

立法會

Legislative Council

LC Paper No. LS 17/01-02

**Summary of the key points in the
Legal Service Division Brief on legal issues arising from
the judgment of Secretary for Justice v. Tang Bun [1999] 3HKC647**

Costs in review proceedings under section 104 of the Magistrates Ordinance
(Cap. 227)

- Upon review of a magistrate's decision by the defendant, the magistrate may order costs be awarded to the defendant if on that review the magistrate reverses or varies his decision.
- Upon review of a magistrate's decision by the defendant, the magistrate may order costs be awarded to the prosecution if on that review the magistrate confirms his decision to convict the defendant.
- Upon review of a magistrate's decision on his own initiative, the magistrate may order costs to be awarded to the defendant if on that review the magistrate reverses or varies his decision.

No order for costs in respect of the following scenarios in review proceedings
under section 104 of the Magistrates Ordinance (Cap. 227)

- Upon review of a magistrate's decision of acquittal of the defendant instituted by the prosecution, the magistrate does not have power to award costs to the prosecution if it results in a conviction of the defendant.
- Upon review of a magistrate's decision of acquittal of the defendant instituted by the prosecution, the magistrate does not have power to award costs to the defendant if he confirms his decision to acquit.
- Upon review of a magistrate's decision on his own initiative of acquittal of the defendant, the magistrate does not have power to award costs to the prosecution if it results in a conviction of the defendant.

Power to re-open case by a magistrate in the United Kingdom

- It only allows a magistrate to re-open cases to rectify mistakes, etc. and there is no provision for costs.

Costs in trials in the magistrates' court in Hong Kong

- Costs follow the event.

Costs in trials in the magistrates' court in the United Kingdom

- Costs follow the event.

Costs on appeals by way of case stated from the magistrates' court in Hong Kong

- Upon an appeal by way of case stated by the prosecution, the court does not have power to make an order for costs upon a successful or unsuccessful appeal in favour of either party.
- Upon an appeal by way of case stated by the defendant, the court may make an order for costs to be awarded to the defendant upon a successful appeal and costs to be awarded to the prosecution upon an unsuccessful appeal only if the appeal is without merit.

Costs on appeal by way of case stated from the magistrates' court in the United Kingdom

- Costs follow the event.

Costs on appeal from the magistrates' decision and in application for review of sentence passed by a magistrate in Hong Kong

- Upon an appeal by the prosecution, the court does not have power to make an order for costs upon a successful or an unsuccessful appeal in favour of either party.
- Upon an appeal by the defendant, the court may make an order for costs to be awarded to the defendant upon a successful appeal but does not have power to make an order for costs in favour of the prosecution upon an unsuccessful appeal unless the appeal is without merit.

- Upon a successful application for review of sentence by the prosecution, the Court of Appeal does not have power to make an order for costs in favour of the prosecution.
- Upon an unsuccessful application for review of sentence by the prosecution, the Court of Appeal may award costs in favour of the defendant.

Costs on appeal from the magistrates' court in the United Kingdom

- The Crown Court, upon dismissing an appeal against a conviction or the sentence imposed on that conviction, may make such order as to costs to be paid by the accused to the prosecutor.
- The Crown Court, upon allowing an appeal against a conviction or the sentence imposed on that conviction, may make a defendant's costs order in favour of the accused.

**Legal Service Division Brief on legal issues arising from
the judgment of Secretary for Justice v. Tang Bun [1999] 3HKC647**

Summary of the judgment of Secretary for Justice v. Tang Bun

The respondent was acquitted of a number of offences at the magistrate's court. The prosecution applied under section 104 of the Magistrates Ordinance (Cap. 227) to review the magistrate's decision to acquit. The magistrate dismissed the application for review and awarded costs of the review hearing to the respondent.

2. The prosecution appealed by way of case stated under section 105 of the Magistrates Ordinance. The Court of First Instance allowed the appeal by holding that the magistrate had no power under the Costs in Criminal Cases Ordinance (Cap. 492) or in any enactment to award costs of the review wherever the application for review was instituted by the prosecution, regardless of whether it succeeded or not, and he had no power to award costs in favour of one party or another.

Arguments for and against the proposition that the magistrate had power under the Costs in Criminal Cases Ordinance to award costs to the defence on dismissing an application for review instituted by the prosecution

3. The legal issue in question is whether the magistrate had power under the Costs in Criminal Cases Ordinance to award costs to the defence on dismissing an application for review instituted by the prosecution.

4. The relevant provisions of the Costs in Criminal Cases Ordinance are as follows—

"3. Defence costs in summary proceedings

(1) Where—

- (a) an information or complaint laid before a magistrate is not proceeded with;
- (b) a magistrate inquiring into an indictable offence determines not to commit the defendant for trial;

- (c) a magistrate dealing with a summary offence or any offence summarily dismisses the information or complaint or acquit the defendant; or
- (d) a magistrate, under section 104 of the Magistrates Ordinance (Cap. 227), on the application of the defendant or on his own initiative reviews his decision, and on that review, reverses or varies his decision,

the magistrate may order that costs be awarded to the defendant.

(2) ...

(3) ...

11. Prosecution costs in summary proceedings

(1) Where—

- (a) a defendant is convicted by a magistrate or a magistrate makes an order on complaint in respect of a defendant under the Magistrates Ordinance (Cap. 227); or
- (b) a magistrate, under section 104 of that Ordinance, on the application of the defendant reviews and subsequently confirms his decision to convict a defendant or to make an order on complaint in respect of a defendant,

the magistrate may order that costs be awarded to the prosecutor.

(2) ...

(3) ...".

5. The magistrate held that he had power under section 3(1)(d) of the Costs in Criminal Cases Ordinance to award costs to the defence on dismissing an application for review instituted by the prosecution. The magistrate further held that he had the power under section 3(1)(c) of the Costs in Criminal Cases Ordinance to award costs to the defence on dismissing an application for review by the prosecution where one of the grounds of the review was on the acquittal of the defendant.

6. On appeal, it was common ground that neither section 3(1)(a) nor 3(1)(b) of the Costs in Criminal Cases Ordinance was applicable to the case. The prosecution argued that in order to exercise the power under section 3(1)(d)

to award costs to the defendant in review proceedings, two conditions must be satisfied—

- (a) the review is made either on application of the defendant or on the initiative of the magistrate; and
- (b) in that review, the magistrate reverses or varies his decision.

Since the application for review was made by the prosecution, the first condition in section 3(1)(d) was not met. The second condition in section 3(1)(d) was also not met because the magistrate dismissed the prosecution's application for review, not reversing or varying his decision. Thus, the facts of the case did not come within the ambit of section 3(1)(d) and the magistrate had no jurisdiction under that provision to award costs to the respondent. The prosecution further argued that section 3(1)(c) had no application to a review by the magistrate because the defendant had already been acquitted upon conclusion of the trial.

7. On the other hand, counsel for the respondent argued that although he accepted that the application for review before the magistrate was not a situation specifically covered by the express wording of section 3(1)(d) of the Costs in Criminal Cases Ordinance, the dismissal of the application was in effect an acquittal of the respondent and hence within the ambit of section 3(1)(c). When the application for review instituted by the prosecution was made, the respondent was facing the risk of the acquittal being reversed, or in other words, open to the jeopardy of being convicted. It followed therefore that the respondent was compelled to incur legal expenses to oppose the application and it was just that upon the dismissal of the application for review when the acquittal was maintained, the magistrate should have power under section 3(1)(c) to award costs to compensate the respondent. If the prosecution was able to obtain costs following an unsuccessful review application by the defence (the situation covered by section 11(1)(b)), so also should the defence be able to obtain costs following an unsuccessful review application by the prosecution. Moreover, there was reciprocity of treatment between the prosecution and the defendant regarding award of costs by the court in trials and appeals under the Costs in Criminal Case Ordinance, therefore section 3(1)(c) should be construed in a wide and liberal way enabling it to cover the situation of review. Counsel for the respondent further argued that since section 3(1) was supposed to cover costs relating to trials and the reviews under section 104 of the Magistrates Ordinance, it was important to bear in mind that a magistrate could "reverse, vary or confirm" his previous decision upon a review pursuant to section 104(6)

of the Ordinance. Since section 3(1)(d) only dealt with reversal and variation of a magistrate's decision upon review, there was an obvious lacuna regarding confirmation of a decision. For that reason, section 3(1)(c) should be viewed and interpreted as covering a confirmation of decision upon a review.

