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.

Vicky is charged –

a) with Mary in respect of one count of conspiracy to sell goods to which a forged trade mark is applied contrary to section 9(2) of the Trade Descriptions Ordinance (Cap. 362) and section 159A of the Crimes Ordinance (Cap. 200);

b) with Don in respect of one count of conspiracy to traffic in a dangerous drug together with Mary and a person named Ah Keung contrary to section 4(1)(a) of the Dangerous Drugs Ordinance (Cap. 134) and section 159A of the Crimes Ordinance (Cap. 200); and

c) with one count of dealing with property known or believed to represent proceeds of any person's drug trafficking contrary to section 25(1) and (3) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).

Mary is charged with Vicky in respect of one count of conspiracy to sell goods to which a forged trade mark is applied contrary to section 9(2) of the Trade Descriptions Ordinance (Cap. 362) and section 159A of the Crimes Ordinance (Cap. 200).

Don is charged with Vicky in respect of one count of conspiracy to traffic in a dangerous drug together with Mary and a person named Ah Keung contrary to section 4(1)(a) of the Dangerous Drugs Ordinance (Cap. 134) and section 159A of the Crimes Ordinance (Cap. 200).

Alex is charged with one count of assisting an offender, contrary to section 90(1) of the Criminal Procedure Ordinance (Cap. 221).

The indictment can be found in the attached 'Bundle of Evidential Material'.

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

1. to make or oppose an application for permanently staying of proceedings of the two drug-related charges against Vicky after Vicky's solicitor-advocate was informed that Mary has been given immunity in relation to the two drug-related charges and that Mary would be testifying for the Prosecution; **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 Vicky (and the other 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 Interim 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 interim 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 Interim Application

The application for permanent stay of proceedings is made by the defence solicitor-advocate for Vicky and opposed by prosecuting solicitor-advocate prior to the commencement of trial proceedings. For the purpose of this application, you can consider the Summary of the Prosecution Evidence, Defence notes of Vicky, Mary and Don.

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 itself 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. WPC 1234
2. PC 6789
3. Mary

(3) Defence witnesses

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

1. Vicky
2. Don
3. Alex

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 interim application.

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exercised (*Lee Kwok-sun v R* (CA 1597/1983)). Similarly, where a defendant alleges he was misled by the prosecutor as to the maximum sentence for the offence, it is desirable that the allegation should be inquired into for deciding whether a change of plea of guilty ought to be allowed (*Law Hau-on v R* (CA 578/1982)). In *Lo Ping-kwan* (MA 1175/91), it was held that in hearing an application to reverse a plea of guilty, the court is to exercise its discretion judicially which meant that it must exercise its discretion taking only proper matters into account. Requiring the accused to give evidence and cross-examination of him extensively about the merits of his proposed defence is a wrong approach. The question as to whether or not the appellant's plea was made under duress was a matter that should have been investigated as a matter of fact and, where necessary, on oath at the time when the issue was raised.

Where a defendant is charged as an accessory after the fact together with the principal offender, the former can be permitted to withdraw his plea before the sentence is passed on him, if the latter is acquitted. The correct procedure in such a case is for the court not to accept the plea of guilty until after the trial of the principal offender. The same practice applies to joint conspiracy trials (*The Magistrate, Ex p Att-Gen* (1954) 38 HKLR 127; *R v Ronald Li* (HCCC 228/1989)).

Where there had not been a deliberate plea of guilty, that is, where there had been some fundamental misconception induced either by misunderstanding or any other cause as to the nature and effect of such a plea, exceptionally *certiorari* to quash the conviction would be an available remedy (see in *Re Fong Ping-sum* [1977-1979] HKC 542; *Re Chan Hung-to* [1977] HKLR 198; *Ng Hong-chan v R* (Crim App 971/1976); *Chan Kwok-choi v R* (Crim App 971/1976); *The Queen v The District Judge of Hong Kong, Ex p Att-Gen* (1956) 40 HKLR 260).

A court has no power to allow a plea of guilty to be withdrawn after sentence but a plea of guilty is not *per se* a bar to the right of appeal against conviction: *HKSAR v Au Yeung Boon-fai* [1999] 3 HKC 605; *R v Li Tung-hing* (HCMA 618/1992, [1992] HKLY 259).

For analysis and restatement of the relevant legal principles on reversal of unequivocal guilty please before sentence, in particular, whether the interests of justice would weigh heavily in favour of allowing a reversal of plea if there is material in mitigation or the community service reports which might suggest that the defendant may not be guilty of the offence charged, see *HKSAR v Chan Chi Ho Lincoln* (2018) 21 HKCFAR 588, [2018] HKCFA 64.

III. STAY OF PROCEEDINGS

Jurisdiction and source of the power to stay criminal proceedings

4–49 In general, if a charge is properly brought before a court of competent jurisdiction that court is obliged to try the case: *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 598. Lord Morris in *Connelly v DPP* [1964] AC 1254 stated that (at 1304):

> "... generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it."

However, the courts have a residual discretion to make orders including an order staying proceedings brought before it to protect itself from an abuse of the court's process: *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 598; *Connelly v DPP* [1964] AC 1254; *R v Humphrey* [1977] AC 1; *Warren v Attorney-General for Jersey* [2012] 1 AC 22.

