Final Year

Sri Lanka Law College

Criminal Procedure

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Reviews, responses and criticism
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1. INTRODUCTION

The law is generally classified under the following;
1. Substantive law
2. Procedural law

The law that creates the rights of the individual is known as substantive laws. The mechanism that governs the method by which these substantive laws should be asserted is known as procedural law. Therefore, the Code of Criminal Procedure Act no 15/1979 falls under the ambit of procedural laws.

Article 13(6) of the Constitution of the Democratic Socialist Republic of Sri Lanka specifies that there can be no retrospective criminal legislation. In this case therefore such retrospective effect would not apply to Substantive law. The fact that there is a retrospective effect in light of procedural law is an accepted custom.

Even though most of the concepts of law derived from Roman Dutch origins, English judges inserted rules that were applicable to English Law. The Civil Procedure Code that was introduced was very similar to the Indian Civil Procedure Code of 1882. Thereafter, the Code of Criminal Procedure was introduced by Act no.15 of 1889. This was effective until 1.1.1974, until the Administration of Justice Law 44 of 1973. This remained in force until 02.07.1977. In 1979, the current Code of Criminal Procedure Act no.15 of 1979 was introduced and has remained effective until today, subject to amendments.

Sources of Law Relating To Criminal Procedure

The sources could be stated as follows;
1. The Constitution of the Democratic Republic of Sri Lanka
2. The Code of Criminal Procedure Act no. 15 of 1979
3. Judicature Act no. 02 of 1972
4. Bail Act no. 30 of 1997
5. The Provincial High Courts Act no. 19 of 1990
6. The Primary Courts Procedure Act no. 44 of 1979

Application Of The Code Of Criminal Procedure

Vijay Prakash v. Hydrabhad Municipal Corporation *(1985) AIR 469*, must be considered here since the provisions of the Indian Code of Criminal Procedure and the Sri Lankan Code are somewhat similar. It was Held here that when a law specifies an offence and does not state the procedure to be followed, that the judge is prevented from resorting to any other procedure simply because the act was silent, and that the provisions of the Code must apply.

When the Code or any other act is silent regarding the procedure to be followed regarding an offence committed, **section 7** states that such procedure as the justice of the case may require and as is not inconsistent with this code, may be followed.

Under the old law, if there were no provision for the procedure to be taken in respect of the offence committed, then the court would have to resort to the rules of English Law to determine the fact. Even though the Indian Criminal Procedure Code does not have any provisions regarding this, in **Rahim Sheik v. King** *(1923) AIR 24*, it has been Held that in such an instance a procedure should be followed that would be in line with the interests of justice. As long as the procedure is not considered illegal, then the measure may be adopted.

2. COURTS OF CRIMINAL JURISDICTION

The original criminal jurisdiction is vested with both the Magistrate's Court and High Court.

Section 5 of the code states that all offences under the Penal Code and offences under any other law, unless otherwise specially provided for in that law or any other law, shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this code.

Sec 10 - Offences under Penal Code
Subject to the other provisions of this Code any offence under the Penal Code whether committed before or after the appointed date may be tried save as otherwise specially provided for in any law-
(a) by the High Court; or
(b) by a Magistrate's Court where that offence is shown in the eighth column of the First Schedule to be triable by a Magistrate's Court.

Sec 11 - Offences under other laws
Any offence under any law other than the Penal Code whether committed before or after the appointed date shall be tried save as otherwise specially provided for in any law-
(a) where a court is mentioned in that behalf in that law-
(i) by the High Court where the court mentioned is the High Court or in relation to an offence punishable with imprisonment for a term exceeding two years or with a fine exceeding one thousand five hundred rupees, the court mentioned is the District Court;
(ii) by a Magistrate's Court where the court mentioned is the Magistrate's Court or in relation to an offence punishable with imprisonment for a term not exceeding two years or with a fine not exceeding one thousand five hundred rupees, the court mentioned is the District Court ;
(b) where a court is not mentioned in that behalf in that law -
(i) by the High Court; or
(ii) by a Magistrate's Court where the offence is punishable with imprisonment not exceeding two years or with a fine not exceeding one thousand five hundred rupees.

Sec. 13 - Sentence which High Court may impose
The High Court may impose any sentence or other penalty prescribed by written law.

Sec. 14 - Sentence which a Magistrate's Court may impose
A Magistrate's Court may impose any of the following sentences : -
(a) imprisonment of either description for a term not exceeding two years ;
(b) fine not exceeding one thousand five hundred rupees;
(c) whipping;
(d) any lawful sentence combining any two of the sentences aforesaid :
Provided that anything in this section shall not be deemed to repeal the provisions of any enactment in force whereby special powers of punishment are given.

POWERS OF THE HIGH COURT

Under the Judicature Act, High Courts were appointed as a court of first instance. However, the 13th Amendment extended its powers to appellate and revisionary jurisdiction as well.

According to **section 9 of the Judicature Act**, the High Court has power to hear cases in respect of any of the following.

1. Any offence wholly or partly committed in Sri Lanka
2. Any offence committed by any person on or over the territorial waters of Sri Lanka
3. Any offence committed by any person in the airspace of Sri Lanka
4. Any offence committed on the high seas, where it is considered piracy by the law of nations
5. Any offence committed by a citizen of Sri Lanka outside the territory of Sri Lanka, whether on board or in relation to any ship aircraft or any other category.

In addition to this, the 13th Amendment has extended appellate and revisionary jurisdiction to the Provincial High Courts in respect of cases that have been tried by Magistrate's Courts and Primary Courts. In addition to this, **section 3** of **the High Court of the Provinces (Special Provisions) Act, no 19 of 1990** states that the High Courts may exercise appellate and revisionary jurisdiction regarding orders made by a Labour Tribunal or the Agrarian Services Act.

Furthermore the offences that can be inquired into and tried by the HC are provided in the 2nd schedule of the judicature Act.

i. All offences against the state punishable under the penal code

ii. Offences punishable under

- Section 296 (Murder)
- Section297 (Culpable homicide not amounting to murder)
- Section 300 (Attempt to Murder)
- Section 364 (Rape) Of the penal code

jii. Offences punishable under offensive weapons Act

iv. Abetment and conspiracy for the commission of above offences

COMMENCING CRIMINAL ACTION BEFORE A HIGH COURT

Section 12 of the Code states that subject to the provisions of the code and of any other written law, the High Court shall not take cognizance of any offence unless the accused person has been indicted before it or at the instance of the AG.

In addition to this, the High Court may take cognizance of an offence in the following exceptional situations (i.e. exceptions to section 12):

(a) The Commission to investigate Allegations of Bribery and corruption, the Director General of the commission has a similar power of the AG to sign an indictment.
(b) The Inspector General of Police may file an information under the **Prevention of Death Threats Regulations No. 1 of 1988**.
(c) An immigration officer may file a report instituting extradition proceedings against an individual.

SANCTIONS IMPOSED BY A HIGH COURT IN A CRIMINAL TRIAL.

Section 13 of the code states that the High Court may impose any sentence or other penalty prescribed by written law. In addition to this, **section 10 of the Judicature act** states that the judges of the High Court may impose any sentence or penalty prescribed by written law.

IN RESPECT OF WHAT OFFENCES CAN CRIMINAL ACTION BE FILED IN THE HIGH COURT?

Section 10 of the Code states that subject to other provisions of this code, any offence under the Penal Code whether committed before or after the appointed date may be tried, save as otherwise specially provided for in any law, by the High Court. A Magistrate's Court may also try such a case where it falls under the eighth column of the 1st schedule of the Code.

It should be noted that the High Court has the power to try all the offences set out in the Penal Code unless a special procedure is identified by any other law for trying the same. The AG would necessarily have to present the indictment for initiation of action. Even if the offence falls under the eighth column of the 1st schedule, the High Court has jurisdiction to try that case.

Section 11 of the Code further states that any offence that falls under any law other than the Penal Code will be tried (unless specially provided for in any law and a court is mentioned in that behalf in that law),

*By the High Court where the court mentioned is the High Court or in relation to an offence punishable with imprisonment for a term exceeding 2 years or with a fine exceeding Rs1500/-, the court mentioned is the District Court. (**S.19 Judicature Act -** District Court has only civil jurisdiction)*

By a Magistrate's Court where the court mentioned is the Magistrate's Court or in relation to an offence punishable with imprisonment for a term not exceeding 2 years or with a fine not exceeding Rs 1500/-, the court mentioned is the District Court.

Prior to the introduction of the present Code of Criminal Procedure Act, the District Court was empowered with criminal jurisdiction. This was repealed by the Administration of Justice of Law. Therefore, some statues still contain provision for the District Court to try cases of a criminal nature. In this instance, one must then consider the punishment for the offence. If the fine exceeds Rs 1500/- and the sentence exceeds 2 years imprisonment, then the High Court will have the jurisdiction to hear such a case.

E.g. *Section 04 of the 'torture act' states that upon conviction in the High Court, the offender should serve a sentence not less than 07 years and not exceeding 10 years. In this instance, the court that would have jurisdiction would be the High Court since the court has been mentioned.*

In some instances, the court is not mentioned. In that situation, one must consider the provisions laid down in **section 11(b)** and then determine jurisdiction. Accordingly, if the court is not mentioned, then the High Court will have the jurisdiction to hear the case. In addition, the Magistrate's Court will be empowered with such jurisdiction as well, if the offence is punishable with imprisonment not exceeding 2 years or with a fine not exceeding Rs 1500/-.

It should also be noted that the only other place where High Court jurisdiction does not exist is where an act other than the Penal Code states

- a court other than the High Court, and
- the offence is punishable by a fine is less than Rs 1500/- or where the sentence is less than 2 years.

E.g. *Under the Public Offences Act, upon conviction of theft of public property, section 03 imposes a sentence ranging from 01 to 20 years as well as a fine of either Rs 1000/- or thrice the value of the stolen items. Clearly, since the punishment exceeds the limit by which a Magistrate's court is empowered to mete out, the case would naturally be heard in the High Court.*

ACTIONS BEFORE THE HIGH COURT

Section 161 of the Code states that all prosecutions and indictments instituted in the High Court shall be tried by a judge of that court. However, if the offence falls within the list of offences set out in the 2nd schedule of the Judicature Act, then trial shall commence before a jury and a judge only if the accused elects to be tried in such manner. **Section 195** adds that in such an instance, the accused should be asked whether or not he desires to be tried by jury or not.

It should be noted that in the case of the rape of a woman below 16 years of age, the trial shall not be heard before a jury.

Dharmasena v. The State *(CA 101/93)* further added that the stance taken by the accused with regard to the manner in which he desires to be tried could be changed anytime before the commencement of the trial.

POWERS OF THE MAGISTRATE'S COURT

The Magistrate's Court is empowered under **section 30** of the Judicature Act to exercise and perform by virtue of the provisions of the Penal Code and law relating to criminal procedure. In addition, it has the power to conduct summary trials and non-summary inquiries as well as assisting in criminal investigations and taking steps for the prevention of crime.

Section 14 of the code further states that a Magistrate's Court may impose imprisonment of either description not exceeding 2 years, also a fine not exceeding Rs 1500/-, as well as whipping. It is also empowered to combine any two of the sentences aforesaid.

However, nothing in this section shall be deemed to repeal the provisions of any enactment whereby special powers of punishment are given. In such an instance if the Magistrate imposes a sentence that exceeds the provisions of the said section, then it will not be deemed as repealed or ineffective.

Section 15 states that no person shall be sentenced due to the non-payment or default of a fine, for a period less than 7 days. In addition to this, a person can be detained in the precincts of the court until such hour of the day as specified in the order made by court, not being later than 8.00 p.m.

A court may also impose a term of imprisonment to any person who has defaulted in the payment of a fine, provided that such prison term does not exceed the court's power under this Code.

Section 16 states that when a person is convicted at one trial of any two or more distinct offences, the court may sentence him for such offences to the several punishments consisting of imprisonment to commence one after the expiration of the other, even where the aggregate is in excess of the punishment which the court is competent to inflict.

However, in a Magistrate's Court, the aggregate punishment shall not exceed twice the amount of the punishment which the court is competent to inflict in the exercise in the course of its ordinary jurisdiction.

3. PREVENTION OF CRIME BY A MAGISTRATE

Criminal law is not just about the detection of offenders and the convicting and sentencing of them. It is also about the prevention of crime. Part IV of the Criminal Procedure Code deals with this issue. Chapters 7,8,9 and 10, i.e. section 80–94, have been dedicated to the prevention of crime. Sections 80, 81, 82, and 83 speak about security for keeping peace and for good behaviour.

Section 80 states that whenever any person is convicted of an offence that involves either
- A breach of the peace, or
- Criminal intimidation, or
- Being a member of an unlawful assembly,

The court before which that person is convicted can require him to enter into a bond, when passing sentence on him, for a sum proportionate to his means with or without sureties for keeping the peace.

This period will not exceed 2 years if the sentence or order was by a Magistrate's Court, and not exceeding 3 years if the sentence or order was by a High Court. If the conviction is set-aside in appeal or otherwise, the bond so executed shall become void.

Sections 81, 82 and 83 speak of a different situation.

Section 81 speaks of a situation when a Magistrate
- Receives information that any person is likely to commit a breach of the peace or to do a wrongful act that may probably occasion a breach of the peace within the jurisdiction of the court of such Magistrate, or
- That there is within such limits a person who is likely to commit a breach of the peace outside such area of jurisdiction,

The Magistrate may require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding 2 years as the court thinks fit.

Section 82 states that wherever a Magistrate receives information that
- Any person is taking precautions to conceal his presence within the local limits of the jurisdiction of the court of such Magistrate and that there is reason to believe that such person is taking such precautions with a view of committing an offence, or
- There is within such limits, a person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself,

The Magistrate may require such person to show cause why he should not be ordered to execute a bond with or without sureties for his good behaviour for such period not exceeding 2 years as the court thinks fit to fix.

Section 83 empowers a Magistrate to require a person who is within the local limits of that jurisdiction and who habitually commits any of the offences mentioned in this section, to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding 2 years as the Magistrate thinks fit to fix.

When a Magistrate acting under the aforementioned sections, deems it necessary to require any person to show cause under such section, he shall if such person is not present in court, issue a summons requiring him to appear in court as per **section 84**. In an instance where the person is in custody and not present in court, the Magistrate may issue a warrant directing the officer in whose custody he is to bring that person before court.

Sections 85 requires every summons or warrant issued under section 84 to contain a brief statement of the substance of the information on which such summons or warrant is issued.

In **Weerasinghe v. Peter** *39 NLR 426***,** a man was required to enter in to a bond for keeping the peace after a situation that occurred on a plantation. This was done on the evidence presented by the Superintendent of the estate. However, he did not witness the incident. Therefore, it was Held that for such order to be effected that it should be based on direct evidence.

The definition of what is meant by '*breach of peace*' was discussed in **Abeywardena v. Fernando** *27 NLR 98*. As such, it was decided that a breach of peace would be an act where a person or property is subject to a violent act that would result in destruction, loss or damage. It is insufficient to say that a breach of peace is an act against morals. It has to be an act against the law.

In **Langram v. Nilame** *22 NLR 446*, where an individual who was bore ill-will towards the members of the organizing committee of a perehara influenced the 'kapuwas' to stay away from their official duties for the event. It was Held here that even though the act amounted to an act against morals, that it did not extend to an act committed against the law. As such it did not amount to an offence under this chapter.

Kanagaratnam v. Thambiah *24 NLR 474* went on to hold that the wrongful act should be a violation of the criminal law or the violation of a person's civil rights.

Before commencing an inquiry when a person is brought before a Magistrate in compliance with or in execution of the warrant or summons issued under **section 84**, **section 86(4)** empowers the Magistrate to order such person to execute a bond for keeping the peace of for maintaining good behaviour pending the termination of the inquiry.

At the end of the inquiry, if it is not proved that it is necessary for such a person to enter into a bond, then the Magistrate shall make an entry on record to that effect. Thereafter, such person will be discharged. If that person is in custody only for the purpose of the inquiry, he shall be released.

Section 87 states that if it is proved that it is necessary for a person to enter into such a bond and that person is a minor, that the bond should be signed by his sureties.

Procedure to be followed where there is failure to give security or the bond is breached

A court is empowered to allow a time period of one month for the furnishing of security to a person who has been ordered to enter into a bond.

However, if such person is in default of giving the security, an order can be made for his imprisonment for a term not exceeding 2 years if it is a High Court, and not more than 1 year if it is be the Magistrate's court. (**Section 89**)

A bond could be entered with or without sureties, with the discretion of court. **Section 91** allows the court to refuse to accept those sureties, for reasons to be recorded, whenever the court is of opinion that such person is an unfit surety.

Section 91 states that a breach of a bond of good behaviour would be occasioned by

- The commission
- The Attempt to commit
- The abetment of any offence punishable with imprisonment wherever it may be committed.

According to **section 94** a surety can apply to court to cancel the bond he signed. In such an instance, the court may either summon or issue a warrant requiring the person for whom such security was bound, to appear or to be brought before court. Thereafter, such person will be required to give fresh security for the un-expired term or the unfulfilled stipulations of such bond of the same description of the original security upon the cancellation of the previous surety.

Sections 421 - 424 contain provisions as to bonds. Whenever such bond has been forfeited, the court shall record grounds of such proof and may call upon any person bound by such bond, to pay the penalty thereof or to show good cause why it should not be paid.

If sufficient reasons are not shown, the court may proceed to recover the penalty by issuing a warrant for the attachment and sale of the movable or immovable property belonging to such person.

If such property is situated outside the local limits of jurisdiction of the court that issued such warrant, it may be executed with the endorsement of the judge within the local limits of whose jurisdiction, the property is found.

If security is not furnished within the specified period, then such person is liable to be imprisoned. However, according to **section 93,** if the court is of the opinion that such imprisoned person may be released without hazard to the community or to any other person, the court may order such person to be discharged.

