant or prosecutor and the person being the subject of those proceedings or his counsel; and

(e) the court may receive and take into account any other material or representations which it considers credible or trustworthy in the circumstances.

The interpretation of s 9N of the Criminal Procedure Ordinance was considered by in *Nancy Ann Kissel v HKSAR* [2010] 2 HKLRD 435, CFA. The question is whether s 9N(b) of the Ordinance prohibits the cross-examination of the defendant by reference to materials relied on by the defendant on bail application. Before deciding the issue, two points have been made to this provision. Firstly, it is said that its operation is limited to bail proceedings and does not speak directly to the trial itself. Secondly, the prohibition is only against oral examination and cross examination

of the applicant for bail "as to the alleged offence." The Court of Final Appeal observed that:

> "There is nothing in the statutory context of section 9N itself or in the related provisions in the Ordinance, in particular sections 9G and 9O, to support the view that there is to be implied in section 9N, or its related provisions, a general prohibition against the use at trial of materials in bail proceedings extending beyond the express prohibition in section 9N(b). Nor does the legislative history, in particular the Law Reform Commission Report on 'Bail in Criminal Proceedings', support the implication of such an extended prohibition. The express prohibition, along with the effect of contravention on the admissibility of evidence at the trial, serves the purpose of protecting an accused from making statements in oral evidence in bail proceedings which can be used against him at trial."

The Court was of the view that evidence led at a bail hearing in breach of s 9N(b) would not be admissible in the subsequent trial. Their view was that evidence which contravened s 9N(b) was inadmissible in the subsequent trial, in order to "protect an accused person and assist in achieving an important purpose of the provisions, namely, that of enabling an applicant to present his bail application fully without being exposed to the risk of giving oral evidence which will be used against him at trial".

Criminal Procedure Ordinance, s 9O

Aids in proof

3–48 **9O.**—For the purpose of bail proceedings, a certificate purporting to be certified by a clerk of the court which has admitted a person to bail and stating—

(a) that the person named in the certificate has been admitted to bail;

(b) the day and time, if any, that the person named in the certificate has undertaken to surrender to custody;

(c) where admission to bail is subject to conditions under section 9D(2), what those conditions are;

(d) that the person named in the certificate has been given notice of such conditions, if any,

shall be evidence of the facts so stated and shall be received in evidence without further proof.

Criminal Procedure Ordinance, s 9P

Restriction on reports of bail proceedings

3–49 **9P.**—(1) Unless it appears to the court that the interests of public justice otherwise require, no person shall publish in Hong Kong a written report, or broadcast in Hong Kong a report, of any bail proceedings containing any matter other than that permitted under subsection (2).

(2) A report of bail proceedings may contain—

(a) the name of the person being the subject of those proceedings;

(b) the offence with which the person being the subject of those proceedings is charged;

(c) the identity of the court and the name of the magistrate, District Judge or judge, as the case may be;

(d) the names of counsel and solicitors, if any, engaged in the bail proceedings;

(e) the result of the bail proceedings and where the person being the subject of those proceedings is admitted to bail subject to any condition under section 9D(2), the details of any such condition;

(f) where the bail proceedings are adjourned, the date and place to which they are adjourned.

(3) If a report is published or broadcast in contravention of this section, the following persons—

(a) in the case of publication of a written report as part of a newspaper or periodical publication, any proprietor, editor, publisher or distributor thereof;

(b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical publication, the person who publishes or distributes it;

(c) in the case of a broadcast of a report, any person who transmits or provides the programme in which the report is broadcast and any person having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical publication,

shall be guilty of an offence and shall be liable on conviction to a fine of $50,000 and to imprisonment for six months.

(4) Proceedings for an offence under this section shall not be instituted otherwise than by or with the consent of the Secretary for Justice. (Amended LN 362 of 1997)

(5) In this section—

"broadcast" means sounds or visual images broadcast by wireless telegraphy or by means of a high frequency distribution system over wires, or other paths provided by a material substance and intended for general reception;

"publish" in relation to a report, means publish the report, either by itself or as part of a newspaper or periodical publication, for distribution to the public.