8. The Court of First Instance held that there was no provision in either section 3 or 11 or in the entirety of the Costs in Criminal Cases Ordinance to cater for the situation where an application for review was made by the prosecution. Only in a review instituted by the defendant (both sections 3(1)(d) and 11(1)(b)) and review made on the magistrate's own initiative to reverse or vary his decision (section 3(1)(d)) that power was given to the magistrate to make an award of costs. Therefore, section 3(1)(d) did not confer power or jurisdiction on the magistrate to award costs of the review proceedings to the respondent upon dismissing the application for review instituted by the prosecution. In relation to section 3(1)(c), the Court held that the dismissal of the prosecution's application for review only confirmed the magistrate's decision of acquittal. It could not amount to an acquittal which had taken place before the review. If the interpretation of section 3(1)(c) were otherwise to cover the confirmation of the decision of the application by the prosecution to review a decision of acquittal, then by the same token, section 11(1)(a) would cover a situation of an application for review by the prosecution of an acquittal decision which was granted resulting in a conviction and therefore giving power to the magistrate to award costs of the review proceedings to the prosecution. Such interpretations, in the opinion of the Court, were overstressing the language of both sections 3(1)(c) and 11(1)(a). In answering the submission of counsel for the respondent on the inequality of treatment of the prosecution and defence that the prosecution could obtain costs following an unsuccessful review application by the defence but not vice versa, the Court noted that wherever an application for review was instituted by the prosecution, regardless of whether it succeeded or not, no power was given to the magistrate to award costs in favour of one party or another. Although it was true that there was reciprocity of treatment of the prosecution and defence regarding award of costs by the court in trials as described by counsel for the respondent, the Court noted that there were differences in sections 8 and 13 of the Costs in Criminal Cases Ordinance in the treatment of the prosecution and defendant in appeals. Section 8 empowers the judge to order costs be awarded to the defendant when the judge allows an appeal, to which section 105 or 113 of the Magistrates Ordinance applies, instituted by the defendant, in the exercise of his powers under section 120 of the

Magistrates Ordinance. Section 13 empowers the judge to order costs be awarded to the prosecution where a defendant unsuccessfully appeals to a judge from any conviction, order or determination of a magistrate and the judge is satisfied that the appeal is or was without merit. Section 13 did not cater for the situation where the appeal to the judge was made by the prosecution. The same observations applied to the situation of a review, in the sense that if the review was instituted by the prosecution which succeeded, the magistrate had no power under section 11 to award costs in its favour. If the review or appeal instituted by the prosecution was opposed by the defendant, and the magistrate or the judge rejected the review or appeal, neither was given any power to award costs in favour of the defendant. There was not necessarily unequal treatment : it was simply that the Ordinance, for one reason or another, did not provide power to the magistrate to award costs in case the prosecution applied for review of his previous decision or appeals against it. All reviews instituted by the prosecution were treated equally by the Ordinance, in that no power to award costs, to one party or another, was given to the magistrate. The Court was of the view that section 3(1)(c) was designed for trials and there was no justification for extending it to cover the review scenario. The doctrine of *generalibus specialia derogant* (special provisions override general ones) applied.

Magistrate's power to award costs in review proceedings under sections 3 and 11 of the Costs in Criminal Cases Ordinance

9. Upon review of a magistrate's decision by the defendant under section 104 of the Magistrates Ordinance, the magistrate may order costs be awarded to the defendant if on that review the magistrate reverses or varies his decision (section 3(1)(d)). Basically it caters for the situation in which the magistrate reverses his decision resulting in the acquittal of the defendant or making an order in favour of the defendant.

10. Upon review of a magistrate's decision by the defendant under section 104 of the Magistrates Ordinance, the magistrate may order costs be awarded to the prosecution if on that review the magistrate confirms his decision to convict the defendant (section 11(1)(b)).

11. Upon review of a magistrate's decision on his own initiative under section 104 of the Magistrates Ordinance, the magistrate may order costs to be

awarded to the defendant if on that review the magistrate reverses or varies his decision (section 3(1)(d)). Basically it caters for the situation in which the magistrate reverses his decision resulting in the acquittal of the defendant or making an order in favour of the defendant.

Background to the enactment of the Costs in Criminal Cases Ordinance

12. The Costs in Criminal Cases Bill was introduced into the Legislative Council in 1995 and enacted in 1996. The Bill was based on recommendations made by the Working Group on Costs in Criminal Proceedings (Working Group) formed by the Attorney General in 1991. It was modelled largely on the Prosecution of Offences Act 1985(UK) and aimed to reform the then law and practice governing the award of costs in criminal cases.

13. Before the enactment of the Costs in Criminal Cases Ordinance, in the magistrates' court, costs might be awarded to the defendant if the magistrate was satisfied that the proceedings should not have been instituted or pursued. However, in the High Court and District Court, a different test applied, in that costs should normally be awarded to the defendant unless there were positive reasons why they should not be, as where he had brought suspicion on himself and had misled the prosecution into thinking the case against him was stronger than it was. Thus, in the magistrates' court, an acquitted person carried the burden of demonstrating that the prosecution was at fault; in the District Court and High Court, he would normally be awarded costs, unless he was at fault or the acquittal turned on a technicality.

14. In relation to the magistrate's power to award costs in review proceedings, the Working Group recommended that "[m]agistrates should have a discretionary power to award costs in review proceedings initiated under s. 104, Cap. 227. (Ref : Paragraph 29, first meeting)" (Extract from the Report of the Working Group is at **Annex I**).

15. Paragraph 29 of the minutes of the first meeting of the Working Group says that—

- "29. Members agreed that there should be costs:
- (1) when the Crown entered a nolle prosequi,
 - (2) when the Crown withdrew a charge,

(3) in review proceedings (s. 104, Cap. 227) and costs should be in the discretion of magistrates." (Extract from the minutes of meeting is at **Annex II**).

16. Clause 3(1)(c) and (d) of the Costs in Criminal Cases Bill are the same as section 3(1)(c) and (d) of the Costs in Criminal Cases Ordinance. Clause 11 of the Costs in Criminal Cases Bill is the same as section 11 of the Costs in Criminal Cases Ordinance.

17. There is no record in the file of the Bills Committee on the Costs in Criminal Cases Bill to show that there was any particular discussion about the magistrate's power to award costs in review proceedings. But in the minutes of meeting of the Bills Committee on 25 March 1996, in response to enquiry of the legal adviser to the Bills Committee regarding clause 3(1)(d) (which is the equivalent of section 3(1)(d)), the Administration clarified that if the magistrate convicted a defendant on an application of the prosecution to review the decision, the defence would not bear costs (An extract from the minutes is at **Annex III**). Members may also refer to an extract from the Report of the Bills Committee on "Prosecution Costs and Defence Costs" for background information (**Annex IV**) and the extract from the minutes of meeting of the Bills Committee on 6 February 1996 for reference (**Annex V**).

General principles upon which costs are awarded

18. In any criminal proceedings, the costs that may be awarded by virtue of an order must not be punitive but, must only be such sums as appear to a court or a judge reasonably sufficient to compensate any party to the proceedings for expenses properly incurred by him in the course of those proceedings, including any preliminary or incidental proceedings : section 15(a) of the Costs in Criminal Cases Ordinance. This principle is also referred to in the Report of the Working Group (**Annex VI**).