Section 66 of the Primary Courts' Procedure Act, no. 44 of 1979, a court is empowered to summon the parties connected to a dispute affecting land and where a breach of the peace is threatened or likely, and require them to enter into a bond.

Section 80-94 however, do not relate to land disputes. Here even though there may be a dispute between two parties, they will be required to appear in court and enter a bond separately on different charges. This could be seen in cases such as:

Valaithan v. Soysa *14 NLR 140, and*

Police v. Dines Hami *21 NLR 127*

However, as per the dictum of Bertram CJ in **Abeywardena v. Fernando** *27 NLR 97***,** it could be seen that in this instance although it has been an established principle to summon the parties separately, it is not incorrect to jointly produce parties where the dispute is one and the same.

Dispersion Of An Unlawful Assembly

Sections 95 - 97 deal with this issue.

As such, any Magistrate or police officer not below the rank of Inspector of Police may command any unlawful assembly or any assembly of 5 or more persons likely to cause a disturbance of the public peace, to disperse. It shall thereafter be there duty to disperse accordingly.

Upon such command, if they do not disperse or without being so commanded, it conducts itself in a manner as to show the determination not to disperse, the following action could be taken according to **section 95(2).**

The Magistrate or police officer may proceed to disperse such assembly by the use of such force as is reasonably necessary to disperse the assembly. They may also require the assistance of any person (not being a member of the armed forces) for arresting and confining the persons who form part of such assembly in order to disperse the assembly or that they may be punished according to law.

Section 95(3)

If such assembly cannot be dispersed in that manner and it is necessary for the public security that it should be dispersed, then a Magistrate or the GA of the district or any police officer not below the rank Superintendent of Police may;

- Cause it to be dispersed by requiring any commissioned or non-commissioned officer in command of any personnel of the Sri Lanka Army, Navy or Air Force, to disperse it by military force. Also to arrest and confine such persons as form part of it may be necessary in order to disperse the assembly or to have them punished according to law.
- When the public security is manifestly endangered by such assembly, and when a Magistrate or the GA of the district or any police officer not below the rank Superintendent of Police may cannot be communicated with,
- Any commissioned officer in command of the Sri Lanka Army, Navy or Air Force, may disperse it by military force. Also he may arrest and confine any persons forming part of it in order to disperse the assembly, or that they may be punished according to law.

Section 96

But while he is acting under this section, it becomes practicable for him to communicate with such a Magistrate or the GA of the district or any police officer not below the rank Superintendent of Police, he shall do so and thereafter obey the instructions of those officers as to whether or not he shall continue such action.

Section 97 further states that prosecution shall not be instituted against any Magistrate, GA, police officer or personnel of the Sri Lanka Army, Navy or Air Force or any person assisting a police officer in the dispersal of an assembly, for any act purporting to be done under this chapter in any court, except with the sanction of the AG.

Section 97

A Magistrate, GA, police officer or personnel of the Sri Lanka Army, Navy or Air Force or any person acting under this chapter in good faith; and
A member of the Sri Lanka Army, Navy or Air Force doing an act in obedience to any order which under military law he was bound to obey,
Shall not be liable in civil or criminal proceedings for any act purported to be done under this chapter.

Orders For Removal Or Abatement In Cases Of Nuisance (Chapter IX)

Sections 98 - 104 deal with this issue.

Accordingly, whenever a Magistrate considers on receiving a report or other information and on taking such evidence as he thinks fit –

(a) That any unlawful obstruction or nuisance should be removed from any way, harbour, lake, river or channel which is or may be lawfully used by the public or form any public place; or
(b) That any trade, occupation or the keeping of any goods or merchandise should by reason of its being injurious to the health or physical comfort of the community be suppressed or removed or prohibited; or
(c) That the construction of any building or the disposal of any substance should as being likely to occasion conflagration or explosion be prevented or stopped; or
(d) That any building or tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence, its removal, repair, or support is necessary; or
(e) That any tank, well or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public,

Such Magistrate may make a conditional order requiring that the person causing such obstruction or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning, possessing or controlling such building, substance, tree, tank, well or excavation shall within a time to be fixed by such order –

i. *Remove such obstruction or nuisance; or*
ii. Suppress or remove such trade or occupation; or
iii. Remove such goods or merchandise; or
iv. Prevent or stop the construction of such building; or
v. Remove, repair or support it; or
vi. Alter the disposal of such substance; or
vii. Remove such tree; or
viii. Fence such tank, well or excavation as the case may be.

In the case of a private nuisance, remedy can be sought via civil litigation.

A public nuisance was defined in **Saram v. Seneviratne** *21 NLR 190* to be a situation where any segment of the public suffers from some sort of annoyance or nuisance. Where some persons are carrying on a business, an annoyance caused by them in this regard could be classified as a public nuisance. In addition, an annoyance caused to a person or to group of persons residing in a house can also be classified as a public nuisance for the purposes of this provision.

In **Sinna Gura v. SP Karawanella** *61 NLR 186*, It was Held that the Magistrate was not empowered by this section to order the removal of a coconut tree that hovered dangerously above a house. (*Note that the provisions related to the old law. Those provisions are applicable to the cases decided presently as well.*)

Section 98(4) also states that 'public place' includes also property belonging to the state or a corporation or vested in any public officer or department of state for public purposes and ground left unoccupied for sanitary or re-creative purposes.

Section 99 (2)

If a conditional order cannot be served on the person against who it is made, then a copy of it shall be posted up at such place or places, as the court may consider fittest for the conveying the information to such person.

The person against whom such a conditional order has been made shall according to **section 100 (1)** either perform the act or act under section 98(2). If none of these steps are taken, then he shall be liable to the penalty prescribed in that behalf in **section 185 of the Penal Code** and the order shall be made absolute.

It must also be noted that the **proviso to section 100** states that if such person be a corporate body, every director thereof shall be liable to the penalty herein before prescribed. Unless such director proves that such default was not occasioned by any act of his or by any omission on his part, his liability shall not cease.

Section 101

A person may appear and move to have the order set aside or modified and the Magistrate shall take evidence in the matter. If the Magistrate is satisfied that the order is not reasonable and proper it shall either rescind the same or modify it in accordance with the requirements of the case and in the latter case, the order as modified shall be made absolute. If the Magistrate is not so satisfied, the order shall be made absolute.

4. INVESTIGATION OF OFFENCES

There are 3 main reasons for the investigation of offences:
1. To ascertain whether a crime has been committed
2. To locate those suspected of the crime
3. To obtain necessary evidence to build up a case against such suspects.

Sometimes when investigating into offences, the rights of individuals will have to be restricted. But it is the duty of society to bring offender to book. In this connection, **section 21** of the code states that every person aware

- Of the commission or the intention of any other person to commit any of the offences under the Penal Code cited in the section; or
- Of any sudden or unnatural death or death by violence or of a suspicious nature, or of the body of the person being found dead without it being known how such person came by death, shall in the absence of a reasonable excuse, give information relating to the above, to the nearest Magistrate's Court or OIC of the nearest police station, peace officer or Grama Niladhari of the nearest village.

It will also be the duty of every peace officer to communicate to the nearest Magistrate or inquirer having jurisdiction or to his own immediate superior officer any information he may have or obtain regarding

(a) The commission of or the attempt to commit any offence within the local jurisdiction in which he is empowered to act;
(b) The occurrence therein of any sudden or unnatural death or of any death by violence or under suspicious circumstances;
(c) The finding of a dead body without it being known how such person came by death.

While section 21 applies to the public at large, section 22 makes reference only to Peace Officers.

Section 2 (as amended by Act no. 12 of 1988) states that a Peace officer includes a police officer, Divisional Assistant Government Agent and a Grama Seva Niladhari appointed by the GA, in writing, to perform police duties.

Failure to observe these provisions will result in such person being punished under section 174 of the Penal Code.

GIVING INFORMATION REGARDING AN OFFENCE

Sections 108 to 125 detail the provisions relating to this topic.

First Informations

As per **section 109(1),** every such information could be given to a police officer or an inquirer orally or in writing.

Section 109

(A police officer as defined by **section 2** relates to a member of an established police force and includes police reservists. An inquirer on the other hand may be appointed by the Minister by name or office for any area, the limits of which will be specified in such appointment, as per **section 108**.)

It will be the duty of such officer to reduce into writing any information given by an informant in the language that the informant has given. It shall further be read over to the informant.

If that is not possible, then the officer may request the informant to give the information in writing. Where the informant is unable to do that, the officer will record the information in one of the national languages, after recording the reasons for doing so, and shall read over the record to the informant or interpret it in the language that he understands.

This information should not only be signed by the informant, but should be included in the Information Book without unwanted delays. **Section 2** defines an Information Book to include a crime pad or a file maintained by the CID and any bureau if investigation for the purpose of recording statements.

Such information that is received and recorded is known as the "*first information*". The rest of the steps to be taken are based on this first information.

Section 109 states further that if the police officer who receives the information is not himself the OIC of the police station, then he shall report the facts of such information to the OIC.

It should be noted that the first information is not a statement recorded during the course of an investigation. The investigation commences only on receipt of the first information.

The first information could be produced before a court by a police officer **under section 157 of the Evidence Ordinance**. Under this section, in order to corroborate the testimony of a witness, any former statement made by a witness, whether written or verbal, relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved. Therefore it can be seen that such statements will not be led as substantive evidence, but merely to corroborate other evidence.

After the first information is received, the police must then consider whether it is an offence that need be investigated. If the answer is in the affirmative, then an investigation will be carried out. If the nature of the case is such that it need not be investigated upon, then the police are not obliged to open an investigation.

The next issue that needs to be looked into is whether such an offence is a cognisable offence or not. The term "*cognisable offence*" is defined under **section 2**. It means an offence for which and 'cognisable case' means a case in which a peace officer may in accordance with the First Schedule arrest without a warrant. The First Schedule refers mainly to those offences listed in the Penal Code. If any such other cognisable offence exists, then it must be stated in such other law to be cognisable.

Statements Recorded In The Course Of An Investigation

Section 110

An officer as mentioned before can orally examine any person acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by that person.

But any oath or affirmation shall not be administered to such person.

The whole of such statement shall be recorded and if the officer asks questions in clarification and the answer is given thereto, it shall be recorded in the form of question and answer.

The record shall be then shown or read to the person. If he does not understand the language, it shall be interpreted to him in the language he understands. He is at liberty to expand or add to his statement.

The statement shall be signed immediately by such person at the place where the statement is concluded. The officer recording the statement shall append below each statement recorded by him a certificate declaring that he has accurately recorded the statement of the informant.

Such person is bound to answer truly all the questions relating to such case put to him by such officer or inquirer other than questions, which would have the tendency to expose him to a criminal charge or to a penalty or forfeiture.

An untrue statement will lead to an offence under the Penal Code. **Section 177 of the Penal Code** states that if such person refuses to answer truthfully a statement to a public statement that such person is legally bound to offer, then he would be deemed to have committed a punishable offence.

Section 180 of the Penal Code states that it shall also be an offence to give to a public servant any information, which the informant knows is false, and that it would cause injury or annoyance to another person.

An officer shall not offer or make or cause to be offered or made any inducement, threat or promise to any person charged with an offence, to induce such person to make any statement with reference to the charge against such person.

An officer shall not prevent or discourage by any caution or otherwise any person from making in the course of any investigation under this chapter any statement which he may be disposed to make of his own free will.

The main distinction between section 109 and 110 is that section 109 speaks of the first information that is given prior to the commencement of an investigation. In some instances there can be 2 'first Informations' that will be received for the same situation. In **King v. Pabilis** *25 NLR 424*, two females were abducted by a group of persons and taken in two different directions. One female was raped. They both managed to escape and arrived at the police station separately and made a statement regarding what happened to them. Both these statements were regarded as a first information.

Panditharathna v. ASP Kegalle *72 NLR 273* also Held that the first information can be given in writing, orally or even via the telephone.

An investigation can commence even before a first information is received by a police station. Such a situation would arise when such an act takes place before a police officer. This was Held in **Aramugam v. IP Mirihana.** (See also **section 109(4A)**)

The first information is important in respect of the evidence the witness who made such statement, presents in court as to whether the evidence corresponds with the statement. Such evidence is led under **section 157 of the Evidence Ordinance**. Here, in order to corroborate the testimony of a witness, any former statement made by a witness, whether written or verbal, relating to the same fact at or about the time when the fact took place or

before any authority legally competent to investigate the fact, may be proved. However, such statement cannot contain hearsay evidence. This was Held in **King v. Karthigesu** *47 NLR 234* and **Queen v. Siriniyal** *70 NLR 376.*

When the person who made the statement cannot be produced in court, such evidence cannot be led.

It should also be noted that under the Evidence Ordinance, the first information is regarded as a public document. Therefore a person has the right to obtain a copy of that statement. This was Held in **AG v. Geetin Singho** *51 NLR 289*.

A statement recorded under **section 110** is one that is noted during the course of an investigation. It is not a public document. Therefore all persons do not have access to such document. An officer may orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. He need not necessarily be a witness. He can also be a future defendant, as Held in **King v. Silva** *30 NLR 193* and **King v. Haramanisa** *45 NLR 532.*

Even though a statement made under **section 110** cannot be used for the purpose of corroborating the testimony of such person in court, it can be used under 2 other circumstances.

1. When a statement is made, the provisions of **section 110(3)** will not apply if such statement falls within the ambit of **section 27 of the Evidence Ordinance**. Therefore the relevant extract that contains evidence regarding an item that was recovered based on the information received by such person, may be admitted in court.
2. If the version of the statement made by the accused person in the course of the investigation differs form the one made in court, then such statement can be used in court to prove that he made a different statement at a different time. (**Section 145 of the EO**)

Under **section 444** an accused is entitled to a copy of the first information and any other statement made by the person against whom or in respect of whom the accused is alleged to have committed the offence.

The section further states that in the course of a trial in a Magistrate's Court, the Magistrate may in the interests of justice make available to the accused or his attorney for perusal in open court, statements recorded under section 110 of any witness, whose evidence is relied upon by the prosecution. (In this regard, also see the **proviso to section 110(4)**)

ASSITANCE GIVEN BY MAGISTRATES FOR POLICE INVESTIGATIONS

This is discussed under **sections 122,123 and 124**.

Under **section 122,** an OIC of a police station can cause a person to undergo a medical examination by a Government medical officer, for the conduct of an investigation, with such person's consent. However, if such person does not so consent, then the OIC may apply to the Magistrate within whose jurisdiction the investigation is being conducted, for an order authorising a Government medical officer named therein to examine such person and report thereon. Such person shall submit to such examination and the GMO shall report to the Magistrate setting out the result of the examination.

Section 123 (3) & (4) deal with a situation where a specimen of the handwriting of any person can be taken with the consent of that person by an OIC for comparison purposes. However, in the event that such person refuses to do comply, then a Magistrate may make the necessary order on application, requiring him to do so.

Section 123 (1) & (2) speak about a situation where

- A finger, palm or foot impression or the impression of any other part of the body of any person suspected of the offence under investigation, or
- Any specimen of saliva, urine, hair or finger nail or scraping from a finger nail of such person may be taken

By an OIC with such suspect's consent. However, in the event that such person refuses to do comply, then a Magistrate may make the necessary order on application, requiring him to do so.

When a person is sent for a medical examination by a police officer, the medical practitioner will normally submit a medical report. It would be presented in the required format where it would include the name, age, the time and place of examination and the nature of the wounds. The medical practitioner will also record the way by which such wound occurred as stated by the victim of those wounds.

Section 116 (3) states that the Magistrate may on application made by the police or inquirer, forward any such weapon or other article or document or specimen or sample to the Government Analyst, Government Examiner of Questioned Documents (GQD), Registrar of Finger Prints or a GMO, for analysis and return of a report to the court.

A magistrate may also assist the conduct of an investigation be either holding or authorizing to hold an identification parade, according to **section 124** to ascertain the identity of the offender.
For such purpose, he may require a suspect or any other person to participate in such parade. Thereafter he may allow *a witness to make his identification from a concealed position* and make or cause to be to be made a record of the proceedings of such parade. (*Italics* added by the amendment)

11 of 1988

This scope of this section was discussed by Weeraratne J, in the recently concluded case of **Mahanama Thillakeratne v. Bandula Weerasinghe and Others** *SC 595-98***.** The police had requested a warrant for the arrest of certain suspects under the provisions of this section. But before the suspects were produced before court, they were first taken to the CID for investigation and examination. Weeraratne J was of opinion that a suspect could not be arrested or warrant issued under section 124. According to his opinion, a suspect can only be asked to present himself before court for investigation purposes of this section and that a warrant for his arrest could only be issued resorting to the provisions contained in **Chapter V** of the code and not section 124.

(Weeraratne J further stated that if a warrant for a person's arrest need be issued, it should be done on the evidence given on oath before a Magistrate.)

Therefore, even though a Magistrate is empowered to assist in the conducting of an identification parade, he is not empowered to issue a warrant of arrest under this section and thereby overriding the requirements of Chapter V of the Code.

The procedure to be adopted in conducting an identification parade is not specifically stated under our law. The law relating to identification parades has been imported into our law

from English Law. Under that law, an identification parade is conducted within the premises of a police station. Normally, an identification parade is conducted by a Magistrate where he records the event. These records are known as Identification Parade Reports.

The rationale behind an identification parade is for the witnesses to identify the suspects of an offence. Therefore it is necessary to present the accused with other civilians. The rules relating to an identification parade are embedded in *The Judicial Officers Manual*. Accordingly the ratio would be 1:5. Where there are many accused more than one identification parade may be held.

Perera v. The Republic *77 NLR 224* concerned a murder that took place within the Magazine Prison. Here 11 prison guards were suspected for the causing of death of a prisoner. At the identification parade, 53 prison guards and 23 outsiders were lined up. The ratio of guards to outsiders was 1:2. This was heavily criticised by Walgampaya J.

In **Weeraratne Joseph Aloysius v. AG** *AC 1700/99*, the law relating to identification parades was considered. Even though there are no express provisions regarding identification parades in our country, it should be conducted in a manner that would befit the interests of justice. That should be the basis of its legality.