The scope of the power

4–50 In *HKSAR v Ng Shun To Raymond* [2013] 5 HKC 90, the Court of Appeal drew together the authorities on abuse of process. The relevant passages are at paras 84–88 and are summarized as follows. (citations omitted)

The circumstances in which, in the exercise of a court's discretion, a stay of proceedings will be justified are exceptional. In exercise of its inherent power to prevent

an abuse of its own process, the court has jurisdiction to stay criminal proceedings in two circumstances:

(1) Where, notwithstanding the remedial measures which are available to a court to ensure a fair trial, the circumstances are such that "a fair trial for the accused is found to be impossible and *continuing the prosecution* would amount to an abuse of process." (*emphasis added*) That is because "the continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the court process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial." The burden is on the accused to show on a balance of probabilities that no fair trial can be held. The basis upon which such applications tend to be mounted include delay, unfair methods of investigation, and pre-trial publicity; and

(2) in rare cases where, even though a fair trial is available, the court is prepared to grant a permanent stay because there has been an abuse of power of a kind that renders the trial of the accused an affront to the court's sense of justice and propriety. An example is the refusal of a court to exercise jurisdiction over an accused who has been unlawfully abducted from another jurisdiction. ([84])

The cases in the second category will be rare since "The public interest lies in the guilt or innocence of the accused being fairly and openly determined at trial. For this to be displaced, powerful reasons must exist for concluding that such a trial, although fair, would nonetheless constitute an intolerable abuse of the court's process. The instances where such an argument has any prospect of success must necessarily be very rare." ([85])

Highly relevant is the injunction not to utilise the discretion to stay for the purpose of disciplining the individual or body guilty of the abuse of power which has been demonstrated: "The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct." ([86])

The key question in the second category of case is, therefore, not whether, without more, the court is offended or even outraged by the prosecutorial misconduct disclosed; and it is not whether the public, possessed of the facts, would be offended or outraged by the misconduct. It is, rather, whether "the court's sense of justice and propriety" or, one should add, public confidence in the proper administration of justice, is or would be offended "if [the court] is asked to try the accused *in the particular circumstances of the case*." (*emphasis added*). ([87])

That is what distinguishes the punitive or disciplinary function, which is not the court's remit, from that which is the court's remit, namely to administer justice in individual cases by a process the integrity of which remains intact. The fact of prosecutorial misconduct in connection with a criminal case does not necessarily undermine the integrity of and respect for the process; for where the weaponry available to a court in the course of a trial is such as to ensure a fair trial, the integrity of the process is maintained, as it is where, assuming the prospect of a fair trial, the circumstances as a whole are such that, notwithstanding the investigative or prosecutorial misconduct in the case, proceeding with the trial of the accused does not offend the court's sense of justice and propriety or bring the criminal justice system into disrepute. ([88])

At paras 90–102, the Court of Appeal corrected its approach in its earlier judgment in *HKSAR v Wang Hung Ki* [2010] 4 HKC 118.

4–51 These principles derived from the authorities may be stated as follows:

(1) The power is designed to protect its own process from abuse. In *Connelly v DPP* [1964] AC 1264, Lord Morris said at 1301-1302:

> "... a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. [They are] powers which are inherent in its jurisdiction. A court must enjoy such powers to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own

procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

Lord Devlin in the same case described it as a power to ensure the court's process is used fairly and conveniently by both sides (at 1347) and observed: " ... from early times ... the court had inherently in its power the right to see that its process was not so abused by a proceeding without reasonable grounds so as to be vexatious and harassing."

(2) In *R v Humphreys* [1977] AC 1 at 46, Lord Salmon pointed out that the power should not be used to interfere with the proper function of the executive in its prosecutorial role. He said:

> "a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution mounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene."

In the same case at p 26D, Viscount Dilhorne said:

> "A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred."

(3) The power of the court to stay proceedings should be directed to the prevention of the abusive use of its powers and should not be used to remedy conduct that falls short of abuse of process. In *Moevao v Department of Labour* [1980] 1 NZLR 464, at 470 and 471, Richmond P observed:

> "It cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the court to prevent its own process from being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the court is itself being wrongly made use of."

(4) The court should not assume a disciplinary function over the misconduct of the Executive. In *R v Sang* [1980] AC 402, Lord Scarman (at 454 and 455) said:

> "The role of the judge is confined to the forensic process. He controls neither the police nor the prosecuting authority. He neither initiates nor stifles a prosecution. Save in the very rare situation ... of an abuse of the process of the court (against which every court is in duty bound to protect itself), the judge is concerned only with the conduct of the trial."

However, it should be noted that *R v Sang* was not concerned with a stay of proceedings. Moreover, if the conduct of the Executive is such as to lead to an abuse of the process of the courts, a stay must be ordered: *Rona v District Court of SA* (1995) 77 A Crim R 16; *R v Swingler* (1995) 80 A Crim R 471.

(5) "The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the accused and the prosecution" (per Sir Roger Ormond in *R v Derby Crown Court* (1984) 80 Cr App R 164). And: "The fairness of a trial ... is not all one-sided, it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."

(6) The means to ensure fairness of trial in any ordinary case is by the court exercising its power to control rather than to stay the proceedings, as stated in *R v Sang* [1980] AC 402; *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 599.