Power to re-open case by a magistrate in UK

19. In UK, section 142(1) of the Magistrates' Courts Act 1980 provides power for magistrates' court to re-open cases to rectify mistakes, etc.. It is in some respects similar to review of a magistrate's decision under section 104 of the Magistrates Ordinance. Section 142(1) provides that—

"A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make."

It appears that there is no provision in the Prosecution of Offences Act to provide for costs in a case re-opened by the magistrate.

20. There are a number of differences between section 142(1) and section 104 apart from their apparent similarities. First, the proceedings under section 142(1) can only be instituted on the magistrate's own initiative and justices only have the power to re-open a case for the purpose of rectifying their own mistake where the defendant was convicted : R v. Gravesend JJ., ex p. Dexter [1997] Crim.L.R.298, D.C. (**Annex VII**); whereas the proceedings under section 104 can be instituted by the prosecution, defendant or on the magistrate's own initiative. Secondly, the magistrate under section 142(1) can only review his decision if it appears to the court to be in the interests of justice to do so; whereas the prosecution or defendant under section 104 may, after the determination by a magistrate of any matter which he has power to determine in a summary way, apply to the magistrate to review his decision in the matter. Moreover, the power of review by a magistrate under section 104(1) is available only with regard to matters which he has power to determine in a summary way. This would include all summary offences and also indictable offences in which the prosecutor has consented to summary trial under section 94A of the Magistrates Ordinance. This clearly does not apply to committals as there is no summary determination made.

Issues arising from the "lacuna" referred to in the judgment of Secretary for Justice v. Tang Bun

21. On the premise of paragraphs 9 to 11 relating to a magistrate's power to award costs in review proceedings under sections 3 and 11 of the Costs in Criminal Cases Ordinance, members may wish to consider whether the existing provisions have offered an equitable treatment of the prosecution and defendant in review proceedings. In particular, the following scenarios are not covered by section 3 or 11—

- (a) Upon review of a magistrate's decision of acquittal of the defendant instituted by the prosecution under section 104 of the Magistrates Ordinance, the magistrate does not have power to award costs to the prosecution if it results in a conviction of the defendant.
- (b) Upon review of a magistrate's decision of acquittal of the defendant instituted by the prosecution under section 104 of the Magistrates Ordinance, the magistrate does not have power to award costs to the defendant if he confirms his decision to acquit.
- (c) Upon review of a magistrate's decision on his own initiative of acquittal of the defendant under section 104 of the Magistrates Ordinance, the magistrate does not have power to award costs to the prosecution if it results in a conviction of the defendant.

Other legal issues arising from the judgment of Secretary for Justice v. Tang Bun

22. In considering the issue of costs in proceedings for review of a magistrate's decision, the court in Secretary for Justice v. Tang Bun also briefly refers to the issues of costs in trials in and on appeals from magistrates' courts. An exposition of the latter issues may be useful to members when deliberating whether sections 3 and 11 of the Costs in Criminal Cases Ordinance have given adequate power to a magistrate to award costs in review proceedings.

23. In Hong Kong, regarding trials in the magistrates' court, there is power given to the magistrate to award costs to the defendant by virtue of section 3(1)(a), (b) (committal proceedings) and (c) of the Costs in Criminal Cases Ordinance, corresponding to such power given him to award costs to prosecution by virtue of section 11(1)(a). The general effect is that costs follow the event. In UK, regarding trials in the magistrates' court, similar power is also given to the magistrate to award costs to the defendant out of the central funds by virtue of section 16(1)(a), (b) and (c) of the Prosecution of Offences Act 1985 (**Annex VIII**), corresponding to such power given him to award costs to prosecution by virtue of section 18(1)(a) (**Annex IX**). The general effect is that costs follow the event. Members may refer to a comparison table at **Annex X** for reference.

24. In Hong Kong, costs on appeals from the magistrate's court to the judge of the Court of First Instance are provided for in sections 8 and 13 of the Costs in Criminal Cases Ordinance. The court in *Secretary for Justice v. Tang Bun* says (at p. 656 of the judgment) that "Although it is not provided expressly, the appeal mentioned in s. 8(b) must relate to an appeal against sentence instituted by the defendant and not the prosecution, because the prosecution has no power to appeal against sentence. Again, although not expressly stated, the appeal referred to in s. 8(a) must also relate to an appeal instituted by the defendant, for otherwise the prosecution appeals by way of case of stated under s. 105 of the Magistrates Ordinance, as in the present case, the judge might order costs be awarded to the defendant even when he allows the prosecution's appeal. Further, the prosecution has no power to appeal against an acquittal."

25. The observation by the court of the scope of section 8(b) is correct. It is noted that the Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate : section 81A(1) of the Criminal Procedure Ordinance (Cap. 221). But section 81A(1) concerns an application for review not an appeal. The Court of Appeal may, if it refuses an application, award against the Secretary for Justice such amount of costs as it may determine, save that the amount shall not, if the respondent is legally aided, exceed the total of the contributions which he is liable to make (**Annex XI**).

26. The observation by the court of the scope of section 8(a) is also correct. Section 105 of the Magistrates Ordinance allows an appeal by way of case stated by either party to the proceedings against a conviction, order, determination or other proceeding after the hearing and determination by a magistrate of any complaint, information, charge or other proceeding which the magistrate has a power to determine in a summary way. An appeal under section 113 may be made by either party to a complaint or other proceeding which a magistrate has power to determine in a summary way other than a determination or proceeding relating to or in connection with an offence (for example, forfeiture proceedings), or any person aggrieved by any conviction, order or determination. Section 120 of the Magistrates Ordinance provides that the judge may make orders for costs when he allows an appeal to which section

105 or 113 applies. Section 120 does not say in whose favour the order for costs is to be made. Therefore, it is assumed that the order for costs can be made in favour of the prosecution or defendant. However, section 8(a) appears to narrow the scope of award to the defendant only. Since section 8(a) of the Costs in Criminal Cases Ordinance is enacted after section 120(1) of the Magistrates Ordinance, it is presumed that the scope of section 120(1) is narrowed by section 8(a) to the extent that when the judge allows an appeal under section 105 or 113, he may only order costs to be awarded to the defendant. Therefore, the conclusion of the court's observation that section 8(a) must relate to an appeal instituted by the defendant is correct due to the combined effect of section 120 of the Magistrates Ordinance and section 8(a) of the Costs in Criminal Cases Ordinance and it appears to be illogical, as the court observes, to award costs to the defendant upon a successful appeal by the prosecution. But it appears that it is possible for the prosecution to appeal by way of case stated under section 105 of the Magistrates Ordinance against an acquittal by a magistrate (Criminal Procedure in Hong Kong, by Gary N Heilbronn, 3rd edition, p. 319 : **Annex XII**), even though upon a successful appeal, the court does not have power to award costs to the prosecution. Moreover, it appears that though the prosecution does not have power to appeal against an acquittal under section 113, it has power to appeal under section 113(3) from any order or determination of a magistrate after the hearing and determination of any complaint or other proceeding other than a determination or proceeding relating to or in connection with an offence (for example, forfeiture proceedings), even though upon a successful or an unsuccessful appeal the court does not have power to award costs to either party.