THE PROCEDURE TO BE FOLLOWED BY AN OFFICER IN THE COURSE OF AN INVESTIGATION

After receiving the first information, the investigation commences. In the course of such investigation, a police officer or an inquirer can follow 3 steps.

1. Based on the facts of the investigation, conclude that there is insufficient evidence to forward the suspect to a Magistrate's Court. (**Section 114**)
2. Conclude the trial within 24 hours and produce the suspect before the relevant court and present the charge.
3. If the investigation cannot be concluded within 24 hours, produce the suspect before a Magistrate's Court along with a report of the investigation and move for time to continue with the investigation.

If the facts are such that they fall into the ambit of section 114, then such person may be released on his executing a bond with or without sureties, and he may so be directed to appear before a Magistrate's Court if and when required.

Under section 114, such officer will not conclude his investigation here. He may probe further into the matter.

If an investigation cannot be concluded within 24 hours and a suspect has been apprehended without a warrant under section 37, then he cannot be detained for more than 24 hours. Further, **section 120(1)** states that an investigation should be completed without unnecessary delay. It should also be added that the Magistrate should be kept informed of the progress of the investigation.

Section 119 empowers the Magistrate to withdraw the case under investigation from an inquirer and himself inquire into the case and try it or commit the same for trial.

According to **section 115**, when an investigation under this chapter cannot be completed within 24 hours fixed by **section 37**, and there are grounds for believing that further investigation is necessary, the officer may adopt the following.

1. Forward the suspect to the Magistrate,
2. Forward a report of the case, and
3. Forward a summary of the statements made by each o the witnesses examined.

If any weapon, document or sample has been taken into custody at that moment, then that too should be produced before a Magistrate.

If the OIC is conducting an investigation of a bailable offence, then he can order that the suspect enter into a bond and take security from him for his appearance in court. (Also See Section 06 of the Bail Act no.30 of 1997)

If an investigation cannot be concluded within 24 hours the suspect has to be produced before the Magistrate's Court having jurisdiction over that investigation. The suspect can even be produced before the Magistrate at his residence when the time limit is 24 hours.

Thereafter, if the Magistrate is of opinion that the suspect should remain in custody, he shall make such order. Such Magistrate however should record the reasons. The Magistrate shall determine the time period of such remand. Normally, the maximum period that such a suspect can remand is 15 days. At the end of those 15 days, if proceedings cannot be instituted against the suspect, he shall be discharged.

Section 115(3) states that a Magistrate shall not release on bail a suspect who has allegedly committed or is concerned in committing an offence punishable under section 114, 191 and 296 of the Penal Code. However such detention order shall be ordered for 15 days at a time as per **section 120(2)**.

A person shall be released on bail if proceedings are not instituted against him in a Magistrate' Court or High Court before the expiration of 3 months from the date of surrender or arrest. However, according to **section 13 of the Bail Act** a person suspected or accused of being concerned in committing or having committed an offence punishable with death or with life imprisonment shall not be released on bail except by a judge of the High Court.

The police may have access, upon application, to a suspect during the lawful custody of a Superintendent of any Prison, for the purpose of such investigation, according to section **115(4)**. The court may also permit that police officer to take that suspect from place to place for the purpose of the investigation in the custody of that police officer for the purpose of the application of **section 27(1) of the Evidence Ordinance**.

Even though **section 115(4)** states that such a person is a suspect, section 27(1) of the Evidence Ordinance refers to him as accused. Therefore to fulfil the requirements of the Evidence Ordinance, the Crim. Pro. Code refers to such person in this section as "an accused person in the custody of such police officer"

5. ARREST

Personal liberty is certified under **Article 13 of the Constitution** as a fundamental right. It is not an absolute right. Therefore it can be limited. In such an instance an arrest can be affected even though it limits an individual's personal liberty. However, such measures have to be adopted legally.

Section 23 speaks about arrest in general. As such, the person making the arrest shall actually touch the body or confine the body of the person to be arrested unless there be a submission to the custody by word or action.

It must also be noted that when a person is being arrested, he shall be informed of the nature of the charge or allegation upon which he is arrested.

Expl.

It shall deemed to be an arrest of a person when

- *Such person is kept in confinement or restraint without formally arresting him, or*
- *Under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody.*

Sirisena v Perera – detaining of witnesses in order to obtain the name of the driver of a vehicle was considered an arrest.

Piyasiri v Fernando – a group of officers being summoned to the office of the Commission of Bribery and Corruption was held to amount to an arrest i.e. when a person is limited from physically going about where he desires, then it is considered to be an arrest.

The Supreme Court considered the definition of an arrest as according to Article 13 of the Constitution. In **Sirisena v. Perera**, The detaining of witnesses in order to obtain the name of the driver of a vehicle who caused an accident was considered an arrest. In **Piyasiri v. Fernando**, a group of officers being summoned to the office of the Commission of Bribery and Corruption was Held to amount to an arrest as well. Therefore, when a person is limited from physically going about where he desires, then it would be considered an arrest.

S. 23(2)

When a person forcibly resists the endeavour to arrest him, or attempts to evade arrest, the person making such arrest shall use such means as are reasonably necessary to effect the arrest.

Anything in this section shall not give a right to cause the death of a person who is not accused of an offence punishable with death.

There are 2 methods of arrest. I.e.:

1. With a warrant
2. Without a warrant

An arrest can be effected without a warrant if such offence is a cognisable offence.

ARREST WITHOUT A WARRANT

Section 32 governs the provisions in this regard. (Refer Code)

In **Muthusamy v. Kannangara** *52 NLR 324*, **section 32(1)(b)** came up for consideration. A person was taken into custody on suspicion of theft. However, no statement regarding his suspicion was received before his arrest. The arrest was Held to be illegal since an arrest without a warrant could only be effected if there was reasonable ground to believe that a person had been connected with a cognisable offence.

A peace officer may pursue a person to be arrested without a warrant to any part as of Sri Lanka, as stated in **Section 34.**

Sections 32 and 34 apply only to peace officers.

Arrest Without A Warrant By Private Persons

Section 35

A private person can arrest a suspect without a warrant for arrest if:

- A cognisable offence is committed in the presence of such private person, or
- Who has been proclaimed as an offender, or
- Whom he reasonably suspects of having committed a cognisable offence.

Therefore all the provisions of section 32 do not apply to this instance.

A private person who effects an arrest shall make over the person so arrested to a peace officer or to the nearest police station without unnecessary delay.

If there is reason to believe that such person comes under the provisions of section 32, then the peace officer shall re-arrest him. The arrest shall be effected according to the provisions of section 23 and the nature of the charge or allegation shall be informed to that person.

In **Gunasekera v. Fonseka** *75 NLR 246*, HNG Fernando J stated that when police officer arrests a person without a warrant, such person should be informed of the reason for the arrest.

Powers Of Arrest In The Case Of A Non-Cognisable Offence

Only a peace officer is empowered to arrest a person without a warrant in respect of a non-cognisable offence. Private persons do not have the authority to do so. However, such arrest can only be done only in accordance with the provisions of **section 33**. I.e.,

Section 33(1)

1. In the presence of a peace officer, a person should be accused of committing a non-cognisable offence.
2. He should be arrested by such peace officer if he either refuses to give his name and address to him or if the officer has reason to believe that information to be false.
3. The arrest should be effected for the purpose of ascertaining his real name and address.
4. Once ascertained, that person shall be released immediately or else within 24 hours from the arrest, exclusive of the time necessary for the journey to be taken before the nearest Magistrate's Court.

Section 33(2) speaks of another situation. In addition to the person being accused of committing a non-cognisable offence, the peace officer should have reason to believe that such person has no permanent residence in Sri Lanka or that the is about to leave Sri Lanka. He shall thereafter be arrested and brought before the nearest Magistrate. He may be required to execute a bond with or without sureties for his appearance before a Magistrate's Court or detained in custody until he can be tried.

When a person is arrested by a private person and in brought before a peace officer, such officer should first consider whether the offence committed would fall under the category of section 32. If the offence is a non-cognisable, then he should be released immediately. However, section 33(1) may be applied here if he either refuses to give or gives false information regarding his name or residence. Otherwise, **section 35** states that if there is no reason to believe that he has committed any offence, he shall be at once discharged.

The Procedure To Be Adopted After Arrest Without A Warrant

Section 36 states that in this instance, a peace officer shall, without unnecessary delay and subject to the provisions contained as to bail, take or send the person arrested before a Magistrate **having jurisdiction in the case**. (*Note it is not the nearest Magistrate*)

Section 3(2) of the Bail Act no 30 of 1997 states that where there is reference in any written law to a provision of the Criminal Pro. Code, relating to bail, such reference shall be deemed, with effect from the date of commencement of this Act, to be reference to the corresponding provision of this Act.

Section 37 states that persons arrested without warrants shall not be detained for a longer period than under all the circumstances of the case is reasonable. Such period shall not exceed 24 hours, exclusive of the time necessary of the journey from the place of arrest to the Magistrate.

OIC's of police stations shall report to the Magistrate's Court of their respective districts, the cases of all persons arrested without a warrant by any police officer attached to the station or brought before them, and whether such persons have been admitted to bail or otherwise. (**Section 38)**

The Procedure To Be Adopted When The Suspect Is In Hiding

Section 24 states that

- If any person acting under a warrant of arrest, or
- Having authority to arrest (for example, without a warrant),

Has reason to believe that any person to be arrested has entered into or is within any place,

→ The person residing in, or in charge of such place shall on demand of such person acting or having authority as aforesaid,

→ Allow him free ingress therein and afford all reasonable facilities for a search therein.

Such a measure can only be adopted if the officer is acting under a warrant of arrest or under the provisions laid down by sections 32, 33 and 35.

The person making the arrest should be under a reasonable belief that such person is hiding in a certain place. It was also Held in **Anura Bandaranaike v. Rajaguru and others**, that the person making the arrest should be satisfied that such person is hiding in that place.

Refusal by the person residing in or in charge of the place to allow free ingress to such officer is deemed to have committed an offence under the Penal Code.

Section 25 states that if ingress to such place cannot be obtained under section 24, it shall be lawful for a person

- Acting under a warrant, or
- In any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity to escape,

For a peace officer to enter such place and search therein and

- In order to effect an entrance into such place, to break open any outer or inner door or window of any place, whether that of the person to be arrested or of any other person,
- If after notification of his authority and the purpose and demand of admittance duly made, he cannot otherwise obtain admittance.

Excise Inspector Point Pedro v. Thangamma *26 NLR 307* Held that it was a violation of this section to enter a house by removing the tiles off the roof.

For the purpose of investigation, detaining the persons of that place within the premises is permitted. However, such detention shall be only for the purpose of searching. A body search of such person may also be conducted to retrieve any object from the body of such person. The body search can be done only by a Magistrate or an Inspector of police and if it is done by an officer below such rank, it shall be done in the presence of either one of the officers above.

Search Of Persons Arrested

Section 29 states that whenever a person

- Is arrested by a peace officer
  - Under a warrant which does not provide for the taking of bail
  - **OR**
  - Under a warrant which provides for the taking of bail, but the person arrested cannot furnish it
  - **OR**
- Is arrested without warrant or by a private person under a warrant and cannot legally be admitted to bail or is unable to furnish bail,

The peace officer making the arrest → **OR** → When the arrest is made by a private person, the peace officer to whom he hands over the person arrested

May subject to section 30, search such person and place in safe custody all articles other than the necessary wearing apparel found upon him.

- And any such article which there is reason to believe were the instruments or the fruits or other evidence of a crime may also be detained until his discharge or acquittal.

Section 30 states that if a woman is searched, then it will be necessary for the search to be made by another woman, with strict regard to decency.

A peace officer may pursue any person into any part of Sri Lanka, whom he has powers to arrest. **Section 42** also states that if a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place. This may be done in any place, either within or outside the jurisdiction where he was in custody. He shall be dealt with as he might have been dealt with on the original taking. For the purposes of this section, when an accused or convict is imprisoned, according to **section 115(2)** such a person is in the lawful custody of the superintendent of that prison.

6. SUMMONS

Section 44 states that every summons issued by a court shall be
- ⟶ In writing
- ⟶ In duplicate, and
- ⟶ Signed by the Registrar issuing the summons **or** such other officer appointed by the court, and
- ⟶ Shall be in the prescribed form.

If the person summoned is unable to read the language of the court, a translation shall be annexed to one of the duplicates.

Attached to every summons issued to every accused should be a
- Copy of the complaint or report, or
- Other document upon which the proceedings against him have been instituted, and
- A list specifying the names and addresses of the witnesses for the prosecution, if any.

Service of Summons

Section 45 states that summons shall ordinarily be served by the Fiscal or the Fiscal's officer. Such summons can also be served by a police officer where
- ⟶ The proceedings have been instituted by a peace officer, or
- ⟶ The case is before the High Court, or
- ⟶ The summons cannot otherwise be served.

or

Where the court requires it, the summons shall be served by a Grama Niladhari or by registered post.

In the case of a
- Company
- Corporation, or
- Incorporated association of persons

⟶ Summons shall be served on the Managing Director, Secretary or other like officer or the person in charge of the principal place of business.

In the case of an unincorporated association of persons, summons may be served by delivering it to the President, Secretary, or other like officer of such association.
Where the service of summons cannot be served in the two preceding instances above, it may be delivered by **registered post** to
- The registered office, or if none,
- The principal place of business.

Section 46 states that where the person to be summoned, cannot by the exercise of due diligence be found, summons may be served on him by leaving one of the duplicates and the translation, where necessary, with
- Some adult member of his family, or
- Servant residing with him.

When the service of summons cannot by the exercise of due diligence, be effected as prescribed under sections 45 and 46, **section 47** states that the serving officer shall
- Affix one of the duplicates and the translation where necessary of the summons
- To some conspicuous part of the house or the homestead in which the person summoned ordinarily resides.

In this way, the court shall deem the summons to have been served.

Service On Employees Of The State, Local Authorities Or Corporations

Where the person summoned is an employee of
⟶ The state, or
⟶ Local authority, or
⟶ Corporation,
It shall be sent in duplicate and with a translation where necessary, to the head of the department, who shall cause

- One of the duplicates with the translation to be served on the employee and
- Return the other to the court with the endorsement of service

Section 49 – Proof of Service
Where summons issued by a court is served,

- An affidavit of such service to be made to an officer authorised to administer oath or affirmation, or
- Report of such service purporting to be made to by a peace officer, or
- On an advice of delivery issued by the post office, or
- The endorsement contained in section 48,

Shall be admissible in evidence and the statements made therein shall be deemed to be correct unless and until the contrary be proved.

7. WARRANT OF ARREST

Chapter V 'B' contains the provisions relating to a warrant of arrest.

In **Mahanama Thilakeratne v. Bandula Weerasinghe and Others** *SC 595-98,* Weeraratne J stated that in order to arrest a person a warrant of arrest could only be issued in accordance with the provisions under chapter V 'B' of the Code. It was also added that before a warrant is issued against any person, evidence should be recorded upon oath.

Section 50 states that every warrant of arrest shall be issued by court under the Code and shall be in writing, signed by a judge of that court and shall be in the prescribed form.

Every such warrant issued shall remain in force until the court, which issued it, cancels it or until it is executed.

King v. Sinnady *32 NLR 330* Held that where a warrant was issued for the arrest of a person who surrendered to the court before the returnable date, and where the court made no order cancelling the warrant, that it still remained in force.

A warrant should also contain the reasons for the arrest. In the case of a bailable offence, **section 51** states that a Magistrate's court shall direct by endorsement on the warrant, that if such person executes a bond with sufficient sureties, he shall be released from custody.

Such an endorsement shall state
- The number of sureties
- The amount in which they are to be bound
- The day and the hour at which he is to attend before court.

Gunasekera v. Appuhamy 37 NLR 11, stated that it shall not be considered legal if a warrant has been issued for a bailable offence and the endorsement has not been made. However, in the case of a non-bailable offence, this condition will not apply. The issuing of a warrant in the case of a non-bailable offence is at the discretion of the Magistrate.

To Whom A Warrant May Be Directed

Section 52 states that a warrant of arrest issued by a court shall ordinarily be directed to the fiscal of that court. It may be executed by all fiscals, fiscals' officers and peace officers within the limits of their several and respective jurisdictions or in any part of Sri Lanka by any police officer.

When the warrant is directed to a peace officer by name, it shall not be executed by another peace officer unless endorsed to him by name.

Section 56 states that when a warrant of arrest is to be executed outside the local limits if jurisdiction of the court issuing it, the court shall ordinarily forward it by post or otherwise to the Magistrate's Court within the local limits of the jurisdiction of which it is to be executed.

Such Magistrate, to which the warrant is forwarded to, shall endorse his name thereon and if practicable, cause it to be executed within the local limits of jurisdiction.

Such warrant may be directed specially to any person and may lawfully be executed by such person without such endorsement anywhere within Sri Lanka, if

- **The delay or publicity occasioned by obtaining the endorsement of that Magistrate will prevent such execution.**

ARREST WITH A WARRANT

When effecting an arrest, the provisions laid down in section 23 should normally be adopted. However, **section 53** states that the person executing the warrant of arrest shall notify the substance thereof to the person arrested, and if so required by the person arrested, show him the warrant, or a copy of it signed by the person issuing it.

According to **section 59** however, where a police officer has reasonable grounds to believe that a person is one for whose warrant of arrest has been issued (notwithstanding anything to the contrary in this chapter), he may arrest that person in execution of the warrant although it is not in his possession for the time being.

PROCEDURE AFTER ARREST

Section 54 states that the person executing the warrant of arrest shall without unnecessary delay (as opposed to 'within 24 hours' or 'forthwith'(S.33(2)) – in the case of arrest without a warrant), bring the person before court, The time of arrest, the place of arrest shall be endorsed on the warrant by the arresting officer.