(7) The court has a wide discretion as to how it goes about determining whether or not to stay the proceedings. The question was raised in *R v Heston-Francois* [1984] 1 QB 278 where it was held that the power to stay:

"... does not include an obligation to hold a pre-trial enquiry designed to bring about a stay of proceedings into such allegations as the improper obtaining of evidence, tampering with evidence and seizure of an accused's documents prepared for his defence. However reprehensible conduct of this kind may be, it is not, at least in circumstances such as the present, an abuse or, in other words, a misuse of the court's process. It is conduct which in those circumstances falls to be dealt with in the trial itself by judicial control upon admissibility of evidence, the judicial power to direct a verdict of not guilty ... or by the jury taking account of it in evaluating the evidence before them [per Lord Justice Watkins at 290]."

(8) The remedy of stay of proceedings should be sparingly exercised:

"It is a grave and serious matter for a court to refuse jurisdiction ... when a court comes to consider whether it should refuse jurisdiction in respect of a prosecution brought before it ... then while being careful to protect its process from abuse, it should be very wary indeed of taking that which I have earlier described as a grave and serious course [see *R v Harris* [1991] 1 HKLR 389, 398 and 399]."

"It [the power to stop a prosecution] is in my view a power that should only be exercised in the most exceptional circumstances [per Viscount Dilhorne in *DPP v Humphreys* [1977] AC 1, 26]."

"Judges should pause long before staying proceedings which on their face are perfectly regular [per Lord Edmund Davies in *DPP v Humphreys* [1977] AC 1, 55]."

The categories of abuse are never closed: *R v Li Wing-tat* [1991] 1 HKLR 731, but there appeared two major streams of stay cases. The first is that stay was granted on the basis that requirement of a fair trial had become impossible making the continuing of the prosecution an abuse of process. The second is that although fairness of the trial was not in question, the court might grant a stay because the circumstances involved an abuse of power which so offended the court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process: *HKSAR v Lee Ming-tee* [2001] HKLRD 598.

(9) The court has a jurisdiction to stay proceedings where the human rights of the accused have been violated: *R v Looseley, Attorney General's Reference No 3 of 2000* [2002] 1 Cr App R 29. Ordinarily it would be necessary to demonstrate that the misconduct on the part of the Executive was such as to deprive the accused of a fair trial: *R v Looseley, Attorney General's Reference No 3 of 2000.* However, recent authority demonstrates that the courts are prepared to stay proceedings where there has been a violation of human rights, even when a fair trial remains possible but where the commencement or continuation of a trial would be so contrary to the public interest in the integrity of the criminal justice system, that the trial should not take place: *R v Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42; *R v Latif & Shazad* [1996] 1 WLR 104, 2 Cr App R 92; *Re Barings plc (No 2); Secretary of State for Trade and Industry v Baker* [1999] 1 All ER 311; *R v O'Connor* [1995] 4 SCR 411; *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400.

(10) There will be circumstances, though rare indeed, in which, despite the availability of a fair trial, an abuse of power so offends the court's sense of justice and propriety or, put another way, is of such a kind as to affront the court's sense of justice and propriety with severe consequences for public confidence in the administration of justice, that the court may feel duty-bound to exercise its discretion to order a stay of the proceedings: *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133, 148, 149 & 151; *HKSAR v Lee Ming Tee & SFC* (2003) 6 HKCFAR 366, 395.

(11) A decision to stay or to refuse to stay proceedings on the basis that they constitute an abuse of process is a decision that can only be made upon findings of fact: *HKSAR v Wang Hung Ki* [2010] 4 HKC 118, para 65.

(12) Where there has been serious prosecutorial misconduct, a court of appeal may quash the conviction and order a re-trial instead of staying the proceedings: *R v Maxwell* [2011] 2 Cr App R 31, SC.

Written notice of an application for a stay of proceedings

Written notice of an application for a stay of proceedings must be given: Practice Direction 9.7, paragraph 1. Practice Direction 9.7, paragraphs 2–4 requires that that notice of application must: 4–52

(1) give details of the nature and grounds of such an application;
(2) provide a skeleton argument and list of authorities; and
(3) identify and summarise evidence to be relied upon by the Applicant.

The prosecutor must provide any reply in writing no later than 7 days before the hearing of the application: Practice Direction 9.7, paragraph 5.

(1) Abuse of process making a fair trial impossible

Delay

The law in relation to the court's exercise of its power to stay for reason of delay has been reviewed and authoritatively stated in *Att-Gen's Reference (No 1 of 1990)* [1992] 1 QB 643, as approved in *Tan v Cameron* [1992] 2 HKLR 254, PC and *Att-Gen v Charles Cheung Wai-bun* [1993] 1 HKCLR 189, PC. See also *R v F (S)* [2011] 2 Cr App R 28. The test is whether "in all the circumstances, the situation created by the delay in bringing the accused to trial is such as to make it an unfair employment of the powers of the court any longer to hold the accused to account": *Tan v Cameron* [1992] 2 HKLR 254, PC at 255E. The court will not concern itself with penalising the prosecution for fault in causing or permitting the delay. The question the court will focus on is: would there still be a fair trial if the accused has been so seriously prejudiced by reason of the lapse of time in bringing him to trial. 4–53

Where an application for stay the proceeding is made on the ground of undue delay, the accused has the burden of proof on balance of probabilities: *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 598. The accused must demonstrate that he has been or will be seriously prejudiced in the preparation or conduct of his defence by unjustifiable delay of the prosecution in bringing the proceedings: *Att-Gen v Cheung Wai-bun* [1993] 1 HKCLR 249. The burden never shifts to the prosecution: *Tan Soon-gin v Judge Cameron* [1992] 1 HKLR 149. There must be a proper factual basis to support such an application: *HKSAR v Lau Kwok-ching* (CACC 411/1997). Delay is considered from the date of the commission of the offence: *Tan Soon-gin v Judge Cameron* [1992] 1 HKLR 149.