27. In summary, the position of costs on appeals from the magistrate's court is as follows. Upon an appeal by way of case stated by the prosecution, the court does not have power to make an order for costs upon a successful or unsuccessful appeal in favour of either party. Upon an appeal by way of case stated by the defendant, the court may make an order for costs to be awarded to the defendant upon a successful appeal : section 8 of the Costs in Criminal Cases Ordinance. The situation is less clear as regards the award of costs of the appeal by way of case stated to the prosecution if the defendant's appeal is unsuccessful. It appears that merely being unsuccessful is insufficient to justify the ordering of such costs and that the appeal must actually be "without merit" for the court to award costs to the prosecution : section 13(a) of the Costs in Criminal Cases Ordinance (**Annex XIII**). It appears that the term "appeal" in

the provision also covers appeal by way of case stated under section 105 as well as section 113 of the Magistrates Ordinance. Members may refer to a summary table at **Annex XIV** for costs on appeal by way of case stated. Upon an appeal by the prosecution, the court does not have power to make an order for costs upon a successful or an unsuccessful appeal in favour of either party. Upon an appeal by the defendant, the court may make an order for costs to be awarded to the defendant upon a successful appeal : section 8 of the Costs in Criminal Cases Ordinance but does not have power to make an order for costs in favour of the prosecution upon an unsuccessful appeal unless the appeal is without merit : section 13(a) of the Costs in Criminal Cases Ordinance. Upon a successful application for review of sentence by the prosecution, the Court of Appeal does not have power to make an order for costs in favour of the prosecution. Upon an unsuccessful application for review of sentence by the prosecution, the Court of Appeal may award costs in favour of the defendant. Members may refer to a summary table at **Annex XV** for costs on appeal from a magistrate's decision and in application for review of sentence passed by a magistrate.

28. In UK, any party to a proceeding in a magistrates' court who is aggrieved by the conviction, order, or other determination may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved : section 111 of the Magistrates' Courts Act. But a person shall not make an application under section 111 in respect of a decision against which he has a right of appeal to the High Court (An example of such a right of appeal is that conferred by the Domestic Proceedings and Magistrates' Courts Act 1978, section 29(1)) or which by virtue of any enactment passed after 31 December 1879 is final. The case is to be heard by a Divisional Court of the Queen's Bench Division or in certain cases by a Divisional Court of the Family Division. In disposing of the appeal, the Divisional Court can "reverse, affirm or amend" the magistrates' decision, or remit the matter to the magistrates with its opinion thereon, or make any other order it thinks fit in respect of the matter, including an order as to costs : section 28A of the Supreme Court Act 1981. Costs may be awarded to the defendant out of central funds : section 16(5) of the Prosecution of Offences Act. There is also power to order the unsuccessful party to pay his opponent's costs, but there is no power to grant the prosecution their costs out of central funds unless it is a private prosecution : section 17(2) of the Prosecution of Offences Act.

29. In UK, section 108 of the Magistrates' Court Act governs appeal from the magistrates' court and provides that—

"A person convicted by a magistrates' court may appeal to the Crown Court—

- (a) if he pleaded guilty, against his sentence;
- (b) if he did not, against the conviction or sentence."

Sections 18(1)(b) and 16(3) of the Prosecution of Offences Act govern the position of costs on appeals. Section 18(1)(b) of the Prosecution of Offences Act provides that "[w]here the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction, the court may make such order as to costs to be paid by the accused to the prosecutor as it considers just and reasonable.". Section 16(3) provides that—

"Where a person convicted of an offence by a magistrates' court appeals to the Crown Court under section 108 of the Magistrates Courts Act 1980 (right of appeal against conviction or sentence) and, in consequence of the decision on appeal—

- (a) his conviction is set aside; or
- (b) a less severe punishment is awarded;

the Crown Court may make a defendant's costs order in favour of the accused."

Thus, a successful appellant may be awarded his costs out of central funds. A publicly funded prosecutor cannot be awarded costs out of central funds, but private prosecutors may have such an order made in their favour : sections 17(1) and (2) of the Prosecution of Offences Act.

In UK, an appeal against conviction or sentence could only be brought by the defendant.

Encl.

Legal Service Division
Legislative Council Secretariat
12 November 2001

EXTRACT

THE REPORT OF THE WORKING GROUP ON COSTS
IN CRIMINAL PROCEEDINGS

- 4 -

(In so recommending, members took due account of the Nolle Prosequi, Administration of Justice, Miscellaneous Provisions Bill, expected shortly to be enacted, and recognised that this recommendation would be subject to the costs provisions there provided for).

(3) Rule 3 of the Costs in Criminal Cases (General) Regulations, 1986, allows for costs to be awarded either way on adjournments, at all levels of courts, where costs have been incurred as a result of an unnecessary or improper act or omission. Members agreed that this offered a useful precedent for Hong Kong as it embraced all tiers. At present there is only provision for this in the magistracy. (Ref : Paragraph 15 and 20, first meeting; paragraph 7, second meeting).

(4) Members agreed that magistrates should have a discretion to reserve the question of costs until the conclusion of the trial - at present, that question cannot in law be so reserved. (Ref : Paragraph 21, first meeting).

(5) Magistrates should be empowered to order costs not exceeding \$10,000. (The present ceiling of \$5,000 is no longer realistic). If the estimated costs exceed that limit, the costs should fall to be taxed if not agreed. (Ref : Paragraph 25, first meeting; paragraph 4(5), fifth meeting).

(6) Magistrates should have a discretionary power to award costs in review proceedings initiated under s. 104, Cap. 227. (Ref : Paragraph 29, first meeting).

(7) The same guiding principles for the awarding of costs should apply in all courts - Section 69, Cap. 227 was unduly restrictive, and all courts should have

EXTRACT

WORKING GROUP ON COSTS IN CRIMINAL PROCEEDINGS

Minutes of the First Meeting held on 10-10-1991 in Q.G.O., 5th floor at 5:00 p.m.

- 8 -

scheme were not high, only \$3160 per day. The Secretary reported that in magistrate's courts fiat the amounts were \$4000 per brief and \$2000 per refresher.

VII. Item 7 Additions and/or Amendments Required:

29. Members agreed that there should be costs:

- (1) When the Crown entered a nolle prosequi,
- (2) When the Crown withdrew a charge,
- (3) in review proceedings (S.104, Cap.227)

and costs should be in the discretion of magistrates.

30. Mr Booth said S.69, Cap.227, unnecessarily fetters a magistrate's discretion, and that the basis for the award of costs in the magistrate's court should be the same as in the higher courts, i.e., the court had a complete discretion as to whether to make an order for the payment of the costs of a successful defendant, but the discretion would normally be exercised in his favour unless there were positive reasons for not doing so. The Chairman said that this was the effect of Annex J, the Prosecution of Offences Act, 1985. Members agreed that the same principles should apply in all courts.

31. Mr Rowse pointed out that there might be enforcement problems against the defendant.

32. Mr Booth said that there was no prosecution for malicious complaint and it would not be fair if costs were awarded against the Crown and not against the malicious complainant personally. Mrs Pritchard said that there were

摘 錄

立法局 95-96 年度第 CB(2)1304 號文件
(此份會議紀要業經當局審閱)

檔號：CB2/BC/6/95

**刑事案件訟費條例草案審議委員會
會議紀要**

日 期：一九九六年三月二十五日（星期一）
時 間：上午八時四十五分
地 點：立法局大樓會議室 B

IV. 逐條審議條例草案的條文

草案第 1 條

15. 黃繼兒先生表示，爲了統一根據條例草案而訂立的規則的實施日期，律政司將以憲報公告指定條例草案的生效日期。林少明先生表示，草擬有關規則的工作約需三個月，惟此項資料尚待確定。 當局

16. 議員察悉，該等規則將由有關的立法局事務委員會或小組委員會審議。

草案第 2 條

17. 按高級助理法律顧問的建議，當局同意刪除中文文本內「虛耗訟費」的定義條文(b)項第二行的「該」字。 當局

18. 議員察悉，「Ridehalgh」一案的原則如要納入條例草案內，則可加在第 15 或 18 條。

草案第 3 條

19. 議員察悉，當局會就有關判給訟費上限的第(2)款，動議委員會審議階段修正案。 當局

20. 當局回應高級助理法律顧問有關第(1)(d)款的詢問時澄清，如裁判官是應控方提出覆核決定的申請而裁定被告人有罪，則辯方無需承擔有關費用。

21. 關於該條文的中文文本，當局同意按高級助理法律顧問的提議，刪除第(1)款最末一句「訟費」之前的「該」字，並把第(1)(b)款"determines"一詞譯爲「裁定」而非「決定」。 當局