According to **section 58,** where a warrant of arrest is executed outside the jurisdiction of the court issuing it, the arrested person shall be taken to the nearest Magistrate's court unless,

- The court issuing the warrant is closer, or
- The court issuing the warrant is within 20 miles of the place of arrest.

(Contrast section 36)

The Magistrate's court shall thereafter direct his removal in custody to the court, which issued the warrant after ascertaining whether the arrested person is the person intended for the warrant to be issued.

If the offence is a bailable offence, and the arrested person is willing to furnish bail, he will be released from the custody by that court before which he is first produced, and the bond will be forwarded to the court, which issued the warrant.

8. SEARCH WARRANTS

Section 68 and section 70 of the Code of Criminal Procedure lays down special provisions with regard to search warrants.

Section 68 (1) states that
(a) Where any court has reason to believe that a person to whom a summons under section 66 or a requisition under section 67 has been or might be addressed will not or would not produce or deliver the document or other thing as required by such summons or requisition; or
(b) Where such document or such other thing is not known to the court to be in the possession of any person; or
(c) Where the court considers that the purposes of any investigation or proceeding under this Code will be served by a general search or inspection,
The court may issue a search warrant in the prescribed form and the person to whom such a warrant is directed may search and inspect in accordance therewith and the provisions hereafter contained.

Section 70 speaks of instances where a Magistrate's court may issue a search warrant when it receives information and after such inquiry as it thinks necessary has reason to believe that;
(a) Any place is being used for the deposit or sale of stolen property or of property unlawfully obtained; or
(b) The place is being used to deposit, sell or manufacture forged documents, forged seals, or counterfeit stamps or coins, or instruments or materials for counterfeiting coins or stamps or for forging; or
(c) That any stolen property or property unlawfully obtained, forged documents, false seals etc, are kept or deposited in any place.

It also directs the person so authorized to enter such premises with the necessary steps that he should follow when effecting such a warrant.

Search warrants that are issued in accordance with these sections of the Code shall remain in force for a reasonable number of days to be specified in such warrants (**section 68(2)**). Also note that section 50(2) of the Act speaks of an instance where every warrant issued by a court under this code, shall remain in force until the court that issued it cancels it or until it is executed. However, in **Croos v. SI Modera 52 NLR 329**, It was Held that a search warrant could remain in force from the date of such issue and that it would be lawful to extend such a warrant based on the facts of the case when such warrant was issued.

Section 67 states that; if any document is in the custody of the Department of posts and telecommunications and, if it is in the opinion of any court, wanted for the purpose on any investigation or proceeding under this code, such court may order the production of same by that authority as the court directs.

Section 67(2) also extends this authority to the Attorney General and police officer not below the rank of Superintendent of Police. These officers are empowered to require the Postal or Telecommunication authorities as the case may be to cause search to be made for and to deliver such document to such officer or to any other person duly authorized by him.

When a search warrant is issued, the court that so directs the issue, could specify that such warrant be confined to the specific premises which empowers a search and that it not be extended to any other area of the premises.

It should also be noted that under the **Police Ordinance**, a police officer is empowered to enter any premises which houses illegal property and take such property into custody. Further, a police officer is empowered to search such premises under this ordinance.

The procedure to be followed when searching such premises is discussed from **sections 73 to 76**.

Section 74 states that whenever any place is liable to any search or inspection and such premises is closed, any person residing in or is in charge of the premises shall upon demand of the person executing the warrant and on production of the warrant allow him free ingress thereto and afford all reasonable facilities for a search therein.

Section 74(2) authorizes such person who executes the warrant to exercise the powers conferred to him by virtue of Section 25 in the event that such ingress referred to above cannot be obtained.

Excise Inspector Point Pedro v. Thangamma 26 NLR 307 Held that it was mandatory for the possessions that were found in a premises and the place they were found be entered into a list and failure to do so be considered illegal. (**Section 75**)

Section 76 further allows the occupant of the place or some person on his behalf to always be present in every instance of the search. He would also be entitled to a copy of the list prepared under section 75, which should be signed by the person executing the warrant and be delivered to the occupant or person.

According to **section 71**, when in the execution of a search warrant at any place beyond the local limits of the jurisdiction of the court which issued it and such place is searched, and the things for which the search made are found, such things together with the list of same prepared, shall be immediately taken before the court issuing the warrant. However, if the place searched is nearer to the to the Magistrate's court having local jurisdiction therein, the list and things shall be immediately taken before such court, and unless there be good cause to the contrary, such court shall make an order authorizing them to be taken to the court issuing the warrant.

9. TRIALS BY THE MAGISTRATE'S COURT

Section 128 of the Code of Criminal Procedure act states that every offence shall ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction it was committed. We have studied earlier the manner in which a High Court and a Magistrate's Court should carry out proceedings with regard to a criminal trial. Here we will consider the aspect of territorial jurisdiction.

Sri Lanka's territorial waters extend 12 nautical miles away from the shore. According to **section 128(2)**, any Magistrate's Court within the local limits of the jurisdiction of which an accused may be or be found, shall have jurisdiction respectively in all cases of offences otherwise within their respective jurisdiction which have been committed on the territorial waters of Sri Lanka.

Section 128(3) states that an offence committed on the territorial waters of Sri Lanka to which subsection (2) is not applicable or an offence committed on the high seas, or on board any ship or upon any aircraft, may be tried or inquired into by the Magistrate's Court of Colombo if it otherwise has jurisdiction or on indictment by the High Court.

Section 128(2) speaks of offences which the Magistrate's Court has jurisdiction (other than territorial) to try. Further, this section only entitles a Magistrate's Court to inquire into matters within the territorial waters of Sri Lanka.

On the other hand, **Section 128(3)** speaks of offences committed on both the territorial waters of Sri Lanka as well as away from Sri Lanka. The rationale behind the words *inquiry* and *trial* being applicable to both these sections is due to the fact that in respect of a few offences, there arises a necessity for a non summary inquiry to be held.

The exceptions section 128 are embedded in other acts.
1. Offences Against Aircraft Act 24/1982
2. Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment Or Punishment Act 22/1994 (Torture Act)

The **Offences Against Aircraft Act** states as follows. Whenever an offence (which, if committed in SL would have been an offence) is committed in a Sri Lankan aircraft on the high seas or on another territory, and if that offence is committed by a citizen of Sri Lanka or a non national, the courts of Sri Lanka have jurisdiction with regard to that offence. If such offence could be brought before a Magistrate's Court, then such matter should be heard before the Magistrate's Court of Colombo, and if such offence could be brought before a High Court, then such matter should be heard before the High Court of Colombo.

WHEN THE ACT DONE AND THE ENSUING CONSEQUENCES TAKE PLACE AT DIFFERENT LOCATIONS

In some instances, an offence may be committed within the jurisdiction of one court and the and the consequences which ensue may occur within the jurisdiction of another court.
E.g. A person could inflict a fatal wound upon another within the jurisdiction of one court and as a result of that infliction that individual could die within the jurisdiction of another court. The non summary inquiry of the death could be held in either one of the courts in which the infliction of the fatal wound or the death took place.

Section 129 of the Code states that when a person is accused of the commission of any offence by reason of anything which has been done and of any consequences which have ensued, such offence may be inquired into or tried by any court within the local limits of the jurisdiction of which any such thing has been done or any such consequence ensued.

JURISDICTION OF A COURT IN RESPECT OF AN OFFENCE BY REASON OF IT BEING RELATED TO ANOTHER OFFENCE.

Section 130

When an act is an offence by reason of the relation to any other act which is also an offence, or which would also be an offence if the doer were capable of committing an offence, a charge of the first mentioned offence may be inquired into or tried by a court within the local limits of the jurisdiction of which either act was done.

A charge of abetment may be inquired into or tried either by

- *The court within the local limits of whose jurisdiction the abetment was committed, or*
- *The court within the local limits of whose jurisdiction the offence abetted was committed.*

TRIAL FOR ESCAPING FROM CUSTODY

Under **section 131(1)** the offence may be tried by the court within the local limits of whose jurisdiction the person charged is found/recaptured or by the court within the local limits of whose jurisdiction the offence was committed.

CRIMINAL MISAPPROPRIATION AND CRIMINAL BREACH OF TRUST

By **section 131(2)** the offences may be inquired into or tried either by

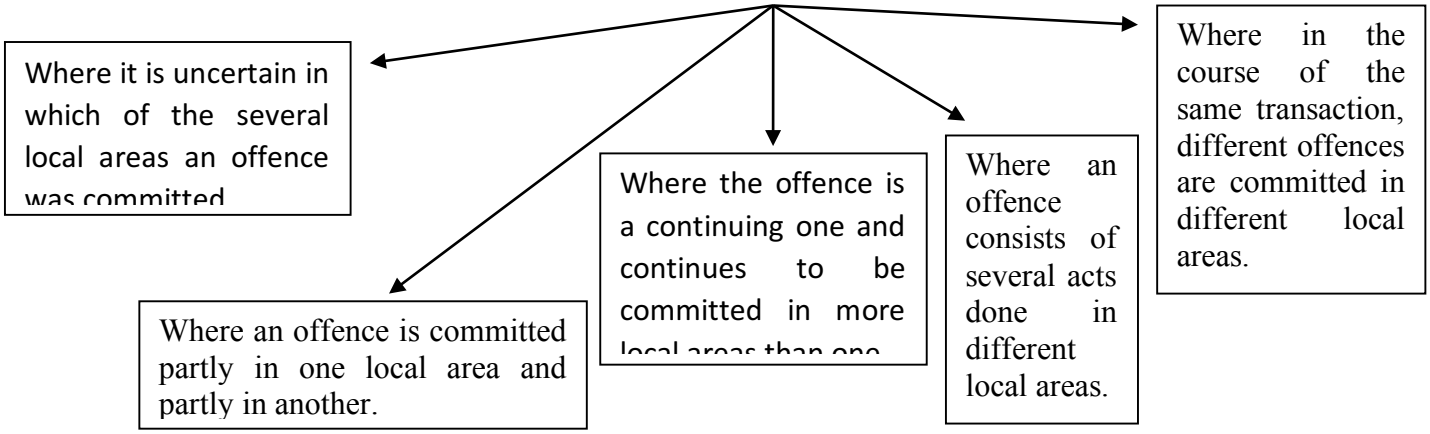
- the court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received by the accused person, or
- by the court within the local limits of whose jurisdiction the offence was committed.

STEALING

By **section 131(3)** the offence may be inquired into or tried either by any court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who receives or retains the same, knowing or having reason to believe it to be stolen.

PLACE OF INQUIRY OR TRIAL IN TO OFFENCES COMMITTED IN VARIOUS PLACES

The offences mentioned below may be inquired into or tried by a court having jurisdiction over any one of such local areas as specified in **section 132(1).** I.e.:



An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a court through or into the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence was committed passed in the course of that journey. (**Section 132(2)**)

Section 132(3)

Provided that the offender is found within such local jurisdiction,

- all offences against the provisions of any law for the time being in force relating to railways, telecommunications, the post office, or arms and ammunition,
- may be inquired into or tried by any court, whether the offence is stated to have been committed within the local limits of the jurisdiction of such court or not.

SECTIONS 133 AND 134

Section 134 - Any sentence or order of any criminal court in the trial of an offence shall not be liable to be set aside merely on the ground **that the inquiry** into the commission of the offence to which the sentence or order relates was made by a Magistrate Court not empowered under this chapter to do so.

This section therefore would be valid in the case of a non-summary inquiry, an not a trial.

Section 133 - Whenever any doubt is entertained by a Magistrate as to the Magistrate's Court by which any offence should be inquired into,

- Such Magistrate may embody the ascertained facts in the form of a case and transmit it to the AG for his opinion.
- The AG shall thereupon decide in which court the offence shall be inquired into and such court shall thereupon have jurisdiction to inquire into such offence.

OBJECTION TO JURISDICTION (Section 39 of the Judicature Act)

Once submissions have been led and the accused has pleaded to the charge against him, neither party will be entitled to object to the jurisdiction of the court of first instance. However, in the course of the trial, if it appears that the matter was brought in a court that had no jurisdiction intentionally, the judge could refuse to proceed further and declare the proceedings null and void.

INSTITUTING PROCEEDINGS BEFORE A MAGISTRTATE'S COURT

Section 136

Proceedings in a Magistrates Court can be instituted in one of the following ways by,

- Private plaint
- B-Report
- Knowledge or suspicion of magistrate
- On any person brought before a magistrate
- Upon warrant of AG
- On a written complaint made by a court

Section 136(1)(a)

Private **plaint**

- An oral or written complaint could be made to a Magistrate of such court that an offence has been committed, which such court has the jurisdiction to inquire into or try. Such

complaint has to be countersigned by a pleader and signed by a complainant, if such complaint is in writing. (*read* **sections 188(1) and 393(1)(d)**)

(could be done when the claim is rejected or refused to be acted upon by an OIC)

B REPORT - section 136(1)(b)

- On a report being made to a Magistrate by an
  - ⟶ An inquirer, or
  - ⟶ A peace officer, or
  - ⟶ A public servant, or
  - ⟶ Servant of a municipal council, urban council or town council.

(*read* **section 188(2)**)

The report produced under this section is normally referred to as **the plaint** and not the charge. A police officer produces a plaint in accordance with the provisions of this section. Thereafter, a Magistrate may initiate proceedings.

According to **section 115**, A person shall be released on bail if proceedings are not instituted against him in a Magistrate' Court or High Court before the expiration of 3 months from the date of surrender or arrest. (**section 13 of the Bail Act** - a person suspected or accused of being concerned in committing or having committed an offence with death or with life imprisonment, shall not be released on bail except by a judge of the High Court) In reference to this, there are 2 cases that concern themselves with the term *institution of proceedings*.

AG v. Punchibanda (1986) 1 SLR 40 - Proceedings had not been instituted against an accused in a murder case even after 3 months from the date of arrest. The AG appealed against the decision to grant bail to the accused. It was Held by the Court of Appeal that during an investigation, when there is a report containing a clear charge forwarded to the Magistrate regarding an offence committed by a suspect under **section 116**, that for the purpose of section 115, proceedings will commence. Therefore, a report need not be made to the Magistrate under section 136 in this instance.

However, in **Thunya *alias* Gunapala v. Galawela OIC (1993) 1 SLR 61**, it was Held by the Supreme Court that the report produced by the police in the course of an investigation (i.e. section 116) does not authorise the commencement of proceedings. For proceedings to commence, it would be necessary that a report under **section 120(3)** and the plaint under section 136 be forwarded.

Section 136(1)(c) - Another method by which the proceedings before a Magistrate's court could commence is upon the knowledge or suspicion of a Magistrate. However the accused may require another magistrate to try the case instead of a Magistrate instituting the proceedings.

Section 136(1)(d) allows proceedings in a Magistrate's court to be instituted on any person being brought before a Magistrate of such court in custody without process being issued, accused of having committed an offence which such court has jurisdiction to inquire or try.

Section 136(1)(e) - When a warrant by the AG under **section 393** requires a Magistrate to hold an inquiry for an offence that the court has jurisdiction to inquire into, proceedings would commence before a Magistrate's court.

Section 136(1)(f) - Proceedings would also commence when a written complaint under section 135 is made to the court. **Section 135(2)** states that the complaint of a court shall be in writing under the hand of the Registrar of that court.

Unless under the provisions of section 136, a written complaint shall not be entertained in any other circumstances. (**S. 136(3)**)

How does the CCPA determine whether it is for the Magistrate to summarily try the offence or whether merely conduct a preliminary inquiry?

1. The offences which the MC can try are indicated by the words in Section 10(b)
"Subject to the other provisions of this code, any offence under the penal code, may be tried- save as otherwise specially provided for in any law, By Magistrate Court where that offence is shown in the 8th column of the first schedule."

2. However the provisions whether to hold a preliminary inquiry is set out in Sec 145 of the CCPA
"When the accused appears or is brought before the Magistrate's Court, the Magistrate shall in a case;

- where the offence or any one of them where there is more than one, falls within the list of offences set out in the Second Schedule to the Judicature Act, No. 2 of 1978 ; or
- where the Attorney-General being of opinion that evidence recorded at a preliminary inquiry will be necessary for preparing an indictment, within three months of the date of the commission of the offence so directs,

hold a preliminary inquiry according to the provisions hereinafter mentioned.

3. AG exercise certain powers under Sec.393(7) regarding preliminary inquiry
"Notwithstanding any other provision c6nt^ined in this act, It shall be lawful for AG, having regard to the nature of the offence or any other circumstances in respect of summary offence

- To forward an indictment directly to the HC, or
- To direct the Magistrate to hold a preliminary inquiry in accordance with the procedure set out in chapter (15), in respect of any offence specified by him where he is of opinion that the evidence at a preliminary inquiry will be necessary for preparing an indictment and thereupon such offence shall not be triable by a Magistrate Court.

10. SUMMARY TRIALS

The main difference between a summary trial and a non-summary trial is that at the end of a summary trial, the magistrate either charges the accused with the offence committed or discharges him or acquits him. The main purpose of a non-summary trial is to ascertain as to whether the matter at hand has sufficient evidence to be tried in a higher court. Chapter 17 of the Criminal Procedure Code outlines the provisions for summary trials. At the commencement of the trial the judge should read the charge against the accused and he should answer to those charges. If there is more than one charge in the charge sheet, he has to answer to all those charges individually and each plea has to be recorded. Such measures can be taken only in an instance when the accused is present in court.

Appearance For A Corporation As An Accused

By **section 261**, at any trial in any court in which a corporation is an accused, the corporation may be represented by the Managing Director, the Secretary, a like officer of the corporation or by a person appointed in writing as a representative of the corporation, by the MD. Such person shall act on behalf of the accused and where the Code requires the accused to be subject to anything, such shall be construed in relation to such person.

It is important to note that where the corporation is unrepresentative, and the Court is satisfied that summons have been duly served, the trial will proceed and be concluded in the absence of such representative.