Delay due to complexity of the case or conduct of the accused may rarely support a stay: *Att-Gen's Reference (No 1 of 1990)* [1992] 3 WLR 9. Where the prosecution is not at fault in causing the delay, a stay should be rarely granted: *R v Hung, William* [1992] 2 HKCLR 90; *R v Wong Hak-on* [1989] 1 HKLR 111. Where the problems giving rise by the delay could be remedied by appropriate direction or other remedies available to the trial judge, a stay should not be granted: *R v Dutton* [1994] Crim LR 910; *R v Birchall* (*The Times*, 23 March 1995). Delay attributable to the accused may rarely be the basis for a stay: *Att-Gen's Reference (No 1 of 1990)* [1992] 3 WLR 9. Delay in discovery of the crime, particularly when the crime was deliberately concealed, would almost certainly not support a stay: *R v West* [1996] 2 Cr App R 374; *Att-Gen's Reference (No 1 of 1990)* [1992] 3 WLR 9. It is the delay which is to be considered not just the portion caused by prosecution: *Deacon Chiu v Att-gen* [1993] 1 HKLR 57. Article 87 of the Basic Law guarantees the right to trial without undue delay. Also Article 11(2)(c) of the Bill of Rights provides for the same guarantee. Although these rights stand independently of the rights provided at common law, the consideration to the granting of a stay is of little significant difference: *R v Hung, William* [1992] 2 HKCLR 90; *R v Cheung Wai-bun* [1993] 1 HKCLR 189; *R v Deacon Chiu Te-ken & Daniel Chiu Tat-cheung* (HCCC 122/92). The presence of undue delay does not automatically lead to a stay of the proceedings. There must be a balance between the interests of the accused and the public interest in bringing offenders to justice. The assessment of the impact of delay on a case must be assessed by reference to the interests served by the right – the right of a defendant to a trial without delay: *Flowers v R* [2000] 1 WLR 2396. The impact on witnesses and others is not to be ignored: *Brownlee v R* [2001] HCA 36.

Pre-trial publicity

4–54 The test is "whether it would be oppressive for the trial to proceed because the likely effect of prejudice is so grave that no direction by a trial judge, however careful, could reasonably expect to remove it": *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 598. However prejudicial the publicity may be, whether the reports were fair and whether they amounted to contempt of court or not, the court has to take into account:

(1) the right of the press to report matters of public interest: *R v Glennon* (1992) 173 CLR 592; *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 599;
(2) the sometimes ephemeral nature of the press report: *Ex p The Telegraph plc* (1994) 98 Cr App R 91;
(3) the duty of the judge to direct juries to exclude what they might have read or heard outside the court: *Stunnan v HM Advocate* [1980] JC 111;
(4) the power of the judge to permit potential jurors to be questioned in exceptional cases: *R v Kray* (1969) 53 Cr App R 412;
(5) the trust that courts repose in jurors to focus and confine themselves on evidence adduced and to heed directions they are given: *R v Kray* (1969) 53 Cr App R 412; *R v Glennon* (1992) 173 CLR 592.

The relevant authorities are discussed by Macrae J in *HKSAR v Kissel (Stay: Media)* [2011] 3 HKLRD 1, upheld: [2014] 1 HKLRD 460, [122]–[123]. Where an application to stay proceedings is made on the basis of prejudicial pre-trial publicity, the accused has to show on the balance of probabilities that there is a real risk that a fair trial is not possible because a future jury may be so prejudiced by the glossily adverse and unfair publicity: *HKSAR v Yip Kai-foon* [1999] 1 HKLRD 277; *R v Taylor & Taylor* (1994) 98 Cr App R 361. It is unnecessary for the accused to establish actual bias on the part of the jury: *HKSAR v Yip Kai-foon* [1999] 1 HKLRD 277. It is however unnecessary and unrealistic to require potential jurors to be wholly ignorant of the facts and circumstances of the case: *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 599. The jurors are presumed to be able to obey directions from the trial judge to lay aside his impressions or opinions and to confine themselves to evidence presented in court. This approach lies in the faith in jurors and in the jury system. In this regard, Ribiero PJ endorsed what was said in *Montgomery v HM Lord Advocate* [2003] 1 AC 641, cited in *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 599:

> "The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict."

For the additional comparative point that weight will be given to the trial judge's determination of whether a trial should proceed, given her knowledge of the case and feel for the "atmosphere in the courtroom", see *Aziz v The Queen* [2018] EWCA Crim 2412. The Court of Appeal was not persuaded that substantial media coverage of an unrelated recent terror incident in London (the Westminister Bridge incident) gave rise to such a risk in the context of a separate trial for terrorism related offences. Nor did the fact that one of the jurors had said that she was attracted to a detective sergeant whose credibility was in issue, where the trial judge had obtained written answers from the juror in question, and satisfied himself that she had capacity to uphold the oath.