摘 錄

立法局 95-96 年度第 CB(2)1035 號文件

檔號：CB2/BC/6/95

一九九六年四月十九日
內務委員會會議文件

**刑事案件訟費條例草案
審議委員會報告**

控方訟費及辯方訟費

20. 條例草案第 3(2)及 11(2)條規定，除非訟費需由法庭的職員評估或控辯雙方已有協議，否則裁判法院所審理案件的訟費不得超逾 15,000 元。
21. 據當局解釋，現時的 5,000 元訟費上限是在一九八一年訂定，經大幅調整後增至建議的 15,000 元。工作小組在一九九二年曾建議將該上限提高至 10,000 元。如計算過去三年的通脹率，並顧及司法機構政務長的建議，15,000 元此數額可算合理。
22. 律師會認為，在裁判法院的法律程序中可判給被告人或檢控人 15,000 元訟費的擬議上限偏低。該會提議將上限提高至 30,000 元。審議委員會亦贊同律師會的意見。
23. 當局應審議委員會的建議，同意將訟費限額提高至 30,000 元，並規定日後首席大法官在獲得立法局批准後，可藉命令修訂該款額。當局同意動議委員會審議階段修正案，以達致此目的。

上訴案件判給訟費的準則

24. 根據條例草案第 8 條，如大法官作出的判處與裁判官的判處「有很大的差異」，則可命令將訟費判給上訴人。鑑於法院的一般做法，是只有在判案時應用了錯誤的原則或判刑太重時，才會批准進行上訴，故審議委員會認為不宜訂下「有很大的差異」此項擬議準則。審議委員會建議以英國的法令第 16(3)(b)條為藍本，規定大法官如判處「較輕的懲罰」，則可命令被告人獲付訟費。
25. 當局接納此項建議，並會動議具此效力的委員會審議階段修正案。

過渡性條文的需要

26. 一如審議委員會所建議，當局認同有需要制訂過渡性條文。當局會動議委員會審議階段修正案，藉以訂明本條例草案不適用於就在條例草案實施前所犯的罪行而進行的刑事法律程序。

委員會審議階段修正案

27. 除在上文各段提述的委員會審議階段修正案外，當局將動議若干技術上的修訂，包括修正本條例草案的中文文本。將由當局動議的整套委員會審議階段修正案的擬稿載於**附錄 II**。

摘錄

立法局 95-96 年度第 HB757 號文件
(此份會議紀錄業經當局審閱)

檔號：HB/C/6/95

**刑事案件訟費條例草案審議委員會
會議紀錄**

日期：一九九六年二月六日（星期二）
時間：上午八時四十五分
地點：立法局大樓會議室 A

控方訟費及辯方訟費

8. 議員得出的意見是較宜在條例草案中制定簡單的準則，而非按新西蘭《1967 年刑事案件訟費法令》的做法，列明判給訟費的詳細指引。在此方面，議員接納現時條例草案的擬本。

9. 關於裁判官作出的訟費命令上限，議員認為擬議的 15,000 元限額偏低。律師會提議的 30,000 元限額則較切合實際情況，亦涵蓋由裁判法院審理的大部分案件。鄭家富議員建議以 50,000 元為限額。主席表示，鑑於訟費未必一定判給辯方，故在決定適當上限時必須考慮被告人的經濟能力。議員因此決定以 30,000 元為上限。為方便日後調整此上限，議員提議由立法局藉決議或公職人員藉命令，以附屬法例形式修訂該金額。

上訴案件判給訟費的準則

10. 議員察悉高級助理法律顧問的意見，即草案第 13 條規定如被告人沒有好的成功機會的上訴案件遭駁回，則控方會獲判給訟費。此條文不適用於控方上訴得直的案件；在此等情況下，控方一般不會獲判給訟費。

11. 議員會要求當局澄清，對於被告人自行提出的上訴案件，現時有否任何關乎被告人獲判給訟費或須繳付訟費的條文。

12. 就草案第 8 條，議員認為建議中凡上訴法院大法官所作的判處與裁判官的判處「有很大的差異」，則辯方會獲判給訟費的準則並不恰當。議員提議以英國的《1985 年罪行檢控法令》第 16(3)(b)條為藍本，該條文規定凡法官判處「較輕的刑罰」，被告人可獲判給訟費。

EXTRACT

THE REPORT OF THE WORKING GROUP ON
COSTS IN CRIMINAL PROCEEDINGS

- 7 -

this right of appeal should be extended to cover costs orders made in the High Court and the District Court. (Ref : Paragraph 10, fourth meeting).

(19) Where the Crown succeeds in an appeal under (18), there should be no power to make an order detrimental to the defendant in respect of the costs of the appeal. (Ref : Paragraph 10, fourth meeting).

(20) Recommendation A(3) applies equally to the Courts of Appeal.

C. General

(21) Members agreed that all costs provisions should be consolidated in one ordinance. (Ref : Paragraph 16, first meeting).

(22) The principle that costs are intended to be compensatory, not punitive, should be clearly spelled out in the Ordinance. A defendant seeking costs should give an assessment to the court. (Ref. : Paragraph 26, first meeting).

(23) The Working Group, having been unable to reach an agreement as to whether both the Crown and the defendant ought to have a right of appeal against a refusal of costs, decided that it was preferable, rather than solely to give this to the defendant, to adhere to the status quo under which neither side can appeal. (Members noted, in discussing (23), and without formally taking positions, that the wider questions of social policy involved in the Crown seeking to challenge, either on appeal or review, decisions taken by lower courts which were advantageous to a defendant, and which might conflict with the Bill of Rights, Section 8, Article 11(6), did

of the defence under section 40 (6); on not being satisfied that the vehicle had been correctly weighed at the council's weighbridge they were entitled to find the defendants not guilty. Even assuming that the information referred to the tractor, the justices had found that the composite vehicle was weighed as one unit. Although the method of weighing adopted might be the only possible way of weighing the tractor unit, that did not appear from the case since the justices had stated that they could see no reason why the tractor and trailer should not have been separately weighed. (*Per* Lord Widgery C.J.) The information was unsatisfactory since its plain terms indicated that the vehicle was the composite articulated vehicle. Whether or not the information was open to technical objection it was misleading. In such a complicated subject justices were entitled to more help than they had received. [Reported by L. Norman Williams, Barrister.]

MAGISTRATES

Criminal Justice Act 1972, s. 41—power to reopen case—whether available where defendant acquitted

R. v. Gravesend Justices, ex p. Dexter

Queen's Bench Divisional Court: Lord Widgery C.J., Ackner and Parker JJ.: January 19, 1977.¹⁸

The applicant was served with a summons to answer an information that he had failed to comply with an order of the justices. At the hearing he pleaded guilty. The clerk to the justices intervened and informed the justices that the applicants should have been brought to court by means of a complaint and not by information, and as a result the justices dismissed the summons and information. The clerk later recognised that he had been mistaken. The justices, employing section 41 of the Criminal Justice Act 1972, which provided that they could vary or rescind a sentence or order made by them when dealing with an offender, purported to withdraw their dismissal of the summons and information. The applicant applied to the Divisional Court of the Queen's Bench Division for an order of certiorari to quash the justices' decision.

Held, granting the application, that the word "offender" in section 41 clearly indicated that the justices only had power to re-open a case for the purpose of rectifying their own mistake where the defendant was found guilty, and they had no such power where, as in the present case, he had been acquitted.

[Reported by Rachel Davies, Barrister.]

¹⁸ For the applicant: *Andrew Collins* (instructed by Hatten, Wyatt & Co., Gravesend). For the prosecution; *Seddon Cripps* (instructed by A. C. Staples, Maidstone).

(5) For the purposes of section 5 of this Act, proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles) shall be taken to be criminal proceedings.

(6) The functions which become functions of the Director by virtue of this Part shall [not be treated as transferred functions] for the purposes of paragraph 1(2) of Schedule 3 to the Pensions (Increase) Act 1971 (meaning of "last employing authority").