TRIAL IN ABSENTIA

Section 192

In a summary trial, where the accused is
(a) Absconding or has left the island; or
(b) Is unable to attend or remain in court by reason of illness and either has consented to the commencement or continuance of the trial in his absence or if such trial may commence and proceed or continue in his absence without prejudice to him; or
(c) By reason of his conduct in court, obstructing or impeding the progress of the trial,
The Magistrate may commence and proceed with the trial in the absence of the accused.

However, in the course of or within a reasonable time of the conclusion of the trial, an accused under section 192(1)(a) appears and satisfies court that his absence from the trial is bona fide, then-
(a) Where the trial is not concluded, evidence up to then shall be read to him and he shall be allowed to cross-examine the witnesses who gave evidence.
(b) Where the trial has concluded, the court shall set aside the conviction and sentence, if any, and order that the accused be tried *in novo*.

However, the above (a & b) shall not apply if the accused has been defended by an attorney at-law at the trial during his absence.

Section 272 is important in this regard because it states that except as otherwise expressly provided, all evidence taken at inquiries or trials under this Code should be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader**.**

After The Charge Is Read

According to **Section 183**, the accused has to answer to the charge after it is read to him. He has to either plead guilty or not guilty. In **Punchiappuhamy v. Wijesekera 49 NLR 216**, it was Held that it is the accused who has to state the fact that he is guilty of the charge. This statement has to be an unconditional statement. If it is not an unconditional statement, the Magistrate should proceed with the trial as if the plea was 'not guilty'. It should also be remembered that the plea of guilty should be recorded in the words spoken by the accused. Once the accused has pleaded guilty to the charge, he may change his position with regard to the charge and plead differently. However, this should be done before sentence is passed. Thereafter the trial will proceed with the rectified plea.

The Magistrate should convict the accused on his own plea. There should also be a conviction recorded by the Magistrate.

Thereafter, the magistrate should impose a punishment suited to the charge. However, before sentence is passed, the Magistrate should consider a report forwarded by the Registrar of Fingerprints, in accordance with the Prevention of Crimes Ordinance, and study the previous offences committed by the accused. He should also ask the accused or the lawyer appearing for the accused whether he has anything to say before sentence is passed.

When The Accused Pleads "Not Guilty"

When the accused pleads a defence of not guilty, the Magistrate must record it. Thereafter the prosecution commences the leading of evidence. The Magistrate should note such evidence in his presence and hearing under his personal direction and superintendence. The provisions relating to the taking down of evidence is stated in **section 273** of the code. The section also specifies that in a Magistrate's Court, evidence should be taken down in the form of a narrative and that the judge has the discretion has the to take down any particular question and answer. However, in a High Court, evidence shall be taken in the form of questions and answers.

The defence may subject any evidence forwarded by the prosecution to cross- examination. After such witnesses are cross-examined, the prosecution can re-examine these witnesses on a point, which is desirous of clarification.

Section 420 of the code is also important in this respect. Accordingly, at the commencement of every summary trial, the court shall inquire from the accused person whether he agrees to make any admissions. He could do so through his attorney at law. The court shall thereafter record such admissions. The court shall, when passing sentence on the accused person, have regard to the fact that he made such an admission. This section shall not apply to a person who is not represented by an attorney at law. Such admissions may also be made before trail, but if so, should be in writing, signed by the accused and certified by his attorney.

If an accused is charged with theft of state property or a corporation, the accused could admit to the fact that the property is state property. The prosecution therefore need not prove that fact but only prove that the accused stole the property.

Section 414 of the act also states further that any document purporting to be a report of the;

- Government Analyst,
- Government Examiner of Questioned Documents,
- Registrar of Fingerprints,

- Examiner of Motor Vehicles or Government Medical Officer etc.,

May be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.

Once the prosecution has called upon all its witnesses and produced all relevant documentary evidence, the prosecution shall conclude its case. The Magistrate shall mark all such evidence received as P1, P2, etc. Once the prosecution rests, the lawyer for the prosecution shall state, "I close the case for the prosecution marking in evidence P1-P5"

The magistrate should further consider whether *prima facie* that a case has been established or not. If he is satisfied that such a case exists, then he could call for a statement from the accused. According to English law, the defendant has three options.

1. Silence
2. Give evidence himself or lead evidence on his behalf through witnesses
3. Make a statement from the dock (Dock Statement)

The Magistrate should further inform the defendant that he has these options available to him and that it is not mandatory that he gives evidence. Thereafter, if necessary, the defence will commence with the recording of evidence.

After the defendant gives evidence, and after the consideration of that evidence, if the Magistrate is of the opinion that the accused is not guilty of the offence, and then the Magistrate could acquit the accused.

After the prosecution has concluded recording evidence and the Magistrate is of the opinion that they have not established a *prima facie* case, even in this instance, the magistrate may acquit the accused.

If the Magistrate decides that the accused is guilty of the crime, then such decision (i.e. the conviction) should be recorded and he should be sentenced accordingly.

DISCHARGE & ACQUITTAL

The Code of Criminal Procedure defines both a discharge and an acquittal. Accordingly, section 2 states that a discharge means the discontinuance of criminal proceedings against an accused, but does not include an acquittal.

An acquittal on the other hand defines itself as when as accused is freed from all charges. To free an accused from all charges, the facts pertaining to the case against him must be considered. According to **section 185,** once the evidence for the prosecution, defence and other such evidence is taken, if the Magistrate finds him not guilty, he shall record a verdict of acquittal. This therefore highlights the fact that an order of discharge cannot be ordered in this situation. In fact, the first instance that an accused can be acquitted is after the witnesses for the prosecution have been examined and cross-examined. This was Held in **De Silva v. Jayathillake 67 NLR 169** and also affirmed by the Privy Council in **Veerappan v. AG 72 NLR 361**.

Further, in **Abeysekera v. Gunawardena 37 NLR 526** and **AG v. Piyasena 96 NLR 484,** it was Held that if there is no charge read to the defendant, that is to say that if the legal procedure is not carried out or, if a decision has been arrived at through an illegal charge, even though the prosecution has concluded leading evidence, the Magistrate can order a discharge.

Section 186 goes on to say that the Magistrate can discharge the accused at any previous stage of the case (i.e. before verdict) without any restriction. However, he must nevertheless state his reasons for doing so. In **Senaratne v. Leno Hamy 20 NLR**, it was Held that the Magistrate could only discharge the accused in the event that the witnesses had not been present in court. However, in **Adrian v. Dias 55 NLR 92**, Nagalingam J. Held that in such a situation, the Magistrate had the power record a verdict of acquittal on the basis that the prosecution was not ready to commence with the proceedings and that the trial should not be postponed.

However, in **De Silva v. Jayathillake 67 NLR 169** and **Veerappan v. AG 72 NLR 361**, it was Held that in such a situation the Magistrate could only record a verdict of discharge.

Section 186 also empowers the Magistrate to acquit the accused if further proceedings will not result in the conviction of the accused. He must however state his reasons for this.

Withdrawal Of A Charge Or Complaint

A complainant can, at any time before verdict is entered, withdraw his case. Thereafter, if the Magistrate is satisfied that there are sufficient grounds for permitting him to withdraw the case, the Magistrate shall withdraw the case and acquit the accused. The Magistrate shall however record his reasons for doing so.

However, according to **section 190,** Except in the case of a complaint made under section 136(1)(a), (c) & (d), the Magistrate may, with the previous sanction of the AG, stop the proceedings at any stage without pronouncing any judgement either of acquittal or conviction and may thereupon discharge the accused. The reasons for this however have to be recorded.

The benefit of such a scheme is that in the event of a situation where the accused is accused of a charge whereby the sentence received or receivable is inadequate, the AG could indict him in the High Court after his discharge from the Magistrate's Court.

In **AG v. Gunasekera 60 NLR 334**, it has been Held that even though the prosecution rests its case, it does not mean that all the leading of evidence has been concluded. After the prosecution leads all the important matters of evidence, if the remaining evidence does not implicate the accused, the court can consider such important evidence and order an acquittal.

Acquittal Would Generally Be Ordered After Consideration Of All Relevant Evidence / Merits Of The Case

Section 188 of the code deals with situations that are connected to this matter. Here if the accused is charged with committing an offence under section 136(1)(a), and if the complainant is not present on the day appointed, then the Magistrate shall notwithstanding anything hereinbefore contained acquit the accused unless for some reason he thinks proper to adjourn the case. The Magistrate shall cancel such order if the complainant can prove that his absence was due to a cause beyond his control.

Section 188(2) states that in the case of a charge brought against an accused under section 136(1)(b) or (c), and on the day fixed for trial, the prosecution is not ready, the court may discharge the accused or adjourn the hearing based on a reason that the court thinks proper.

Section 188(3) has been amended by Act no. 15 of 1989. Accordingly, the order of discharge referred to in subsection (2) shall operate as an acquittal where either,

(a) It is set aside and the case against the accused is not reopened within a period of 01 year from the date of such order; or
(b) The case has been duly reopened and an order of discharge has been made for the 2nd time.

When An Accused Is Charged For One Offence And Another Offence Is Proved

In such an event, if evidence shows that an accused has committed an offence, which is apart from the offence already charged, then even without a charge, the accused can be held accountable for it, in the circumstances mentioned below.

Alternately, a new charge can be drawn up and the defendant can be asked to plead.

Conviction Without A New Charge

The provisions relating to this are included in **sections 177, 178 and 179**.

Section 177 could convict an accused when he is charged with one offence and it appears in evidence that he has committed another offence. In such a situation, he may be convicted for the offence for which he is shown to have committed if he could have been charged with it under the first limb of section 176, although he was not charged with it.

It can be seen that section 177 applies only to those provisions set out in section 176. Under section 176, when there is doubt as to the liability of the defendant on which ground he may be convicted, there are 2 methods by which one could overcome it. The accused may be charged either for one of the said offences or else he could be charged alternatively for each of the probable offences. (Read illustration)

When an accused is charged with an offence which consist several particulars of some that combine itself into making it one minor offence, and if such combination is proved and the remaining particulars are not, **section 178** states that in such an instance, the accused may be convicted of such minor offence, even though he was not charged with it.

Subsection (2) to the section further points out that this would also apply to an accused that is charged with the original offence in a court that does not have the jurisdiction to try such minor offence.

Section 179 speaks of a situation where a person is charged with the commission of an offence and where it is proved that he attempted to commit that offence. Further, that if in such attempt he did an act towards the commission of that offence, he may be charged of an attempt to commit that offence although he was not charged with such attempt. However, such attempt to commit that offence should be made punishable by the written law of Sri Lanka.

Where A New Charge Is Required For Conviction Of A Different Offence

Section 167 states that any court may alter any indictment or charge at any time before judgement, or as in the case of a trial in the High Court, before verdict of the jury is returned. Every such alteration shall be read and explained to the accused.

Wherever the court is of opinion that such alteration is not likely to prejudice the accused in his defence or the prosecutor in the conduct of his case. The trial may proceed after such alteration has been made, as if it had been the original indictment or charge. (Section 168)

If the court is of the contrary opinion, then it may either direct a new trial or adjourn the trial for such period, as may be necessary. (Section 169)

In such alteration, if an offence for which the prosecution requires previous sanction surfaces, then the case shall not proceed until such sanction is obtained. It may proceed only in the instance where sanction has already been obtained for the prosecution on the same facts as those on which the altered charge or indictment is founded. (Section 170)

Under section 171, the prosecutor and the accused would have the opportunity to recall or re-summon and examine with reference to such alteration any witnesses who may have already been examined.

Double Jeopardy

Can a person who has already been acquitted or convicted for an offence be tried on the same offence?

Under A plea of **autrefois convict** (Law French for "previously convicted") is one in which the defendant claims to have been previously convicted of the same offence and that he or she therefore cannot be tried for it again.

A plea of autrefois convict can be combined with a plea of not guilty. A plea of **autrefois acquit** (Law French for "previously acquitted") means the defendant claims to have been previously acquitted of the same offence, on substantially the same evidence, and that he or she therefore cannot be tried for it again. A plea of autrefois acquit can be combined with a plea of not guilty.

This is commonly known as Double Jeopardy.

The underlying idea is that, a man should not be placed in jeopardy a second time In regard to the same offence or different offence of the same facts, of which he could properly have been convicted at the first instance.

Section 314 (1)
A person who has once been tried by a court of competent Jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remain in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 176 or for which he might have been convicted under section 177.

Illustration A – A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards while the acquittal remains in force be charged with theft as a servant or upon the same facts with theft simply or with criminal breach of trust.

For this section to apply, the conviction or acquittal must “remain in force” and would not apply where such orders are overturned on appeal.

De Silva v Jayathillake – On 25th January 1960, which was the date fixed for the retrial of a summary case, a material witness for the prosecution was absent, and the Magistrate directed that the " case be called " on 9th February 1960. On the latter data the Magistrate made order discharging the accused when he was informed by the complainant that the witness would not be available for another year for his evidence to be taken. On 19th February 1961 the same complainant instituted the present case against the same accused for the same offence. Held, that the accused was not entitled to raise the plea of autrefois acquit. The earliest stage at which a Magistrate can convict an accused in a summary trial is after he has taken the evidence for the prosecution, the evidence for the defence (where tendered) and the evidence (if any) which he (the Magistrate) may of his own motion cause to be produced. The earliest stage at which a Magistrate can acquit an accused in terms of section 190 is the same stage at which he can convict him. While it is open to a Magistrate for reasons stated to discharge an accused in terms of section 191, such discharge can amount only to a discontinuance of the proceedings against that accused and does not have the effect of an acquittal. An acquittal under section 190 means an acquittal on the merits. Adrian Dias v Weerasingham overruled.

Veerappan v AG – The defence of autrefois acquit cannot succeed if in the relevant earlier case the accused was discharged because counsel for the prosecution stated that the prosecution was not adducing any evidence against the accused and there is no indication that the accused was called upon to plead to the charge. In such a case it cannot be said that the appellant was ever put in peril on the first occasion.

Section 314 (2)
A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection (1) of section 175.

Illustration B – A is tried upon a charge of murder and acquitted. There is no charge of robbery, but it appears from the facts that A committed robbery at the time when the murder was committed. He may afterwards be charged with and tried for robbery.

Section 314 (3)
A person convicted of any offence constituted by any act causing consequences which together with such act constituted a different offence from that of which he was convicted may be afterwards tried for such last- mentioned offence, if the consequences had not happened or were not known to the court to have happened at the time when he was convicted.

Illustration C – A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

Section 314 (4)
A person acquitted or convicted of any offence constituted by any acts may notwithstanding such acquittal or conviction be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

Section 315

(1) The plea of a previous acquittal or conviction may be pleaded either orally or in writing and may be in the following form or to the following effect: - "the defendant

says that by virtue of section 314 of the Code of Criminal Procedure Act he is not liable to be tried".

(2) Such plea may be pleaded together with any other plea, but the issue raised by such plea shall be tried and disposed of before the issues raised by the other pleas are tried.

(3) On the trial of an issue on a plea of a previous acquittal or conviction the depositions transmitted to the court on the former trial, together with the Judge's notes if available and the depositions transmitted to the court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges.

When An Accused Can Be Held Liable For A Distinct Offence Based On The Same Facts.

Section 314(2) states that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 175(1). If a person is acquitted on a murder charge and thereafter it transpires that he was guilty of robbery when the murder took place and there no such charge of robbery, then he may afterwards be charged and tried for robbery.

Section 314(3) states that a person convicted of any offence constituted by any act causing consequences which together with such act constituted a different offence from that of which he was convicted, he may be tried afterwards for such last-mentioned offence, if the consequences had not happened or were not known to the court to have happened at the time when he was convicted. For example, if a person is convicted for causing grievous hurt and thereafter the injured person dies, the accused could be tried again for culpable homicide.

Subsection 4 to the section states that a person could be held liable for an act notwithstanding the fact that he was discharged or acquitted for an offence constituted by such. He may be subsequently charged and tried for any other offence constituted by the same acts which he my have committed, if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

In an instance where court has ordered an acquittal and the court has only the jurisdiction to order a discharge, then as Held in **Weerasekera v. Simon 57 NLR 377**, due consideration should first be given to the legal status and not to the words in the order. As such therefore, an order of acquittal could be treated as an order of discharge under these circumstances. Similarly *vice versa*.

It has also been Held in **AG v. Piyasena 63 NLR 489** that if a charge sheet has been incorrectly recorded or if the recording is found to be illegal then the accused should only be discharged, under these circumstances.

In **Kanagasingham v. Bawa 33 NLR 356**, it was Held that if an accused is charged with theft and alternatively with the housing of stolen property and thereafter in another trial he is charged with criminal misappropriation of property, then such a charge would not be entertained since it falls into the ambit of section 176.

However, in **Premadasa v. Cooke 53 NLR 379**, it was Held that a person charged under section 298 of the Penal Code and thereafter acquitted, could yet again be charged under the Motor Traffic Act.

Plea Of Previous Acquittal Or Conviction

According to **section 315**, the plea of previous acquittal or conviction may be pleaded either orally or in writing and may be in the following form or to the following effect:

> "The defendant says that by virtue of section 314 of the Code of Criminal Procedure Act, he is not liable to be tried".

11. CHARGES IN SUMMARY TRIALS

If the Magistrate finds that the case before him should be heard summarily according to Chapter XVII, then the charge shall be drawn up first. According to **section 182**, when the accused is brought before the Magistrate, if there is sufficient ground for proceeding against him, the Magistrate shall frame charges against the accused.

A plaint differs from a charge sheet in that a plaint is produced to a Magistrate by an officer making a report under section 136. The Magistrate frames charges based on the plaint. Unlike the plaint, a charge sheet is addressed specifically to the accused.

It has been legally accepted that a Magistrate should frame the charges since he is a person who is well versed in the law to ascertain whether a plaint should be acted upon or not. It has been Held in **AG v. Baskeran 62 NLR 64**, that the whole trial was considered illegal if the Magistrate had not framed charges.