Ill health

4–55 Poor health on the part of an accused or a short life expectancy should not normally be a sufficient ground to stay. It would set a dangerous precedent if an accused's

physical condition could in principle provide a reason to stay criminal proceedings permanently for if it was a ground in itself, then the accused would escape trial regardless of the gravity of the allegation he faced: *R v Tan Soon-gin, George* [1996] 1 HKCLR 67. However, where the condition of the accused is such as to render a fair trial impossible even if the accused is fit to plead, a stay may be granted: *R v Deacon Chiu Te-ken & Daniel Chiu Tat-cheong* [1993] 2 HKCLR 21; *R v Cheung Wai-bun* [1993] 1 HKCLR 189.

Missing witness/exhibits

Where a witness is missing despite reasonable steps taken to serve his attendance 4–56
in court, the judge has a discretion either to adjourn the case or allow it to continue. The matters the judge will consider in the exercising of the discretion include the importance of the evidence the witness is expected to give, the reason for his absence (eg deliberately disappearing, sickness or possible intimidation) and the likelihood of his attending again if a short adjournment is granted. Where the prosecution wishes its case to proceed despite the absence of one of their witnesses, the judge should consider the extent to which the absent witness might support the defence case: *R v Cavanagh & Shaw* [1972] 1 WLR 676; *Att-Gen v Ma Chiu-keung* [1988] 2 HKLR 64; but see *R v Law Lai-on* (CA 663/1994). There must be some basis to show what the witness would say and how it would be likely to assist the defence case: *HKSAR v Chan Kam-fai* (CA 893/1997). Even where it is established that the accused might be prejudiced by the absence of a witness, the court is obliged to consider other practical remedial measures before granting a stay: *Secretary for Justice v Cheung Chung Chit* [2003] 3 HKLRD 447.

It is for the accused to show on balance of probability that he was so prejudiced by the absence of the witness that a fair trial was not possible: *R v Holgate (No 1)* [1996] 3 HKC 315; *HKSAR v Law Yik-lun* [2001] 1 HKLRD 676. The witness must be identifiable: *R v Tan Soon-gin, George* [1996] 1 HKCLR 67. The relevance and impact of this evidence must be assessed and so must the likely quality and credibility of his evidence: *HKSAR v Law Yik-lun* [2001] HKLRD 676. It is not necessary to hold a full inquiry into the absence of the witness: *R v Leung Chi-sing* [1993] HKLY 341. Much depends on the importance of such a witness to the defence case. The same principles apply to an application on the basis of lost exhibits: *R v Lo Tak-kee* (CA 341/1995); *R v Chu Kam-lo* [1995] 1 HKCLR 179; *HKSAR v Cheung Wai* [1998] 2 HKLRD 250; *HKSAR v Chan Chun Chuen* [2012] 3 HKLRD 265.

In *HKSAR v Chan Kong On* [2011] 2 HKLRD 1085, the Court of Appeal referred to the principles regarding a missing witness in *R v Lam Tat Chung Paul* (1994) 6 HKPLR 147, namely, in assessing the importance of the missing witness, it is necessary for the court to consider all evidence relevant to the issue, including any statements made by this witness. Whether or not the defendant can give the evidence which the witness is expected to give is not a factor which the court can take into account, because the defendant has the right to remain silent and the right to elect not to give evidence. In considering whether the defendant can have a fair trial, it is necessary for the court to weigh the public interests of the two sides. First, anyone who has committed a criminal offence must be brought to justice. Secondly, the community expects trials to be fair and to take place within a reasonable time after a defendant has been charged. The evidence that a missing witness is expected to give need not be determinative of the issues of the case, but it must in a material way assist the accused, and therefore, the absence of such evidence would result in unfairness at trial.

In *R v Holgate (No 1)* [1996] 3 HKC 315, the accused's wife had disappeared about two years before the trial but others could have provided confirmation of the defendant's exculpatory explanation. The court held that the accused had the burden of showing, on a balance of probability, that the absence of his wife's evidence was so prejudicial to his case that no fair trial could be held and he failed to discharge that burden.

In *R v Lau Yuk-wan* [1997] HKLY 261 the alleged offence occurred in the presence of a "participating informant", who was not available at the trial. An application to stay the proceedings was refused as neither side could locate the informant. On appeal, it was held that in the circumstances of the case it was incumbent on the

prosecution to have obtained a statement from the informant. In *HKSAR v Law Yik-lun* [2001] HKLRD 676 the applicant applied to stay the proceedings on the ground that a witness of alibi was no longer available to give evidence on his behalf. On appeal, it was held that the judge was correct to take that view that the prejudice caused by the absence of the alibi witness was not substantial or really serious enough to ground a permanent stay. He told the jury that they must consider the loss of opportunity to the accused caused by the delay, but refrained from intimating to the jury the value or quality of the evidence that was unavailable and that was proper. It is clear from *R v Dutton* [1994] Crim LR 910 and *R v John E* [1996] 1 Cr App R 88, a trial judge should in an appropriate case give directions to the jury on the difficulties faced or prejudice suffered, possible or real, by the accused when an application for stay had been rejected, but that requirement depended on the circumstances of each case.

In *R v Leung Chi-sing* [1993] HKLY 341, an application to stay on the ground of absence of a prosecution witness does not mean that in every case the court must hold an enquiry involving the production of documents, affidavits and other evidence before the court exercises its discretion. Much depends on the circumstances of the case and the issues that arise in the particular case. Adjournment for lengthy hearings and evidence on preliminary matters of this nature are rarely justified. In most cases, the absence of a witness which assists the defence and the implications which flow from that for the conduct of the defence case are easily explained to the judge who will normally hear the application in a summary manner and will announce his decision. The court may give short reasons for refusing a stay but is not obliged to do so: *R v Takashi Machiya* [1990] 1 HKC 73.