(7) The person who, immediately before the commencement of section 2 of this Act, holds the office of Director shall be treated on the commencement of that section as holding that office in pursuance of an appointment made by the Attorney General.

NOTES

The definition of "legal representative" was inserted, and the definition of "solicitor" and the word "and" preceding it were repealed, by the Courts and Legal Services Act 1990, s 125(3), (7), Sch 18, para 52(2), Sch 20.

The words in square brackets in sub-s (6) were substituted by the Employment Rights Act 1996, s 240, Sch 1, para 25(1), (3).

Sub-s (1): This Part. Ie Pt I (ss 1-15) of this Act.

Magistrates' court. See the note to s 3 ante.

Crown Prosecution Service. As to the constitution and functions of the Service, see s 1 ante.

Sub-s (2): Justice of the peace. See the note to s 7 ante.

Sub-s (7): Attorney General. See the note to s 2 ante.

Magistrates' Courts Act 1980, ss 1, 115. See Vol 27, title Magistrates.

Courts and Legal Services Act 1990, s 119(1). See Vol 11, title Courts and Legal Services.

Administration of Justice (Miscellaneous Provisions) Act 1933, s 2; Obscene Publications Act 1959, s 3. See this title ante.

Pensions (Increase) Act 1971, Sch 3, para 1(2). See Vol 33, title Pensions and Superannuation.

PART II COSTS IN CRIMINAL CASES

Award of costs out of central funds

16 Defence costs

(1) Where—

- (a) an information laid before a justice of the peace for any area, charging any person with an offence, is not proceeded with;
- (b) a magistrates' court inquiring into an indictable offence as examining justices determines not to commit the accused for trial;
- (c) a magistrates' court dealing summarily with an offence dismisses the information;

that court or, in a case falling within paragraph (a) above, a magistrates' court for that area, may make an order in favour of the accused for a payment to be made out of central funds in respect of his costs (a "defendant's costs order").

(2) Where—

- (a) any person is not tried for an offence for which he has been indicted or committed for trial; or
- [(aa) a notice of transfer is given under [a relevant transfer provision] but a person in relation to whose case it is given is not tried on a charge to which it relates; or]
- (b) any person is tried on indictment and acquitted on any count in the indictment;

the Crown Court may make a defendant's costs order in favour of the accused.

- (ii) carrying on under national ownership any industry or undertaking or part of an industry or undertaking; or
- (d) any other authority or body whose members are appointed by Her Majesty or by any Minister of the Crown or government department or whose revenue consist wholly or mainly of money provided by Parliament.

NOTES

Sub-s (1): Indictable offence; central funds. See the notes to s 16 ante.

Divisional Court of the Queen's Bench Division. See the note to s 3 ante.

Summary offence. For meaning, see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

Sub-s (5): Crown Prosecution Service. As to the constitution and functions of the Service, see ss 1-7 ante.

Further provisions. Cf the note to s 16 ante.

Application to other proceedings. See the note to s 16 ante.

Definitions. For "proceedings", see s 21(1) post; as to "the costs of any party to proceedings", see s 21(4), (5) post.

Regulations. See s 20 post and the note "Regulations under this section" thereto.

Award of costs against accused

18 Award of costs against accused

(1) Where—

- (a) any person is convicted of an offence before a magistrates' court;
- (b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
- (c) any person is convicted of an offence before the Crown Court;

the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.

(2) Where the Court of Appeal dismisses—

- (a) an appeal or application for leave to appeal under Part I of the Criminal Appeal Act 1968; or
- (b) an application by the accused for leave to appeal to the House of Lords under Part II of that Act; [or
- (c) an appeal or application for leave to appeal under section 9(11) of the Criminal Justice Act 1987;]

it may make such order as to the costs to be paid by the accused, to such person as may be named in the order, as it considers just and reasonable.

(3) The amount to be paid by the accused in pursuance of an order under this section shall be specified in the order.

(4) Where any person is convicted of an offence before a magistrates' court and—

- (a) under the conviction the court orders payment of any sum as a fine, penalty, forfeiture or compensation; and

(b) the sum so ordered to be paid does not exceed £5;

the court shall not order the accused to pay any costs under this section unless in the particular circumstances of the case it considers it right to do so.

(5) Where any person under [the age of eighteen] is convicted of an offence before a magistrates' court, the amount of any costs ordered to be paid by the accused under this section shall not exceed the amount of any fine imposed on him.

Costs in trials in the magistrates' court

	Provision	Costs
Hong Kong	An information or complaint laid before a magistrate is not proceeded with : s. 3(1)(a) of the Costs in Criminal Cases Ordinance.	The magistrate may order that costs be awarded to the defendant.
	A magistrate inquiring into an indictable offence determines not to commit the defendant for trial : s. 3(1)(b) of the Costs in Criminal Cases Ordinance.	The magistrate may order that costs be awarded to the defendant.
	A magistrate dealing with a summary offence or any offence summarily dismisses the information or complaint or acquits the defendant : s. 3(1)(c) of the Costs in Criminal Cases Ordinance.	The magistrate may order that costs be awarded to the defendant.
	A defendant is convicted by a magistrate or a magistrate makes an order on complaint in respect of a defendant under the Magistrates Ordinance : s. 11(1)(a) of the Costs in Criminal Cases Ordinance.	The magistrate may order that costs be awarded to the prosecutor.
UK	An information laid before a justice of the peace for any area, charging any person with an offence, is not proceeded with : s. 16(1)(a) of the Prosecution of Offences Act.	A magistrate's court for that area may make an order in favour of the accused for a payment to be made out of central funds in respect of his costs.

	Provision	Costs
UK	A magistrate's court inquiring into an indictable offence as examining justices determines not to commit the accused for trial : s. 16(1)(b) of the Prosecution of Offences Act.	A court may make an order in favour of the accused for a payment to be made out of central funds in respect of his costs.
	A magistrate's court dealing summarily with an offence dismisses the information : s. 16(1)(c) of the Prosecution of Offences Act.	A court may make an order in favour of the accused for a payment to be made out of central funds in respect of his costs.
	Any person convicted of an offence before a magistrate's court : s. 18(1)(a) of the Prosecution of Offences Act.	A court may make an order for costs to be paid by the accused to the prosecutor as it considers just and reasonable.

- (a) 確認或撤銷該項定罪或命令重新審訊；及
- (b) 作出為實施其決定所需的其他命令；

但如上訴法庭認為實際上並無司法不公，則即使上訴法庭認為就如此保留的法律問題或會作出對被定罪的人有利的決定，上訴法庭仍可確認該項定罪。

(由 1972 年第 34 號第 15 條代替。由 1998 年第 25 號第 2 條修訂)

應律政司司長的申請覆核刑罰

81A. 由律政司司長申請覆核刑罰

(1) 律政司司長經上訴法庭許可，可就上訴法庭以外任何法庭所判處的刑罰（法律所固定的刑罰除外），基於該刑罰並非經法律認可、原則上錯誤、或明顯過重或明顯不足的理由，向上訴法庭申請覆核。(由 1997 年第 362 號法律公告修訂)

(2) 根據第(1)款提出的申請——

- (a) 須以書面提出並由律政司司長簽署；(由 1997 年第 362 號法律公告修訂)
- (b) 須附有第(2A)款所指明的文件或文件的副本；
- (c) 須於判處刑罰之日後 21 天內或上訴法庭所容許的更長時間內，或根據《裁判官條例》(第 227 章)第 104 條就覆核刑罰或覆核所判處刑罰的定罪而進行的任何法律程序被撤回或獲處置之日後 21 天內或上訴法庭所容許的更長時間內，送交司法常務官存檔。(由 1979 年第 20 號第 4 條修訂)

(2A) 就第(2)(b)款而言，所指明的文件如下——

- (a) 如屬裁判官判處刑罰的案件，一份裁判官所裁斷的或在其席前承認的事實和判處該刑罰的理由的陳述書；
- (b) 如屬區域法院法官判處刑罰的案件，按照《區域法院條例》(第 336 章)第 80 條載於紀錄的裁決理由陳述書，以及一份判處該刑罰的理由的陳述書；
- (c) 如屬高等法院法官判處刑罰的案件，在法官席前進行的全部法律程序的紀錄，但在該等法律程序中進行的任何審訊中所提供的證據除外；

- (a) affirm or quash the conviction or order a new trial; and
- (b) make such other orders as may be necessary to give effect to its decision:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the question so reserved might be decided in favour of the convicted person, affirm the conviction if it considers that no miscarriage of justice has actually occurred.