Criminal Procedure Ordinance, s 9Q

Record of bail proceedings

9Q.—A record of all bail proceedings shall be maintained in such manner and form as may be prescribed by rules and orders made for the purposes of this section under s 9 and shall be made available to an accused person and to counsel and solicitors to such extent and on such terms as may be prescribed. **3–50**

In *HKSAR v Su Wei* (HCMP 2589/2011, [2011] HKEC 1701), where the applicant was remanded in *Siu Lam* for, *inter alia*, a psychiatric report, the magistrate only indicated in the record of bail proceedings that the bail had been refused and there was a remand in goal custody. The court was of the view that what the form should have done is given a reason. It is important that the form pursuant to s 9Q be filled in properly, and it was not done here.

The judge commented that if the magistrate's mind had been concentrated on reason in the instant case, which would have been "there is an appearance of mental incapacity here", he would not have in fact remanded the applicant as he did.

Criminal Procedure (Record of Bail Proceedings) (Cap 221I)

Empowering section

1.—(Cap 221 section 9)

Rule 2. Record of bail proceedings

(1) For the purposes of section 9Q of the Ordinance, a record of all bail proceedings shall be maintained and shall consist of a summary of all matters relevant to such proceedings including any application for admission to bail, the grounds of such application, the grounds of any objection to any admission to bail, the adjudication of the court and the reasons for such adjudication. **3–51**

(2) A record of all bail proceedings kept under subrule (1) may be kept—

(a) in writing;

(b) in the form of a disc, card, tape, microchip, sound track or other device on or in which information or data is recorded or stored by mechanical, electronic, optical or other means; or

(c) partly in the form referred to in paragraph (a) and partly in the form referred to in paragraph (b).

(3) An extract of the record of bail proceedings mentioned in subrule (1) in the form prescribed in the Schedule shall be made available to the accused person and to counsel and solicitors engaged in the proceedings.

Schedule: (rule 2(3)) Extract of Record of Bail Proceedings _____ Court/ Magistracy

3–52 Name ..... Case .....
Date of hearing .....
Case adjourned to 9.30 a.m. on ..... in Court No. .....

(I) Granted Bail. ☐
(II) Bail granted subject to the conditions listed in item V below which the court considers necessary to secure that the accused will not— ☐
(III) Bail refused. Remanded in police custody ☐
Bail refused. Remanded in jail custody because there are substantial grounds for believing that the accused would— ☐
(a) fail to surrender to custody as the court may appoint ☐
(b) commit an offence while on bail ☐
(c) interfere with a witness ☐
(d) pervert or obstruct the course of justice ☐

(IV) Reasons:
(a) Nature and seriousness of the alleged offence including the likely disposal in the event of conviction. ☐
(b) Previous record of absconding in other proceedings. ☐
(c) Previously absconded in these proceedings. ☐
(d) Lack of local ties. ☐
(e) Appears to have no fixed abode. ☐
(f) Alleged to have committed this/these offence(s) while on bail for other matters. ☐
(g) Criminal record of similar offences. ☐
(h) Other suspects still at large. ☐
(i) Stolen goods/exhibits still to be recovered. ☐
(j) Others ☐

(V) Bail Conditions:
(a) $ .....
(b) Surety/Sureties required
$ ..... Cash ☐
$ ..... Own recognizance ☐
$ ..... Cash ☐
$ ..... Own recognizance ☐
$ ..... Cash ☐
(c) Not to leave Hong Kong. ☐
(d) Surrender all travel documents prior to/within ..... of release from custody. ☐
(e) To reside at address given. ☐
(f) To obey a curfew from ..... to ..... ☐
(g) To report to Police Station between the hours of ..... and ..... on Mon/Tue/Wed/Thur/Fri/Sat/Sun/ Everyday. ☐
(h) To inform ..... Police Station 24 hours prior to any change of residence. ☐
(i) Not to contact either directly or indirectly any prosecution witness. ☐
(j) Others ☐
.....

Judge/Magistrate