R (Ebrahim) v Feltham Magistrates Court [2001] EWHC Admin 130 is the leading England and Wales authority which deals with the power of a court to order a stay where evidence has been lost. See *R v E* [2018] EWCA Admin 130 for the application of *R (Ebrahim) v Feltham Magistrates Court* where the prosecution had failed to obtain mobile telephone data from the complainant of a sexual assault (which by trial was unavailable), but where the complainant had given reliable evidence that she had not communicated the assault to anyone.

Length and complexity of trial

4–57 Although a stay of proceedings is rare on grounds that the trial is lengthy or complicated, it was observed in *R v Tan Soon-gin, George* [1996] 1 HKCLR 67 that:

> "The criminal justice system is bedeviled by large and complex commercial frauds. So often the prosecution needlessly reverts to conspiracy charges to demonstrate the full ambit of an accused's alleged criminal responsibility where substantive offences, such as obtaining by deception or false accounting, would have been more than adequate. Seldom is anything lost by taking this course, and much is gained. The court's powers of sentence are usually about the same, and the trial is rendered manageable. It is generally fairer to everyone and, not least in the High Court, to the jury whose business and private lives are liable to be utterly disrupted by having to spend countless months at court with all the stress that this imposes."

These considerations are not limited to commercial crime trials: *R v Kelland* [1995] 2 Cr App R 134; *R v Phong Ung Cau* [1995] 2 HKCLR 173.

(2) Application for stay on the basis that prosecution conduct is an affront to the conscience of the court

4–58 When faced with a stay application based upon the second limb of the abuse test, it is not appropriate for a court to order a stay merely because of a sense of outrage at such particular misuse of executive power as may be demonstrated in the circumstances of the particular case; that the ultimate question under this limb of abuse is always whether all the circumstances specific to the particular case, including but not limited to the misconduct, lead to the conclusion that proceeding with a trial of the accused for the offence charged offends the court's sense of justice and propriety

or that public confidence in the criminal justice system would be undermined by proceeding with it or whether, conversely, it is in the interests of justice that, notwithstanding the misconduct, the accused be tried for the offence with which he is charged: *HKSAR v Ng Chun To Raymond* [2013] 5 HKC 390 at [104].

Breach of undertaking of non-prosecution

4–59 A charge of undertaking by the Secretary for Justice not to prosecute is not usually of itself sufficient ground to stay a prosecution if public interest may be better served by the charge: *R v Harris* [1991] 1 HKLR 389. In that case it was held by the Court of Appeal that the public would have good reason to feel more concerned if the prosecution of a serious charge was not allowed to go forward simply because the Attorney General obstinately adhered to a decision he would have been better considering erroneous. For examples of cases where a court may consider a stay of proceedings on the ground of the prosecuting authorities not honouring an undertaking, see: *R v Croydon Justices, Ex p Dean* [1993] 3 WLR 198; *R v Bloomfield* [1997] 1 Cr App R 135; *Rona v District Court of SA* (1995) 77 A Crim R 16. See also *Chu Pui-wing v Att-Gen* [1984] HKLR 411.

Where a defendant has been induced to believe that he will not be prosecuted, this is capable of founding a stay for abuse; however, it is not likely to do so unless: (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) the defendant has acted on that representation to his detriment; even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation: *R v Abu Hamza* [2007] 1 Cr App R 27, CA, rejecting the common law principle of legitimate expectation as a test, and considering *R v Croydon JJ, ex p Dean*, 98 Cr App R 76, DC (abuse to prosecute a 17-year-old for destroying evidence after a murder when he had given evidence in the murder trial on the assurance that he would not be prosecuted), *R v Townsend* [1997] 2 Cr App R 540, CA (the longer a person is left to believe that he will not be prosecuted, the more unjust it becomes for the prosecution to renege on their promise, and any manifest prejudice to him resulting from his cooperation will make it inherently unfair to proceed), and *R v Bloomfield* [1997] 1 Cr App R 135, CA (abuse to prosecute after an unequivocal statement by prosecution counsel to the court that the prosecution would tender no evidence, where there had been no change of circumstances that might have justified departing from that statement). See also *R v Horseferry Road Magistrates' Court, ex p DPP* [1999] COD 441, DC, in which it was held that a stipendiary magistrate had wrongly concluded that a breach of an assurance not to prosecute justified a stay *per se*, and the matter was remitted for the court to investigate what prejudice to the defendant would result from pursuit of the proceedings and whether there were special circumstances present (such as, in *ex p Dean*, the defendant's youthfulness and the assistance he had given subsequent to the assurance, or, in *Bloomfield*, the fact that the assurance given to the court would already have been acted upon but for an adjournment to suit the convenience of the prosecution); *R v Gripton* [2011] Crim LR 388, CA (assurance in open court that witness would not be prosecuted for perjury whatever the outcome; clearly "undesirable" for prosecution to change their stance, but no abuse where witness not even aware of the statement until her arrest for perjury); and *R v Killick* [2012] 1 Cr App R 10, CA (letter to solicitors of the defendant when he was the subject of investigation for sexual assaults indicating that the CPS had decided that the matter would be discontinued was not an unequivocal representation that the defendant would not be prosecuted, because of the rights of the complainants to seek a review of that decision of which his solicitors would have been well aware).