(Replaced 34 of 1972 s. 15)

Review of sentence on the application of the Secretary for Justice

81A. Application by Secretary for Justice for review of sentence

(1) The Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate. (Amended L.N. 362 of 1997)

(2) An application under subsection (1) shall—

- (a) be in writing signed by the Secretary for Justice; (Amended L.N. 362 of 1997)
- (b) be accompanied by the documents, or copies of the documents, specified in subsection (2A);
- (c) be filed with the Registrar within 21 days, or within such further time as the Court of Appeal may allow, after the date on which the sentence was passed or any proceedings for the review, under section 104 of the Magistrates Ordinance (Cap. 227), of the sentence or of the conviction on which the sentence was passed, were withdrawn or disposed of. (Amended 20 of 1979 s. 4)

(2A) The following documents are specified for the purpose of subsection (2)(b)—

- (a) in the case of a sentence passed by a magistrate, a statement of the facts found by him or admitted before him and of the reasons for the sentence;
- (b) in the case of a sentence passed by a District Judge, the statement of the reasons for the verdict placed on record in accordance with section 80 of the District Court Ordinance (Cap. 336) and a statement of the reasons for the sentence;
- (c) in the case of a sentence passed by a judge of the High Court, the record of the whole of the proceedings before him other than the evidence given in any trial that took place in those proceedings; (Amended 25 of 1998 s. 2)

(d) 在任何案件中，任何關於答辯人而又在判處刑罰的法庭席前呈交的報告。(由 1979 年第 20 號第 4 條增補)

(2B) 第(2A)款所指明的文件或文件的副本，須在為此以書面向判處刑罰的裁判官或區域法院法官提出要求後 7 天內，或如該刑罰是由高等法院法官判處的，則須在為此以書面向司法常務官提出要求後 7 天內，交付律政司司長。(由 1979 年第 20 號第 4 條增補。由 1997 年第 362 號法律公告修訂)

(3) 上訴法庭可命令將答辯人羈留扣押，直至根據第 81B(1)條作出命令為止。

(4) 上訴法庭如覺得適合，可應答辯人的申請，准予答辯人保釋，以聽候申請的聆訊。

(5) 上訴法庭如拒絕申請，可判令律政司司長支付上訴法庭所裁定的訟費款額，但如答辯人獲得法律援助，該款額不得超逾答辯人所須支付的分擔費用的總額。(由 1997 年第 362 號法律公告修訂)

(6) 在本條以及第 81B 及 81C 條中—
“答辯人”(respondent)指已被判處刑罰的人。

(由 1972 年第 18 號第 2 條增補。由 1979 年第 20 號第 4 條修訂；由 1998 年第 25 號第 2 條修訂)

[比照 N.Z. Crimes Act 1961 s. 383]

81B. 上訴法庭對刑罰的覆核

(1) 上訴法庭在聆訊申請時—

(a) 如認為刑罰並非法律所認可、原則上錯誤、或明顯過重或明顯不足，可藉命令撤銷法庭所判處的刑罰，並依法判處上訴法庭認為本應判處的其他刑罰（不論是較嚴或較寬）以作取代；

(b) 在任何其他情況下，可藉命令拒絕更改刑罰。

(2) 律政司司長及答辯人在覆核刑罰的聆訊中均有權獲得聆聽。(由 1997 年第 362 號法律公告修訂)

(2A) 如答辯人已獲送達申請書或申請的通知，則即使答辯人沒有出庭，上訴法庭仍可聆訊和裁定覆核刑罰的申請。(由 1979 年第 20 號第 5 條增補)

(3) 為施行本條，上訴法庭可行使第 83V 條所賦予的任何權力。

(由 1972 年第 18 號第 2 條增補。由 1972 年第 34 號第 16 條修訂；由 1998 年第 25 號第 2 條修訂)

(d) in any case, any report concerning the respondent which was before the court which passed the sentence. (Added 20 of 1979 s. 4)

(2B) The documents, or copies of the documents, specified in subsection (2A) shall be delivered to the Secretary for Justice within 7 days of a request therefor being made in writing to the magistrate or District Judge who passed the sentence or, if the sentence was passed by a judge of the High Court, to the Registrar. (Added 20 of 1979 s. 4. Amended L.N. 362 of 1997; 25 of 1998 s. 2)

(3) The Court of Appeal may order a respondent to be detained in custody until an order has been made under section 81B(1).

(4) The Court of Appeal may, if it seems fit, on the application of a respondent, admit the respondent to bail pending the hearing of the application.

(5) The Court of Appeal may, if it refuses an application, award against the Secretary for Justice such amount of costs as it may determine, save that the amount shall not, if the respondent is legally aided, exceed the total of the contributions which he is liable to make. (Amended L.N. 362 of 1997)

(6) In this section and sections 81B and 81C—

"respondent" (答辯人) means a person on whom a sentence has been passed.

(Added 18 of 1972 s. 2. Amended 20 of 1979 s. 4)

[cf. N.Z. Crimes Act 1961 s. 383]

81B. Review of sentence by Court of Appeal

(1) Upon the hearing of the application the Court of Appeal may, by order—

(a) if it thinks that the sentence was not authorized by law, was wrong in principle or was manifestly excessive or manifestly inadequate, quash the sentence passed by the court and pass such other sentence (whether more or less severe) warranted in law in substitution therefor as it thinks ought to have been passed;

(b) in any other case, refuse to alter the sentence.

(2) The Secretary for Justice and the respondent shall have the right to be heard on the hearing of the review of a sentence. (Amended L.N. 362 of 1997)

(2A) The Court of Appeal may hear and determine an application for the review of a sentence notwithstanding that the respondent is not present, if the respondent has been served with an application or notice of it. (Added 20 of 1979 s. 5)

(3) For the purposes of this section the Court of Appeal may exercise any of the powers conferred by section 83V.

(Added 18 of 1972 s. 2. Amended 34 of 1972 s. 16)

CRIMINAL APPEALS AND REVIEWS

Consequences of Review

Thus, if applied for first, review will be available in addition to other kinds of appeal and judicial review (giving the defendant an additional opportunity to challenge the decision). Making the relevant application for review postpones the commencement of the time limit for making other appeals but such postponement does not apply to applications for judicial review.¹¹ Incidentally, there is no appeal from the magistrate's decision to refuse to grant a review.¹²

The major advantages of self-review are the informality of the application procedure, its relative rapidity, and, notably, the fact that the procedure is considerably less expensive than an appeal or application for judicial review in the Court of First Instance.

12.1.2 *Appeal to Court of First Instance 'by way of case stated'*

The appeal 'by way of case stated' is an important but less common mode of appeal from the decisions of a magistrate.¹³ In practice, it is used more by the prosecution than the defence. Essentially, the magistrate is requested to 'state and sign a case setting forth the facts and the grounds' of the relevant determination for the opinion of a judge. It consists of a brief summary of the case in point form, which ends by posing one or more questions which are the issue(s) to be decided in the appeal. The magistrate may draft the case, or may invite either party (including the prosecution) to draft the case and present it to him for consideration.