Godage and others v. OIC Kahawatte (1992) 1 SLR 54 and **Sameem v. Bribery Commissioner (1991) 1 SLR 76** both Held that the responsibility of framing charges lay with the Magistrate and that failure to do so will result in the whole trial being considered illegal. These cases Held further that since the report did not contain a signed charge sheet by the Magistrate, that the proceedings were considered illegal due to the non-compliance of section 182(1). Therefore, in both these instances, it was deemed to be illegal to convict the accused.

Charge

The rationale behind a charge is to inform the accused regarding the charges that have been set up against him.

Section 164 speaks of the charge in general. Accordingly, every charge under this Code shall state the offence with which the accused is charged. If the law, which creates the offence, gives it any specific name, the offence may be described in the charge by that name only. Where it does not give it any specific name, so much of the definition of the offence must be stated, as it will give the accused notice of the matter with which he is charged.

In addition to this, the section also states that the law and section of the law under which the offence said to have been committed is punishable shall be mentioned in the charge. **Perera v. Perera 59 NLR 64** and **Dorai v. OIC Dehiwala 61 NLR 230** stated that it is a legal requirement to include in the charge, facts that are accurate and clear, by which the accused can obtain a broad picture of the allegations against him.

The fact that the charge made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.
Example - A is charged for the murder of B. This is equivalent to a statement that the act

- *Fell within the definition of section 293 and 294 of the Penal Code*
- *Did not fall under any of the general exceptions*
- *Did not fall within the special exception under section 294, or*
- *Did not fall within exception 01and one or the other of the three provisos to that exception applied to it.*

Section 165 states that the charge shall contain particulars as to
- The time and place of the alleged offence
- The person (if any) against whom it was committed

To give the accused sufficient notice of the matter with which he is charged and to show that the offence is not prescribed (according to section 456).

In **Rohana v. Seneviratne 72 NLR 390** it was Held that the reason behind the inclusion of the date of the offence is to not mislead the accused. When preparing a charge the date or an approximate date is normally stated.

Unless any other law specifically provides for in that law or any other law, a charge shall be drawn up in accordance with the provisions of the Code (according to section 5).

Words Included In The Charge

One must be careful in the drafting if a charge since the proper definition to the offence should be included. If a person has been accused of dishonesty, as according to the provisions of the Penal Code, then all the elements of dishonesty will have to be proved as according to that section. Also, where a person is tried for giving false evidence, the charge must set out such statement and how it was made.

A Draft Murder Charge
"On or about the 1st of July in the year 1999 at Fort, within the jurisdiction of this court, by the killing of X, you are charged with having committed the offence of Murder and are liable to be punished under Section 296 of the Penal Code."

Charges Including Several Offences

There are many principles of law, which govern this area. The general rule contained in **section 173** states that for every distinct offence any person is accused of, there shall be a separate charge and every such charge shall be tried separately. There are however several exceptions to this rule.

Section 165(2) speaks of an instance where the accused is charged with criminal breach of trust or dishonest misappropriation of property. The gross sum shall be specified. In addition to this the dates between which the offence is alleged to have been committed shall also be included. It shall deemed to be a charge framed under section 174. However, the time included between the first and the last date shall not exceed one year.

De Zoysa v. Queen 63 CLW 36 Held that when the date of the charge exceeds even one day more than the specified one year, that it will be considered illegal.

JOINDER OF CHARGES

When various offences have been committed there are several legal principles that one must adhere to. **Section 173** states that for every distinct offence a person is charged with, a separate charge shall be produced and tried separately. (Note exceptions)

Section 174 states that when a person is accused of more offences than one of the same kind committed within the space of 12 months, he may be charged and tried for at one trial for any number of them not exceeding 3. In trials before the High Court, such charges may be included in one and the same indictment.

Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code or of any other law.

King v. Senanayake 20 NLR 83 Held that the offence of house breaking done for a number of days would fall under this section.

E.g. – If an accused has committed 3 offences and 2 of them are committed between a 12-month period and the other has been committed after 12 months, only the offences committed within a 12-month period can be included in one charge sheet. The offence committed after the 12 months have to be included in a separate charge sheet and tried separately.

This is one method by which the law introduces the concept of joinder of charges. Another method by which this concept can be effected is according to the provisions of **section 175**. Accordingly, in one series of acts when more offences than one are connected together to form **part of the same transaction**, that person may be charged with and tried at one trial for each of such offence. In the High court, such charges may be included in one and the same indictment.

Jonklaas v. Somadasa 44 NLR 141 and **Wilbert v. Police Inspector Halawatha 69 NLR 448** Held that in considering what is meant by 'during the course of the same transaction', the facts of the case have to ascertained. The connection between the time of the offences, the connection between the reasons for committing the offence, if the offences committed were part of one continuous series of offences etc., have to be considered.

It must also be noted that even though the offences committed fall within the ambit of the same transaction, that it need not necessarily be included in one charge sheet or indictment. It could be included in different charge sheets or indictments and tried separately. This was Held in **Boteju v. Moorthi 55 NLR 374**.

Other Important Matters To Be Considered When Preparing A Charge

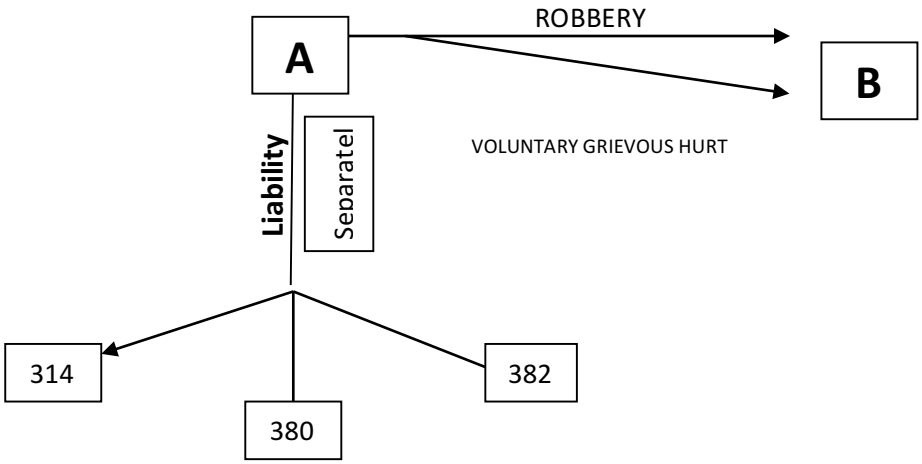
In some instances, even though an accused has committed one act, he may be liable for more than one offence. Under the Bribery Act, if a public servant accepts a bribe, then he will be liable not only for accepting a bribe to perform his official duty, but also for accepting a bribe as a public official. In the charge sheet therefore he could be charged for both these offences.

Since these offences can be punished under 2 distinct definitions it could be included as offences that form part of the same transaction.

S. 175(3)

→ When one act or more than one act by itself or themselves constitute an offence
→ When combined, constitute a different offence,

The accused may be charged with and tried at one trial for the offence constituted by such acts when combined and the separate offences constituted by each or some of such acts. (And in the HC, included in one indictment) Care must be taken under this section not to join aggravated versions of the same offence in the same charge sheet. (E.g.- causing grievous hurt as well as causing grievous hurt with an offensive weapon)



Under **section 176**, when there is doubt as to the liability of the defendant as to which of several offences the facts which can be proved will constitute, the accused may be charged either for one of the said offences or alternatively for each of such charges. (Read illustration) Any number of such charges may be tried at one trial and in a trial before the High Court, it may be included in one indictment. Or else, he may be charged with having committed one of the said offences without specifying which one.

JOINDER OF PERSONS

Section 180

When more persons than one are accused of
- Jointly committing the same offence, or
- Committing different offences performed as part of the same transaction, or
- When one is accused of the offence while the other of abetment or of attempt to commit that offence,

They may be charged and tried together or separately as the court thinks fit.

In **AG v. Munasinghe 70 NLR 241** it was Held that no other provision exists for the joinder of persons other then these provisions.

Queen v. Ibra Lebbe 65 NLR 470 Held that when a group of persons have committed distinct offences in one instance it does NOT *per se* become part of the same transaction, and they cannot be charged and tried together.

In a case that was decided ages ago, it was Held that a group of carters could not be charged and tried together when they committed the offence of riding their carts in a line in the night without any lighting. This was due to the fact that the offence did not form part of the same transaction.

In **Joseph v. Fernando 42 NLR 49**, a person was accused for theft. Another was charged for keeping in his possession those stolen items that were found on a different date and at a different place. It was Held that such an action did not constitute acts that formed part of the same transaction and that they could not be tried together.

In **Excise Commissioner Kandy v. Punchimahattaya 46 NLR 28**, a bus driver and a conductor were charged jointly for possession of illegal liquor. The inspector witnessed that

while the driver of the bus had hidden the liquor under his seat, the conductor was trying to conceal the liquor from the inspector.

In the case of a principal and an abettor, even though they may be tried jointly, if the court is of opinion that such a trial would unfairly prejudice one party, then they would commence proceedings separately.

12. NON SUMMARY PROCEEDINGS

The provisions under the former Criminal Procedure Code made allocation for the conducting of a preliminary examination for some offences. However, with the introduction of the Administration of Justice Law in 1974, this provision became redundant. However, the Code of Criminal Procedure Act no. 15 of 1979 has included provisions relating to the conducting of a preliminary inquiry in some instances.

According **to section 142** of the Code, a preliminary inquiry can be held if one or more of the offences committed by the accused falls under the **2nd schedule of the Judicature Act no. 02 of 1978** or if the AG is of under **section 145(b) or 393(7)** directs the magistrate to hold such an inquiry.

According to an amendment brought under the Judicature Act, where the case concerns the rape of a female under 16 years of age, it shall not be necessary to hold a preliminary inquiry. However, in all other instances of rape, murder, attempt to murder, hurt by dangerous weapons or the conspiring to commit those offences, it shall be lawful to conduct a preliminary proceeding.

THE SUITABILITY OF A PRELIMINARY INQUIRY

One argument brought against these inquiries is that it is a waste of time as well money. After the conclusion of the police inquiry, it takes at least 6 months to conduct and conclude a preliminary inquiry. Practically speaking, it is nearly impossible to conclude one before such time. In this instance, the probability that a witness may die or more importantly forget the facts of his testimony, are very high. We have even ended up with situations where the accused had married a witness during the time lag.

Another set back is the fact that with the conducting of a non-summary, a defendant will be subject to 2 trials. As per a normal trial, at a non-summary the witnesses are sworn in and also subject to cross-examination. This would lead to additional legal fees as payment would have to be made for 2 distinct trials.

If sufficient evidence is not produced to at a non-summary against an accused, the Magistrate could discharge the accused. In this instance, the trial need not be committed to (placed before) a High Court and therefore, wastage of time and money would be minimised. However, it must also be noted that the number of accused who are discharged from a non-summary are very few. In some instances, even with minimum evidence, the trial is committed to the High Court.

In a non-summary, a witness is required to testify under an oath. When one is not conducted, the indictment is drawn up upon the statements made to the police. This however, is unsworn. Therefore, at the trial before the High Court, a witness may always testify contrary to his statement to the police. Further, any legal action that could be taken against such a witness is minimal since the statements recorded were unsworn. However, once testified to in a preliminary inquiry, if the witness deviates from his original position, then legal action can be brought against such a witness.

Once the trial is placed before the High Court and if a witness cannot be found or is dead, then according to **section 33 of the Evidence Ordinance**, the previous testimony made by the witness to the Magistrate in the preliminary inquiry could be presented as evidence to the

court. However, in the absence of such inquiry, the prosecution would have to rely on the police statements, which have no evidentiary value.

However, it has been the opinion of many that preliminary inquiries should be used and not done away with. **Section 148** of the Code further states that if specialist evidence is to be recorded at the preliminary, then the sanction of the AG is required. Here too, such expert witness's report could only be produced and filed on record. Therefore, there would be no unnecessary cross-examination of specialist evidence.

It has also been argued that in order to minimise the time spent on the preliminary, that the number of questions to be asked at cross-examination should be limited. It has been proposed to the Commission that the defence should forward a list of prospective questions it decides to ask from a witness to the Magistrate. The Magistrate will thereafter choose the appropriate questions and record it.

Another proposition is that the police statement that the accused made should be read by the Magistrate to the accused and ask him as to the truth of the contents. If he asserts the fact that it is true, then he should be asked to sign it and give a sworn statement as to its authenticity. It should be received by the court that the defendant accepted such contents to be true.

It has also been proposed to amend the Evidence Ordinance and in the instance that such witness cannot be found or if he is dead, such a sworn statement of acceptance before the Magistrate should enable such subject matter (statements to the police) to be included as evidence at the trial.

Chapter XV of the Cr. P.C. deals with situations where the cases appear not to be trialable summarily by the Magistrate's court but trialable by the High Court.

According to **section 146**, when conducting a preliminary inquiry, a magistrate shall at the commencement of such inquiry read over to the accused the charge or the charges in respect of which the inquiry is being held. However, the accused is not required to reply to that charge, and the accused should be informed of this. In addition, if such reply is made, it shall not be recorded by the Magistrate, nor shall any reply be admissible in evidence against the accused. This is one major distinction between a summary and a non-summary trial.

Further, **section 147** also states that at the commencement of a non-summary, two certified copies of the notes of the relevant information books used for the purpose of investigation shall be furnished to the Magistrate by such OIC of the police station. In addition, all statements recorded in the course of the investigation shall also be forwarded to the Magistrate.

In a non-summary, the Magistrate shall record the statements made under oath or affirmation by witnesses to such offence, in the presence of the accused. These are called depositions. However, the evidence of an expert shall only be produced in the form of a report and shall be filed on record, unless the AG otherwise directs.

The defendant has the right to cross-examine all witnesses produced against him by the prosecution. He or his lawyer would also have the right to inspect any statement made by the witness against the accused. **AG V Ranjith Jayalath (1986) 1 SLR 205** Held that the accused has the right only to inspect the statements made by the witnesses to the police, not the notes of the investigations made by the police.

Similar to the provisions in section 192, the provisions of trial in absentia may be used and an inquiry in the absence of the accused may commence in this situation as well, under **section 148(4)**.

After the case for the prosecution is closed, the Magistrate must consider whether there is sufficient ground to place the case before the High Court on the evidence adduced. Thereafter, the Magistrate shall read the charge to the accused and explain the nature thereof in ordinary language. S**ection 150** also specifies that the accused has the right to call witnesses, and if he so desires, to give evidence on his own behalf.

Thereafter, the Magistrate shall address the accused in the words to the like effect as in **section 151**. Any answer made in response to the charge shall be recorded in the manner provided by **section 277**. This is known as a statutory statement.

If the accused wishes to add something to that statement, he may be allowed to do so. Thereafter, the accused may sign or attest that statement and the Magistrate should certify it.

The statutory statement is one of the many productions that will be produced at the Trial before a High Court. In addition, according to **section 219**, all statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution. It should be noted here that these statements are not evidence given by the accused.

After the recording of the statutory statement, if the Magistrate considers that the evidence is sufficient to put the accused on trial, **section 154** empowers him to commit the accused for trial before the High Court.

DISCHARGING THE ACCUSED FROM A NON-SUMMARY INQUIRY

According to **section 153**, if the Magistrate considers that there is insufficient evidence to put the accused on trial, he shall, with reasons to be recorded, order the accused to be discharged. However, it shall not be a bar to any subsequent charge in respect of the same facts. In this respect therefore, the Magistrate shall not resort to making use of the provisions laid down in section 150 and 151.

According to **section 156**, the witnesses who were produced before the non-summary will be required to enter a bond promising to present themselves at the trial if called upon to do so.

Section 157 states that if the accused is committed for trial, the Magistrate shall record whether the accused is on bail or in custody and certify under his hand the record of the inquiry.

13. POWERS OF THE ATTORNEY GENERAL

The powers of the AG are detailed in the Code of Criminal Procedure Act as well as the Judicature Act. While these powers are wide, it is drafted with the intention of meeting the interests of justice more efficiently.

THE AG'S POWERS WITH REGARD TO NON-SUMMARY PROCEEDINGS (PRELIMINARY INQUIRIES)

Section 142 (1) outlines the offences for which a non-summary could be held. Apart from section 142 (1) wherever the schedule does not specify a preliminary inquiry into an offence, section 393 empowers the AG to order the magistrate to conduct such a preliminary inquiry.

Under **section 395** AG has the power to call for a case record committed to the HC under section 159 from the High court.

In addition to this, whenever the AG is of opinion that there is insufficient evidence to warrant a commitment for trial, or that the accused should be discharged from the matter of the complaint, information or charge, he could quash such committal according to **section 396.**

Section 397 further empowers the AG to order a Magistrate to take further additional evidence as may be indicated in an order when he is of opinion that a criminal offence is disclosed by the proceedings against the accused but, that the evidence already taken is not sufficient to afford a reasonable foundation for a full and proper trial.
(Ex: Further evidence regarding an aspect of investigations can be recorded from a police officer, Expert evidence to establish the time of death/ age of injury)

At the conclusion of a criminal trial, if the defendant is discharged, the report is not presented to the AG. However, if a person is convinced that such discharge was not one that was made according to law, he could notify the AG by way of petition. The inquiring officer into the alleged offence could even do it. In such an instance, the AG can order the Magistrate to direct the preliminary inquiry to him as per **section 395.**

In **ATTORNEY GENERAL Vs. DON SIRISENA 70 NLR 347** it was held that when attorney General gives directions to the Magistrate under section 391of the then procedure code (presently section **395**) the magistrate's refusal to comply would be unlawful.
According to **section 398**, the AG has the power to order a High Court Judge or a magistrate to transmit to him the case record in any criminal case in which an inquiry or trial has been or is being held before him. Thereupon such inquiry or trial shall be suspended in the same and the like manner as upon such adjournment thereof. Upon such report forwarded to him, if the AG is of opinion that the accused should not have been discharged. He could then institute proceedings against that accused in the High Court.

The AG should give his advice and return the case record within 2 months.