Manipulation of jurisdiction

4–60 Where an appropriate charge had been brought before a court in respect of a crime alleged to have been committed within its jurisdiction, the court could not refuse to hear the case or dismiss the charge on the ground that its jurisdiction had been invoked by a device to bring the alleged offender within its jurisdiction: *Phromanonta, Manit v R* [1977] HKLR 226.

It may be an abuse of process of the court if improper means are used to bring the accused before court when an extradition proceeding was available: *Ex p Bennett* [1994] 1 AC 42; *R v Mali* [2011] HCA 50. It is not an abuse of process of the court to lure the accused to a jurisdiction where he is more amenable to trial: *Somchai Liangsiriprasert v USA* [1990] 2 HKLR 612. The court must balance the public interest of bringing serious crime offenders to justice and the public interest in not giving the impression that the end always justifies the means: *R v Latif & Shazad* [1996] 1 WLR 104.

Issue estoppel

4–61 Where a regular practice of not prosecuting has been established over a long period of time thereby leading the accused to arrive at a legitimate expectation that such practice would continue, a sudden change of that practice without prior warning and beginning the prosecution could amount to an abuse of process: *R v Li Wing-lai* [1991] 1 HKLR 731. See also *R v Soo Fat-ho* [1992] 2 HKCLR 114.

Unfair investigation, obtaining of evidence and conduct of counsel

4–62 In *R v Lau Kam-wing & Chan Kam-to* (HCCC 11/1996), an application of stay alleged that the conduct of counsel for the prosecution, allied with other unsatisfactory features of the prosecution's conduct in the course of and prior to proceedings, had by a process of attrition exhausted the ability of the defence properly to conduct its case, and had assailed and affronted the integrity of the court's process.

Where an application is made on the basis of unfairness to the accused in the course of an investigation or the obtaining of evidence against him or the suppression of evidence in favour of him, a stay will rarely be granted. For it is in the discretion of the judge to redress the unfairness by exclusion of the evidence so obtained, as in *R v Sang* [1980] AC 402, or to censure the abusive conduct such as may be seen in *Li Wai-ki v R* (CA 136/1983) where the abusive conduct of the investigation attracted very severe criticism from the court as follows:

> "We regard such a device as abhorrent. The treatment of Leung Chi was quite inexcusable. It was a cynical perversion of power; for the powers of arrest granted to ICAC are granted so that they may be exercised with a view to the prosecution of those arrested and not so that evidence may be obtained or presumed for use against others. Again such a course of conduct can be self-defeating. Men of the character of the first witnesses in this case will tend to give information which they think their interrogators want."

In *R v Maxwell* [2011] 2 Cr App R 31, prosecutorial misconduct involved the police lying about rewards and benefits received by an informer.

Prosecution/investigators contribu ting to commission of offence

4–63 In *R v Looseley; Att.-Gen.'s Reference (No 3 of 2000)* [2002] 1 Cr App R 29, the House of Lords reviewed the law relating to the topic of entrapment. In this regard it was held, in effect, as had been previously acknowledged in *R v Latif and Shahzad* [1996] 2 Cr App R 92, HL, that the end does not always justify the means. In giving guidance, their Lordships took account of the jurisprudence on the topic that has emanated from the European Court of Human Rights in *Teixeira de Castro v Portugal*, 28 EHRR 101. The conclusions of their Lordships, in summary, were as follows—

(1) It is not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. Such conduct would be entrapment, a misuse of state power, and an abuse of the process of the courts.

(2) By recourse to the principle that every court has an inherent power and duty to prevent abuse of its process the courts can ensure that executive agents of the state do not so misuse the coercive law enforcement functions of the courts and thereby oppress citizens of the state.

(3) As to where the boundary lies in respect of acceptable police behaviour, each case must depend on its own facts, but a useful guide to identifying the limits of the type of police conduct which is acceptable is to consider whether, in the particular circumstances, the police did no more than present the defendant with an unexceptional opportunity to commit a crime. The yardstick is, in general, whether the conduct of the police preceding the commission of the offence was no more than might have been expected from others in the circumstances; if not, then the police were not to be regarded as having instigated or incited the crime; if they did no more than others might be expected to do, they were not creating crime artificially. However, the investigatory technique of providing an opportunity to commit crime should not be applied in a random fashion or be used for wholesale virtue-testing without good reason. The greater the degree of intrusiveness, the closer will the court scrutinise the reason for using it. The ultimate consideration is whether the conduct of the law enforcement agency is so seriously improper as to bring the administration of justice into disrepute. The use of pro-active techniques is needed more, and is hence more appropriate, in some circumstances than others; the secrecy and difficulty of detection and the manner in which the particular criminal activity is carried on being relevant considerations. The police must act in good faith, and having reasonable suspicion is one way such good faith might be established, but reasonable suspicion of a particular individual will not always be necessary. In deciding what is acceptable, regard is also to be had to the defendant's circumstances, including his vulnerability.

(4) The remedy where entrapment has occurred is not a substantive defence. The doctrine of abuse of process enables a court to stay proceedings when it would not be fair to try a defendant; one such situation would be when the proceedings result from executive action that threatens either basic human rights or the rule of law. A stay will usually be the more appropriate remedy in an entrapment case.