Who May Appeal

Appeal 'by way of case stated' is in principle available to either party, the Secretary for Justice (even when he is not a party, but the determination is connected with an offence), or 'any person aggrieved' by the determination (in theory, it could arguably extend to a victim who is not a party).^{13a}

The Secretary for Justice or prosecutor may appeal in this manner against an acquittal by a magistrate, which unlike acquittals in trials before judge and jury in the Court of First Instance, is not final, in the sense of being unappealable (see 12.4).¹⁴ Naturally, on appeal, the case may be remitted for retrial or conviction, or the magistrate's finding altered by the judge under s 119(1)(d) MO.

To institute these proceedings, the appellant must give security (enter into a recognizance to prosecute the appeal with diligence and to be liable for costs) as well as pay the nominal court fee (s 110 MO).

¹¹ See s 104(10) MO.

¹² See the last sentence in s 104(10) MO.

¹³ See ss 105-112 MO.

^{13a} This is held to include a police witness fined by a magistrate for failing to appear, and it was suggested that any person wrongfully affected by a decision or order could appeal. See *A-G r Davies* [1970] HKLR 203.

¹⁴ Care must be taken with the use of the word "final" as in most contexts, it will mean not open to appeal, though in others, slightly differing definitions may be given for it.

(b) 在沒有任何該類協議的情況下，裁判官命令評定該等訟費。

(3) 終審法院首席法官可在獲得立法會批准下，藉命令修訂第(2)款指明的款額。(由 1998 年第 25 號第 2 條修訂；由 1999 年第 39 號第 3 條修訂)

12. 可公訴罪行的控方訟費

凡被告人就某罪行而被區域法院或原訟法庭判有罪或在該等法院席前被判有罪，則區域法院及原訟法庭除可作出在其他情況下按法律可予作出的判處外，另可命令將訟費判給檢控人。

(由 1998 年第 25 號第 2 條修訂)

13. 在法官或上訴法庭駁回被告人沒有好的成功機會的上訴案件中的控方訟費

凡被告人—

(a) 不服裁判官所作的定罪、命令或裁定而向法官提出上訴；或

(b) 不服以下事項向上訴法庭上訴—

(i) 他的定罪或就他所作出的其他裁斷或裁決；或

(ii) 判處；或

(c) 向上訴法庭申請不服(a)段所提述的任何事項而上訴的許可，

而該上訴或申請不成功，若法官或上訴法庭信納該上訴或申請（視屬何情況而定）是沒有好的成功機會的，則法官或上訴法庭可命令將訟費判給檢控人。

(由 1998 年第 25 號第 2 條修訂)

14. 控方訟費可作為民事債項予以追討

(1) 任何憑藉根據本部所作出的命令而判給檢控人的訟費，是被告人欠檢控人的債項，且可作為民事債項予以追討。

(2) 凡在法院根據本部作出命令前，如在被告人被拘捕、逮捕或拘押或自動接受拘押時，自被告人取得任何款項或被告人向法院付給任何款項，則法院在作出任何此項命令時，可命令判給檢控人的訟費或該等訟費的任何部分，從任何如此取得的或如此付給的款項中支付。

(3) 第(2)款並不適用作為《法律援助條例》(第 91 章)第 18A(1)條所指的為使法律援助署署長受益的第一押記的款項。

(b) the magistrate, in the absence of any such agreement, orders that those costs be taxed.

(3) The Chief Justice may, with the approval of the Legislative Council, by order, amend the sum specified in subsection (2).

12. Prosecution costs for indictable offences

Where a defendant is convicted of an offence by or before the District Court or the Court of First Instance, the District Court and the Court of First Instance may, in addition to such sentence as may otherwise be passed by law, order that costs be awarded to the prosecutor.

(Amended 25 of 1998 s. 2)

13. Prosecution costs where judge or Court of Appeal dismisses unmeritorious appeal by defendant

Where a defendant unsuccessfully—

(a) appeals to a judge from any conviction, order or determination of a magistrate; or

(b) appeals to the Court of Appeal against—

(i) his conviction of an offence or any other finding or verdict made in respect of him; or

(ii) sentence; or

(c) applies to the Court of Appeal for leave to appeal against any of the matters referred to in paragraph (a),

and the judge or the Court of Appeal is satisfied that the appeal or the application, as the case may be, is or was without merit, the judge or the Court of Appeal may order that costs be awarded to the prosecutor.

14. Prosecution costs to be recoverable as a civil debt

(1) Any costs awarded to a prosecutor by virtue of an order made under this Part shall be a debt due to the prosecutor from the defendant and be recoverable as a civil debt.

(2) Where prior to an order being made under this Part any moneys were taken from a defendant on his apprehension, arrest, being taken into custody or his surrender to custody or were paid into court by a defendant, the court may, on the making of any such order, order that the payment of any costs awarded to the prosecutor or any part thereof be made out of any moneys so taken or paid.

(3) Subsection (2) shall not apply to moneys that are a first charge for the benefit of the Director of Legal Aid within the meaning of section 18A(1) of the Legal Aid Ordinance (Cap. 91).

Authorized Loose-leaf Edition, Printed and Published by the Government Printer,
Hong Kong Special Administrative Region

Costs on appeal by way of case stated from the magistrates' court

	By Prosecution	By Defendant
Appeal by way of case stated	After the hearing and determination by a magistrate of any complaint, information, charge or other proceeding which he has power to determine in a summary way, the prosecution may appeal by way of case stated to a judge any conviction, order, determination or other proceeding as aforesaid on the ground that it is erroneous in point of law, or that it is in excess of jurisdiction : s. 105 of the Magistrates Ordinance.	After the hearing and determination by a magistrate of any complaint, information, charge or other proceeding which he has power to determine in a summary way, the defendant may appeal by way of case stated to a judge any conviction, order, determination or other proceeding as aforesaid on the ground that it is erroneous in point of law, or that it is in excess of jurisdiction : s. 105 of the Magistrates Ordinance.
Costs	Upon a successful or unsuccessful appeal by way of case stated, the judge does not have power to make an order for costs in favour of either party.	Upon a successful appeal by way of case stated, the judge may make an order for costs in favour of the defendant : s. 8 of the Costs in Criminal Cases Ordinance. Upon an unsuccessful appeal by way of case stated, it appears that the judge does not have power to award costs of the appeal to the prosecution unless the appeal is without merit : s. 13(a) of the Costs in Criminal Cases Ordinance.

**Costs on appeal from a magistrate's decision and
in application for review of sentence passed by a magistrate**

	By Prosecution	By Defendant
Appeal	<p>After the hearing and determination of any complaint or other proceeding which a magistrate has power to determine in a summary way other than a determination or proceeding relating to or in connection with an offence either party thereto may appeal from such order or determination of such magistrate to a judge : s. 113(3) of the Magistrates Ordinance.</p>	<p>Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence, who did not plead guilty or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge : s. 113(1) of the Magistrates Ordinance.</p> <p>Any person who after pleading guilty or admitting the truth of the information or complaint is convicted of any offence by a magistrate may appeal to a judge against his sentence unless the sentence is one fixed by law : s. 113(2) of the Magistrates Ordinance.</p> <p>After the hearing and determination of any complaint or other proceeding which a magistrate has power to determine in a summary way other than a determination or proceeding relating to or in connection with an offence either party thereto may appeal from such order or determination of such magistrate to a judge : s. 113(3) of the Magistrates Ordinance.</p>

	By Prosecution	By Defendant
Costs	Upon a successful or an unsuccessful appeal, the court has no power to make an order for costs in favour of either party.	Upon a successful appeal, the court may make an order for costs in favour of the defendant : s. 8 of Costs in Criminal Cases Ordinance. Upon an unsuccessful appeal, the court does not have power to make an order for costs in favour of the prosecution unless the appeal is without merit : s. 13(a) of the Costs in Criminal Cases Ordinance.
Application for review of sentence	The Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate : s. 81A(1) of the Criminal Procedure Ordinance.	Not applicable.
Costs	Upon a successful application, the court does not have power to make an order for costs in favour of the prosecution. Upon an unsuccessful application, the court may make an order for costs in favour of the defendant : s. 81A(5) of the Criminal Procedure Ordinance.	Not applicable.