Section 399 – where a magistrate discharges an accused under section **153** of the code the AG having considered the evidence direct that the case be committed to the High court. The AG could also redirect that a NS inquiry be held or give other directions to the Magistrate.

AG'S POWERS REGARDING CRIMINAL CASES

Section 12 states that the High Court shall not take cognizance of any offence, unless the accused has been indicted before it for trial by or at the instance of the AG.
(However, even the Director General of Bribery Commissions has been conferred the same powers.)

In **Victor Ivan Vs. Sarath.N.Silva 1998 1SLLR 340** it was held by Mark Fernando J that the AG's power to file (or not file) an indictment (for criminal defamation) is a discretionary power which is neither absolute nor unfettered. The exercise of that discretion is neither legislative nor judicial action but constitutes "executive or administrative action".

Section 393(1) states that it will be lawful for the AG's to exhibit information, present indictments and institute, undertake or carry on criminal proceedings in the following cases. They are:

a) Where in the case of any offence where a NS is imperative or the AG has directed a preliminary inquiry according to chapter 15.
b) Where the offence is not bail able
c) In any case referred to him by a state department in which he considers that criminal proceedings should be instituted.
d) In any case other than one filed under section 136 (1) (a) of this code, which appears to him to be of importance of difficulty or which for any other reason, required his intervention.
e) In any case where the indictment is presented or information exhibited in the High Court by him.

Ex: AG can exhibit information for trials –at-bar, white flag case, Angulana case

Section 191 states that apart from any complaint made under section **136 (1) (a),** for any case tried under chapter 17, that is to say summarily, the AG, Solicitor General, a State Counsel, or a pleader generally or specially authorized by the AG would be entitled to appear and attorney-at-law to appear and conduct the prosecution.

THE AG'S POWERS TO GIVE ADVICE

According to section **393 (2),** the AG shall give advice whether on application on his own initiative to State Department, Public Officers, officers of the police and officers in corporations in any criminal matter of importance or difficulty.

Section 393 (2) also states that the AG is entitled to summon any officer from the state or of a corporation or of the police to attend his office with any books or documents. Such interview would be carried out for the purpose of initiating or prosecuting any criminal proceeding or giving advice in any criminal matter of importance or difficulty.
Ex: AG can summon the Government analyst, DNA expert or JMO for a consultation

Section 393 (5) further states that the SP or the ASP in charge of any division shall report to the AG every offence committed within his area where

a) Preliminary investigation under chapter 15 is imperative, or
b) For the institution of proceedings, the consent or sanction of the AG is required, or
c) A request of such report has been made by the AG, or
d) Such SP or ASP considers the advice or assistance of the AG necessary or desirable, or

e) The Magistrate so directs, or
f) The offence was cognizable and the prosecution was withdrawn or cannot be proceeded

OTHER SPECIAL STATUTORY POWERS OF AG

Section 318 states that an appeal shall not lie from an acquittal by a magistrate's court except at the instance or with the written sanction of the AG.

Under **Section 256** of the code, where an offence is triable exclusively by the High Court, the Magistrate may, after having obtained the AG's authority to do so, or the AG himself may tender a pardon to a person directly or indirectly concerned in or privy to the offence under inquiry (ie, an accomplice) Such person shall make a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence and to every other person concerned.

This measure is adopted when there is insufficient evidence to indict the principal to the abettor in the commission thereof.

Ex : Witness Jonty in the multiple murder case of Hokandara.

Section 47 of the Judicature Act further empowers the AG to transfer an inquiry or a trial of a criminal offence from its original court to another court, whenever it appears to him that such measure would be expedient.

In some instances, bail for an accused could only be set with the consent of the AG. **Section 450 (6**) is one such section that empowers the AG to consent to bail. This is mandatory where the accused is being tried by a trial at bar.

POWERS OF ENTERING INTO A *NOLLE PROSEQUI*

This is a customary power bestowed upon the office of the AG. Whenever the AG is of opinion that in the interests of justice or for the purpose of national unity, an accused should be discharged from the case, then the AG can enter into a *nolle prosequi. (see sec194(1) of cr.procd.code)*

Section 401 states that the Solicitor general or a State Counsel may by special or general direction of the AG exercise all or any of the AG's powers except:

- The powers of entering into a *nolle prosequi*
- Pardoning an accomplice
- Sanctioning an appeal from an acquittal in the MC

The above powers may only be exercised by the AG himself. They cannot be delegated to subordinate officers.

14. COMPOUNDING OF OFFENCES

A criminal act in which a person agrees not to report the occurrence of a crime or not to prosecute a criminal offensar in exchange for money or other consideration.

Section 266 –

(1) The offences described in the first and second columns of the given table may, when a prosecution for such offence is not pending in the Magistrate's Court, be compounded by the person mentioned in the corresponding entries in the third column of that table and when a prosecution is pending in a Magistrate's Court be compounded by that person with the consent of the Magistrate of that court.
(2) When any offence is compoundable under this section the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.
(3) When the person who would otherwise be competent to compound an offence under this section is a minor, an idiot, or a person of unsound mind, any person competent to contract on his behalf may compound such offence.
(4) Subject to the provisions of any other law the compounding of any offence under this section shall
    (a) when a prosecution for such offence is not pending in the Magistrate's Court, not have the effect of an acquittal of the accused;
    (b) when a prosecution for such offence is pending in a Magistrate's Court, have the effect of an acquittal of the accused.
(5) Any offence not described in this section shall not be compounded

According to cases such as **Don Harry v. Vetto Hami 43 NLR 431** and **Edwin v. Sinna Thambi 53 NLR 424** that were decided under the provisions of the previous law relating to Criminal Procedure, it has been Held that the compounding of an offence has the effect of an acquittal of the accused.

However, according to **Act no. 11 of 1988**, the amended section 266(4) states that when the prosecution for such offence is not pending in the Magistrate's Court, it shall not have the effect of an acquittal of the accused. In addition to this, it also states that when the prosecution for such offence is pending in a Magistrate's Court, then it shall have the effect of an acquittal of the accused.

Perera v Mendis – Magistrate doesn't have power to give conditions which must be followed by parties after compounding it.
Examples of compoundable offences
(Offences – Persons by whom offence maybe compounded)

- Criminal/House trespass – Person in possession of property
- Defamation – Person defamed
- Criminal Intimidation – Person intimidated
- Grievous hurt – Person to whom hurt was caused
- Wrongful restraint – Person who was restrained
- Assault
- Mischief
- Affray

15. SUSPENDED SENTENCES AND CONDITIONAL DISCHARGES

Section 303 discusses the provisions relating to suspended sentences. The section has been repealed and the new provisions have been substituted by **Act no. 47 of 1999**. In accordance with this law, the court must consider certain facts before suspending the whole or part of the sentence of the accused.

In the old law, the court had the discretion to order a suspended sentence for an offence that carried a maximum prison sentence of 2 years. However, the new provisions lay down further considerations for the court to act upon before ordering such a sentence on an accused.

(***See Section 303(1) in Act no. 47 of 1999.***)

When A Suspended Sentence Should Not Be Given

The provisions with regard to this are discussed under **section 303(2).**

According to the 4th limb of this section, a court shall not make an order for suspending a sentence of imprisonment, if the term of imprisonment imposed or the aggregate terms of imprisonment where the offender is convicted for more than one offence (*see section 16*) in the same proceedings, exceeds 2 years.

Under the old law, a sentence of less than 2 years could have been suspended. However, under the new law an additional restriction is imposed. I.e. if a person convicted of more than one offence and the aggregate of the term of punishment for all those offences exceed 2 years, then such a sentence cannot be suspended.

(***Read section 303(2)*** as well)

Sec 303: Where an offender is sentenced for a term not exceeding 2 years the sentence shall not take effect *unless* that during that period specified by court which is a period not less than 5 years, such offender commits another offence punishable with imprisonment. This was amended by **Act No. 47 of 1999** where the court sentencing a person to imprisonment can suspend the whole or part of the sentence. Here the court must consider the following when making such an order.

Firstly the nature of the offence and the guilt of the offender regarding the offence. Secondly the previous character of the defendant and the loss caused by the offence. Thirdly the maximum punishment ordered for such offence and the facts that would permit an order of simple imprisonment. Fourthly the need to order an appropriate punishment and the need to discourage society from committing similar offences. Lastly the need to protect society & the victim.

The ordering of Suspended Sentences have become more regularised due to the amendment which also states instances where Suspended Sentences cannot be ordered. For instance if the law has stated a minimum term of imprisonment and if the defendant is already serving a term of imprisonment or if he is ordered to do so. Thirdly if the offence was committed when offender is subject to probation or a conditional release or discharge & the punishment for the earlier offence exceeds 2 years.

The suspended term should not be less than 5 yrs. The Court must notify the offender at time of ordering Suspended Sentence that if he commits an offence during the period of suspension (operative period) the sentence will come in to operation.

If an Offence is Committed during the Operative Period

The operative period commences on the date that the Suspended Sentence is ordered. If the person doesn't commit any offence during rehabilitation he is discharged of the offence at the end of such period. Under the earlier law at the end of the operative period it was considered that person had not undergone imprisonment. Yet under the present law the person ordered to serve the Suspended Sentence was considered as having served a term of imprisonment. However this will not subject him to disqualification or make him unsuitable to hold office or obtain a pension.

The procedure if a person commits an offence punishable with imprisonment during a Suspended Sentence

Any person can file a plaint with affidavit, in the court which ordered the Suspended Sentence. The plaint cannot be filed two years after the expiry of the operative period. If the offence is during the operative period, the person guilty of such offence can be summoned to court for inquiry. At the end of such inquiry the court can order that the Suspended Sentence should come into operation or that a Part of the sentence should come into operation or the court may even extend operative period. Court is limited to making such orders and may not make any other order.

The court when ordering a Suspended Sentence should explain the nature of the Suspended Sentence in a language that the offender understands & if he commits an offence during the operative period, which is punishable with imprisonment, he can be ordered to serve both terms of imprisonment.

Operational Period

The period for which the whole or part of the sentence may be suspended is referred to as the operational period. It shall be determined and specified by court when making the order suspending the whole or part of the sentence. In addition to this **section 303(3)** also states that such period should not be less than 5 years from the date of the order suspending the whole or part of the sentence.

According to the section, if during the operational period, an offender is sentenced to imprisonment for another offence committed prior to the commencement of the operational period, the operational period continues to elapse while the offender is serving that sentence.

Section 300 also states that when a person actually undergoing imprisonment is sentenced to imprisonment, such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced. Thus the above provision is in conformity with section 300

After The Operational Period Ends

Section 303(7) states that at the end of the operational period, an offender who is sentenced to suspended imprisonment shall be taken to be discharged from the sentence.

The old law states that if the offender does not commit a subsequent offence during the operational period, the conviction and the suspended sentence imposed on the offender shall be deemed for all purposes, never to have been entered or imposed.

However, under the new law, **section 303(8)** states that a suspended term of imprisonment shall be taken as being a sentence of imprisonment for the purpose of any law, except any law providing for disqualification for, or loss of office or the forfeiture or suspension of pensions or other benefits.

E.g. – a person could qualify for the post of a MP even if he has carried out a suspended sentence and has not committed any other punishable offence during the operational period. This would not therefore serve as a disqualification.

Section 303(12) further states that if a person has been convicted and dealt with for an offence, the statutory penalty for which is, or includes imprisonment, and that the offence was committed during the operational period in relation to another offence, then a complaint may be made to the court that imposed the suspended sentence under subsection (1) in relation to the other offence.

This complaint can be made by any person not later that 2 years from the end of the operational period. Such complaint shall be in writing and be supported by affidavit from the complainant.

On receipt of such complaint, the court shall summon the person in respect of whom it has imposed a suspended sentence and the person making the complaint, to appear before court.

Failure to attend court will result in the court issuing a warrant for the arrest of any such person and thereafter, be brought before court.

Section 303(13) further states that if the court is satisfied that the person to whom a suspended sentence was imposed is guilty of an offence, the statutory penalty for which is, or includes imprisonment and that the offence was committed during the operational period, the court may adopt the following. Either

- Restore the sentence or part sentence held in suspense and order the offender to serve it, or
- Restore part of the sentence or part sentence held in suspense and order the offender to serve it, or
- In the case of a wholly suspended sentence, extend the operational period to a date not later than 12 months from the date of the order, or
- Make no order with respect to the suspended sentence.

It should also be noted that under the circumstances, unless the court is of the opinion that it is unjust to do so in view of all the circumstances that have arisen or have become known since the suspended sentence was imposed. If it is of that opinion, then the court shall record it's reasons in writing.

In addition to this, the court may impose a fine not exceeding Rs 25,000/- on such person.

Section 304 further points out that a court proposing to make an order suspending a sentence of imprisonment shall, before making such order, explain or cause to be explained, to the offender in a language readily understood by the offender;

- The purpose and effect of the proposed order; and
- The consequences that may follow if the offender commits another offence punishable with imprisonment during the operational period.

CONDITIONAL DISCHARGE

Sec 266: Compounding Offences done only in the Magistrates Court if the case pending before Magistrate's Court or if the case is not pending before the Magistrate's Court [plaint not filed yet].

Gunapala v OIC Galewala- It was held that the case commences only after plaint is filed under **Sec 136.** While case is pending, victim in **Sec 266** can compound offence with consent of Magistrate. When case is not pending before court, consent of Magistrate is not required.

Result of compounding offences is important because Compounding becomes an acquittal, if done while the case is pending but if not pending, it doesn't become an acquittal.

Perera v Mendis -Magistrate doesn't have power to give conditions which must be followed by parties after compounding

Don Harry v Beetto Harry - Magistrate cannot re-try case which has been compounded

Sec 266(5): Any offence not described in **Sec 266** cannot be compounded. However, abetting & attempting offences in **Sec 266** can be compounded.

Sec 266(3): If a person who can compound offences in **Sec 266** is a minor, idiot, of unsound mind, then any person competent to contract on his behalf may compound the offences.

Section 306 speaks of instances where a person could be granted a conditional discharge when he is charged with an offence in the Magistrate's Court and is punishable by that court. If the court is of opinion that, having regard to

- The character, antecedents, age, health or mental condition of the person charged, or
- The trivial nature of the offence (*de minimis non curat lex*), or
- The extenuating circumstances under which the offence was committed,

That it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to discharge the offender conditionally, then the court may not convict.

In **Emanis Singho v. IP Dompé 69 NLR 158**, it was Held that once the accused has been found guilty of the offence that he could not be conditionally discharged. It should be noted therefore that a Magistrate could order a conditional discharge only in an instance where the accused has not been found guilty.

AG v. Rajasinghe (1993) 2 SLR 81 went on to Hold that a conditional discharge could only be granted in a Magistrate's court.

In addition to this, the court would either discharge the offender with a warning or discharge the offender conditionally on his entering into recognizance, with or without sureties, to be of good behaviour. He would have to appear for conviction and sentence when called on at any time during such period, not exceeding 3 years, as may be specified in the order of court.

Identical provisions are made by **section 306(2)** when a person has been convicted on indictment (i.e. in the High Court), subject to the difference that no discharge on a warning could be given. It must be noted that this subsection applies only the stage of sentencing. In this situation as well, he would have to appear for sentence (only) when called to do so, at any time during such period, not exceeding 3 years as specified in the order.

It should also be noted that a conditional discharge could be ordered on an accused upon an indictment only after he has been found guilty of the offence.

Section 309 states that if the court before which the offender entered into recognizance to appear for conviction or sentence is satisfied on information by oath or affirmation, that he has failed to observe any of the conditions of the recognizance, it may either issue

- A warrant of apprehension, or
- A summons to the offender and his sureties (if any)

Requiring him to attend on the date specified. The court could either sentence him for the original offence and could also invalidate the bond partially or wholly.

16 TRYING A CASE BEFORE THE HIGH COURT

A criminal trial could be heard before a High Court only upon an indictment. If after the commencement of the non-summary proceedings, the matter is brought before the High Court, according to **section 159**, the Magistrate shall transmit to the AG, a certified copy of the evidence recorded at the non-summary proceeding. Thereafter, if the AG is of the opinion that there is insufficient evidence to warrant a commitment for trial, and if he is of the opinion that the accused should be discharged from the matter of the complaint, then according to **section 396**, he may by order in writing quash the commitment made by the Magistrate. Once the AG makes such direction, it shall be the duty of the Magistrate to comply with it.

If the AG is of the opinion that the evidence gathered against an accused in insufficient to afford a foundation for a full and proper trial, he shall, under **section 397**, make in order a writing requiring the Magistrate's court to record such evidence and direct the record of inquiry to be returned to the Magistrate's court.

After the perusal of the non-summary proceeding, if the AG is of the opinion that the case should be tried before High Court, an indictment should be drawn up according to the requirements under **section 162** of the Code of Criminal Procedure.

If the accused is not discharged, the Magistrate shall record the statutory statement made by the accused. If he does make such a statement, that fact too should be attached to the list of annexations to the indictment. Such a statement should be in conformity with section 219 where it shall be put in and read before the close of the case for the prosecution.

If the provisions of section 151 (statutory statement) are not carried out by the Magistrate during a non-summary proceeding, then the AG may act under the provisions of section 397 and request the Magistrate to record such statutory statement and forward it to him.

Section 160(1) states that an indictment can be drawn up by the Attorney General. However, it should also be noted that the Director General of the Bribery Commission also has the power to forward an indictment for trial. (There are 2 other situations where the High Court may take cognisance of a matter – see COMMENCING ACTION BEFORE A HC (p.2))

Further, according to section **160(3),** the AG can substitute or include in the indictment, any charge in respect of any offence which is disclosed by any evidence taken by the Magistrate, notwithstanding that such charge was not read to the accused by the Magistrate.

Contents Of An Indictment

This topic is highlighted under the provisions of **section 162**. This would necessarily include the list of witnesses that the prosecution intends to call as well as the documents and things intended to be produced at the trial. However, after notice to the defence, the prosecution has the right to call any other witness or produce any other thing that is not included in the list.