For a case in which it was held that these principles (which are not exhaustive, and no one of which is determinative: *R v Moon*, 70 JCL 194, CA ([2004] EWCA Crim 2872) (addict persuaded to sell small quantity of drugs to undercover officer pressing her with a bad luck story) (distinguished in *R v Jones (James)* [2010] 2 Cr App R 10, CA (undercover officer seeking advice on the growing of cannabis from proprietor of shop selling cannabis seeds and hydroponics equipment)).

Even if the trial of the accused could be conducted fairly, a trial judge has jurisdiction to stay proceedings on the basis that the accused was subjected to entrapment by the law enforcement agency: *HKSAR v Wong Kwok Hung* [2007] 2 HKLRD 621; *HKSAR v Fung Hin Wah Edward* [2012] 1 HKLRD 374, [67].

Five factors of particular relevance when considering entrapment are: (i) reasonable suspicion of criminal activity as a legitimate trigger for the police operation; (ii) authorisation and supervision of the operation as a legitimate control mechanism; (iii) necessity and proportionality of the means employed to police particular types of offences; (iv) the concepts of the "unexceptional opportunity" and causation; and (iv) authentication of the evidence: *R v Moore and Burrows* [2013] EWCA Crim 85, [52].

For a review and summary of the Canadian, English and Strasbourg jurisprudence on when conduct is and is not considered to be entrapment, see *R v Ali Syed* [2018] EWCA Crim 2908.

For discussion and application of English principles concerning stay of proceedings on the grounds of entrapment (private vigilante entrapment), see *R v TL* [2018] EWCA Crim 1821.

Unjust subsequent trial where plea of autrefois acquit technically not open

4–64

Where a charge is brought on substantially the same evidence as was employed in support of an earlier charge in respect of which the accused had been acquitted, the court held it was not an abuse of process so long as the prosecution was not seeking to go behind the verdict of acquittal as a necessary part of its endeavour to procure a conviction in the subsequent charge: *Yu Wai-shan v R* [1986] HKLR 550; *R v Yeung Chi-sing* [1993] 1 HKCLR 95. See also *HKSAR v Li Chi-shing* [2000] HKLRD (Yrbk) 257.

Private prosecution

4–65 A private prosecution may be stayed if it can be established that the motivation for bringing the prosecution is improper: *Raymond v AG* [1982] QB 839; *Williams v Spautz* (1992) 61 A Crim R 431; *R (Dacre) v Westminster Magistrate's Court* [2009] 1 Cr App R 6.

Prosecuting on a more serious charge while accepting a lesser plea from the accomplice

4–66 Where prosecuting counsel offered to two accused a plea to manslaughter on a joint charge of murder and one defendant declined and was convicted of murder, the conduct of the prosecution does not amount to an abuse of process: *R v Hui Chi-ming* [1991] 2 HKLR 537, PC. See also *R v Fung Hing-wah* [1992] HKLY 212.

IV. PROSECUTION NOT PROCEEDING

A. ALTERNATIVE CHARGES

4–67 Where a person arraigned on an indictment pleads not guilty of an offence charged in the indictment but guilty of some other offences of which he might be found guilty on that charge, and he is convicted on that plea of guilty without trial for the offence of which he has pleaded not guilty then, whether or not the two offences are separately charged in district courts, his conviction of the one offence shall be an acquittal of the other: s 51(4) CPO.

Where the charge is an alternative of equal gravity to a charge to which the accused has pleaded guilty, it is usual for the alternative charge not to be put to the accused. For example, a charge of dishonest handling has been laid as an alternative to a charge of theft. In such a case, the charge to which the accused is to plead guilty will be put first. However, where the alternatives are of different gravity such a course may not be appropriate. For example, where the accused is charged with in the alternative the offences of wounding with intent (s 17) and the lesser offence of malicious wounding (section 19), the proper course is for pleas to be taken on each count. If the accused pleads guilty to the lesser offence and the plea is accepted by the prosecution, the judge will direct a verdict of "Not guilty" to the graver charge (s 17) after the guilty plea to the lesser offence (s 19) is taken and entered into the record. If on the other hand, the accused pleaded guilty to the graver charge (s 17), then, the lesser charge (s 19) need not be put: *R v Hazelline* [1967] 2 All ER 671.

Where there are alternative counts to both of which the accused pleaded not guilty, the jury should be discharged from giving any verdict upon the alternative count after returning a verdict of guilty on the graver or primary charge. The reason is that if the case goes on appeal and it is demonstrated that the accused is not guilty of the count on which he was convicted, but is guilty of the alternative, an acquittal on the alternative count prevents the Court of Appeal from substituting the proper verdict. The prosecution cannot invite the Court of Appeal to so substitute an alternative charge of which the accused had been acquitted by the jury: *R v Tsui Fung* [1996] 1 HKCLR 106.

B. OFFERING NO EVIDENCE

4–68 Where an accused person arraigned on an indictment pleads not guilty and the prosecutor proposes to offer no evidence against him, the court before which the accused person is arraigned may, if it thinks fit, order that a verdict of not guilty shall be recorded without the accused person being given in charge to a jury, and the verdict shall have the same effect as if the accused person had been tried and acquitted: s 51A CPO.

The prosecution may decide not to proceed with its case by offering no evidence. This course is taken where since committal the prosecution have concluded that they cannot properly ask a jury to convict. Such a situation may arise when new evidence is discovered favourable to the defence; or when a key prosecution witness becomes no longer available for the trial; or even exceptionally on a review of the existing