If a non-summary proceeding has been held, then all the documents and certified reports should be included in to the list of the indictment. If a non-summary proceeding has not been held, then statements made by witnesses to the police should be included. If a non-summary proceeding has been conducted, then the annexation of the statements by witnesses that were made to the police is not essential. But if the Defence Attorney wishes to

receive a copy, then according to **section 158**, he will be entitled to such copy, which he could obtain from the officer in charge of the police station where the relevant books are kept.

The reports of the inquiry by the police need not be forwarded to the Defence. Even though they participate in the investigation, they do not make verbal statements in this regard. However, they are supposed to submit to the defence their findings at the crime scene. This problem does not arise if a non-summary proceeding has preceded the trial since all evidence with regard to the inquiry would be recorded.

In addition, the indictment should also include sketches, copies of identification parades, etc.

The indictment shall be in the prescribed form and shall be brought in the name of the AG and shall also be signed by him or the Solicitor General or a State Counsel.

AFTER THE INDICTMENT IS DRAWN UP

The procedure to be followed upon the indictment being received by the High Court is dealt with under **section 195**. The judge of the High Court presiding at the sessions of the High Court holder in the judicial zone whereat the trial is to be held shall,

- Cause the accused to appear before court or brought before him.
- Cause a copy of the indictment with its annexes to be served on the accused/ accused persons, who will be tried upon it.

Under the grounds specified under **section 241**, the court may proceed with the trial with or without a jury, if the accused does not appear in court (similar to the provisions of summary procedure S.148 and non-summary procedure S.192).

According to **section 162** of the Code, if the charge in the indictment is one that falls under the 2nd schedule of the Judicature Act, then a jury could try such proceeding. However, this option is at the discretion of the accused (i.e. whether or not a case should be heard before a jury or only a judge) and was brought about by an amendment to the act by no. 11 of 1988.

Further, according to section 195(ee) {inserted by Act no. 11 of 1988}, if the indictment relates to an offence triable by a jury, the judge should inquire from the accused whether or not he elects to be tried by a jury.

In **Dharmasena v. Republic 101/93 CA**, it has been Held that an accused can change his option of whether to be tried either by judge or jury **anytime before** the commencement of the trial.

In addition, in the case of **Wijeysena Silva & others v. AG (1998) 3 SLR 309**, it was decided that where there are several accused, each of them should be individually questioned as to the method in which they prefer to be tried. According to their discretion therefore, a separation of trials should commence (S180).

Section 195 also states that where an accused opts to be tried by a jury, the accused should elect from which of the respective panel of jurors the jury shall be taken from (whether Sinhala or Tamil). He shall also be informed that he shall be bound by and may be tried according to the election so made.

Further, an order regarding the bail of the accused should also be recorded in this instance. In addition to this, he should be asked whether he requests for an assigned Counsel. If the accused consents to this, then a lawyer will be nominated by the state and assigned to him. The state would bear the cost of legal charges.

In such an instance, even though the indictment has been handed over to the accused, he will then be requested to forward it to his assigned counsel. Thereafter, if the accused opts to retain another counsel, he may request that the brief be handed over to him once again. However, the Assigned Counsel must appear in court on the subsequent date of the proceedings and inform the court that he has been taken off the case and request permission from court to be excused from further proceedings.

The day that the accused is handed with the indictment, he could be informed of the date of the trial.

TRIAL BY JURY BEFORE A JUDGE

Section 161 of the Code outlines the instances when a jury could hear a case. As such, a jury could hear a case if the offence is

- One that it either falls under list set out in the 2nd schedule to the Judicature Act no. 02 of 1978; or
- If the AG decides that the case is of such nature that it should be heard in the High Court before a jury.

Whether there was a preliminary inquiry or not, in every other case, trial by indictment in the High Court shall be heard without a jury.

The option of the case being tried by jury is at the discretion of the accused. Whether or not a case should be heard before a jury or only a judge was brought about by an amendment to section 162 **by Act no: 11 of 1988**.

Further, according to section 195(ee) {inserted by Act no. 11 of 1988}, if the indictment relates to an offence triable by a jury, the judge should inquire from the accused whether or not he elects to be tried by a jury.

If the accused consents to having the trial heard before a jury, then the jury shall be chosen from the relevant panel of jurors.

Requirements of A Juror

According to **section 244** of the code, a person could be eligible to serve as a juror if he conforms to the following requirements. He/she would necessarily

- Resident in Sri Lanka and be over 21 years of age
- Have obtained a pass at the G.C.E. (O/L) Examination or an equivalent examination in six subjects including Sinhala or Tamil language
- Be in receipt of an income of not less than Rs 300/- per month.

Further, every such person who is also a graduate of a recognized university or holds an equivalent professional qualification shall, in addition, be qualified and liable to serve as a special juror.

Section 208 further states that the prosecuting counsel or the accused may apply to the High Court at the sessions where the trial is pending for an order requiring a special jury to be summoned to try any case. If the judge is of the opinion that the application is just and reasonable, he shall make the order accordingly.
However, such application should be supported by affidavit in the instances where it is not made by the Attorney General, Solicitor General or State Counsel.

Section 246 states that the following people shall not serve on a jury except with their own consent.

- Persons serving in the Sri Lanka Army, Navy or Air Force on full pay or active employment.
- Persons registered under the law for the time being in force as medical practitioners
- Persons duly qualified as dispensers of drugs and actually employed as such
- Registrars and Deputy Registrars of Birth
- Persons over the age of sixty years.

Section 245 further includes that category of persons who are not eligible to serve as jurors. As such,

(a) The President of the Republic of Sri Lanka
(b) Judges of Courts established under the law in force
(c) Members of Parliament
(d) Representatives of Foreign Governments
(e) Officers and other employees of parliament and of courts and the Ministry of Justice
(f) Inquirers appointed under this code
(g) Attorneys at Law
(h) Police and Custom Officers
(i) Priests
(j) Persons employed in the Department of the Attorney General, Commissioner of Prisons and Commissioner of Probation and Child Care services
(k) Persons who have suffered imprisonment for a term of one month or more
(l) Persons who labour under such bodily or mental incapacity or profess such religious tenets as render them unfit to discharge the duty of a juror.

Cannot serve in the capacity of a juror.

Sec 246: Can serve as jurors only with their own consent

1. Armed Forces
2. Registered Medical Practitioners
3. Qualified drug dispensers & employed as such
4. Registrars & Deputy Registrars of Births & Deaths
5. Over 60

Other than the above - all others qualified to serve on a jury are bound to do so

Sec 248(3): GA must prepare name list of all qualified jurors in July and forward to HC Registrar. Absence is an offence.

Sec 251: Juror not compelled to serve more than 2 weeks. However once trial commences must serve till the end. Jury trials heard continuously. No postponements.

Commencing Trial before a Jury [same manner as trial before a judge

Sec 204: Indictment read & explained to accused. "Are you guilty or not guilty?"

Sec 205: If **accused pleads guilty** + judge satisfied that he **understands effect of plea** correctly, then plea recorded on Indictment & **is convicted**. If accused pleads **guilty** to a charge **of murder**, judge may **refuse to receive plea** & trial commences as if the accused pleaded not guilty.

Sec 206: If accused *doesn't plead* or he pleads *not guilty* or judge *refuses to receive* plea of guilty (in case of murder) jurors are chosen to try the case.

Sec 218: Prosecution begins. States nature of charges. Evidence proposed to establish guilt. Examination of witness. Cross-examination by defence. Foreman may ask question on behalf of jury. Judge **must not** allow inadmissible questions of fact. Jury questions and answers must be recorded.

Sec 219: Statements of accused recorded in course of inquiry in MC. Is read as evidence, before close of prosecution case.

Sec 220: If judge considers that there is **no evidence against accused** at end of prosecution case, direction to jury to return verdict of **not guilty.** If judge considers **that there is evidence** against accused judge asks defence if it's going to adduce evidence. If **defence** has *no intention of adducing evidence* **prosecution addresses jury for the 2nd** time in support of his case. Sum up of evidence against accused. Unlike in a *trial by judge* where at the end of the prosecution the judge considers if he **accepts the evidence** led to prove accused's guilt, in a *trial by jury* judge only considers **if there is evidence** to prove accused's guilt. Jury-Judge's *acceptance* of evidence is immaterial. The jury does that.

Sec 221: Defence begins its case. States facts and law relied on. The accused can remain silent. He can make a dock statement *[considered as evidence].* Call witnesses to give evidence on his behalf. Can give evidence himself. Prosecution can cross-examine the witnesses & accused.

Selection of The Jury

The selection of the jury happens by way of casting lots. The prosecution and the defence have the right of objecting to any member serving on the jury. The accused could object to a total number of 2 jurors without mentioning any reason. The prosecution can object to any number without a reason. When any juror who is supposed to serve is objected to, he would thereafter be ordered to stand down. Those not asked to stand down can take their place. According to **section 209** of the Code, the jury shall consist of seven persons. If 07 jurors cannot be chosen due to various objections, the High Court Judge could thereafter inquire into the reasons for such objections. If there are sufficient reasons for the objections, the Judge could postpone the trial until a new jury is selected.

The grounds on which a juror can be objected to sitting in on a jury are mentioned in **section 211** of the Code. It could be either

(a) That there is some presumed or actual partiality in the juror, or
(b) On some personal ground such as deficiency in the qualification required by any law or rule having the force of law for the time being in force, or

(c) His executing any duties of police or being entrusted with police duties, or
(d) His having being convicted of any offence, which in the opinion of the Judge renders him unfit to serve on the jury, or
(e) His inability to understand the language of the panel from which the jury is drawn, or
(f) Any other circumstance which in the opinion of the judge renders him improper as a juror.

Section 212 goes on to say that while the Judge shall decide an objection taken down, his decision shall be final.

Choosing of The Foreman

Section 213 of the Code states that once the jurors have been chosen, the Registrar will address them and request them to choose their foreman from among them. If according to the Judge, within a reasonable period of time, they do not choose one, the Judge appoints the foreman. Thereafter, the jurors shall be sworn or affirmed.

A juror would normally be asked whether he is aware of the facts of the case and whether he is related to anybody from the prosecution or defence. If such questions are answered in the affirmative, then that juror would be asked to stand down at the commencement of the trial. In **Rex v. Edwin 48 NLR 211**, after the trial proceeded, it was found out that one of the juror's cousins was married to the sister of the witness. On that ground, the entire jury was discharged.

Section 216 also states that the Judge may discharge the jury when the prisoner becomes incapable of remaining at the bar (e.g.- due to sickness) and whenever in the opinion of the judge the interests of justice so require.

Further, if by chance the jury is exposed to any inadmissible evidence regarding the bad character of the accused, on that ground alone the jury can be discharged.

Rex v. Fernando 47 NLR 97 Held that when a witness stated that defendant had prior to this given false evidence, the jury was discharged. In such an instance, the trial would be held before a new jury.

Commencing The Trial Before Jury

Section 217 states that as soon as the jury has been sworn in, the Registrar shall in the hearing of the accused read the indictment to the jury. The judge shall then inform them that it is their duty to listen to the evidence and upon that evidence to find by their verdict whether or not the accused is guilty of the charge or charges. The judge may also direct them briefly on the presumption of innocence, the burden of proof and such other principles of law as may be relevant to the case.

Once the charge sheet is read to the accused before the jury and he pleads 'not guilty', the trial will commence thereafter. The prosecution leading evidence, cross-examination, re-examination will be carried as out as normal procedure would warrant it.

After a witness has given evidence, the jury could be asked if it has a question to pose to the witness. If it does, the members should inform the foreman.

Once the case for the prosecution is closed, **section 220(1)** states that if the judge considers that there is no evidence that the accused committed the offence, he shall direct the jury to return a verdict of 'not guilty'.

Whether or not the evidence can be accepted is not a matter for consideration by the Judge at this point. If the jury is of opinion that there was sufficient evidence to find him guilty, then the defence could be called to open his case.

Acceptable Verdicts Of A Jury

When the case for the defence and the prosecuting counsel's reply (if any) are concluded, the judge shall charge the jury by summing up the evidence and laying down the law by which the jury are to be guided. **(Section 229)**

Thereafter, the jury would retire into the jury room to come to a finding. Further, all jurors take an oath not to discuss any matter relating to the case (with outsiders/parties to the case) after they leave the courtroom. After the jury has come to a decision, the court would be informed. Thereafter the court would reconvene. The foreman would thereafter be asked whether the jury has reached a verdict by the officiating registrar. He would first be asked whether the decision was reached unanimously. If it were not so then the court would question the breakdown of the decision. If it is by a 5-2 or 6-1 majority, then the court would accept the decision. If it is a 4-3 majority decision, the court will not allow such verdict.

When The Judge Does Not Agree With The Verdict Of The Jury

Even though the jury has unanimously arrived at a verdict, the judge may be at variance with such decision. In an instance where the judge thinks that an accused should be made guilty of any charge and the jury finds him otherwise, he cannot force his view to be accepted by the jury. In **Queen v. Handy 61 NLR 265** and **Queen v. Arnolis Appuhamy 70 NLR 256,** It has been Held that the verdict returned should be one that is made by the jury and not by the judge. The basis on which the judge could pose any question regarding such decision should be merely to understand the rationale behind such finding and not as to the accuracy of the decision. In an instance where the jury returns a verdict whereby an accused is found guilty of Culpable Homicide, the judge can question the jury in order to understand whether the foundation for the finding was based upon the knowledge, the exceeding of the right of private defence etc. However, he cannot question its accuracy.

In **Karunadasa and another v. AG (1983) 2 SLR 22**, When the jury returned a verdict of guilty on Culpable Homicide, the judge refused to accept the decision and directed them to return a verdict of guilty of Murder. This was Held to be illegal.

Duty of Judge at a Jury Trial

Sec 230: Firstly the judge has to decide all questions of law, arising in the course of the trial. He has to decide questions regarding the relevancy of facts which are to be proved, the admissibility of evidence, the propriety of questions asked and he has to use his discretion to prevent inadmissible evidence being presented, whether it's objected to or not. At the commencement of trial, judge must give an introduction regarding the legal principles that apply to a case. At the end of the trial, judge must give a summary of the evidence presented & necessary directions to the jury and in some instances, before admitting certain evidence, he must consider if other facts have been proved. For example if a confession is made, the judge must 1st decide the voluntariness of a confession, which is a question of law, by

conducting a *voire dire* inquiry, before admitting such evidence. The Jury **cannot be present** at such inquiry. If judge is satisfied that confession was made voluntarily, it can be presented as evidence present at the inquiry.
Secondly he has to decide on the meaning & construction of all documents, given as evidence in trial. Thirdly he must decide on matters of fact need to be proved, in order to enable evidence of particular matters to be given. And finally he must decide if any question that arises is for him or the jury for if, according to law, a fact must be decided by a jury, a judge cannot decide incorrectly that it must be decided by him.

Queen v Pauline de Crusz -At the end of prosecution case, judge must decide if defence should be called or not.

Sec 220: When prosecution case ends. If judge considers that there's no evidence that accused committed offence he must direct jury, to return a verdict of "not guilty". The judge must only consider if there's sufficient evidence, must not decide on acceptability of such evidence. If judge considers that there is evidence that accused committed the offence he must call the defence. If the defence doesn't intend to adduce evidence……..See **Sec 220** ***Supra***

Queen v Sethang-The judge must place all facts in favour of defence, before the jury in his final address. If the judge doesn't give directions regarding an important fact it is a **non-direction**. If however he interprets a fact incorrectly it is a **misdirection. I**f a fact is material to the case & judge misdirects/non-directs the jury, judgement can be overruled in appeal. The judge must also state as to what an *acceptable verdict* is.

Karunaratne v Republic -judge must give directions to jury on verdicts it can return

Duty of Jury at a Trial before a Jury

Sec 232: They must decide which view of facts is true & then return a verdict which they ought to return under such view, according to the direction of the judge in order to decide if evidence should be accepted or rejected. Secondly they must determine meaning of all technical terms [other than terms of law] for if a certain word is defined in law, the judge must explain the legal meaning to the jury and the jury is bound to accept such meaning, as in for example 'dishonestly' where the judge must explain the meaning given to it in the Penal Code & jury bound to accept it. The jury must also decide on all questions, which according to law, are deemed to be 'questions of fact', for example if murder was committed under grave & sudden provocation the jury must decide whether the provocation was grave enough, to warrant a reasonable man to commit a homicide (a question of fact)

Karunadasa & Others v. Republic - Once the trial commences, if the jury consents the accused can be convicted for a lesser offence. For instance if B is charged for murder & he pleads guilty to a lesser offence of culpable homicide not amounting to murder, judge must inquire from jury if they are willing to accept it. If they're not, the trial must continue.

State v Sittampalam **-if defendant wants to plead guilty to a lesser offence, during the trial he must first get the consent of State Counsel must be obtained and only if he consents, will the jury be asked, if they consent as well. If the jury does not consent to accept the lesser offence the trial must continue.**
The jury must decide if general indefinite expressions apply to particular cases but if an expression refers to a legal procedure or a meaning is ascertained by law it is the duty of the judge to decide the meaning.

The Duty Of The Judge And The Duty Of The Jury

Section 230 of the Code outlines the duty of the judge. He has to decide all questions arising in the course of the trial and to the relevancy of those facts, which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties. It is also his discretion to prevent the production of inadmissible evidence whether it is or not objected to by the parties.

He has to also decide upon the meaning and construction of all documents given in evidence at the trail. He should also be able to decide upon the matters of fact, which it may be necessary to prove in order to enable evidence of particular matters to be given. In addition, he has to also decide whether any question which arises is for himself or for the jury.

In some instances, to prove the existence of one piece of evidence, other circumstantial evidence needs to be adduced first.
E.G. When the original has been destroyed, before admitting in evidence and duplicate or secondary evidence, the fact that the original was destroyed must be proved first. In such situations, then judge must consider such circumstantial pieces of evidence.

Section 220(2) also confers power on the judge to consider whether there is sufficient evidence to say that the accused did commit the offence, in order to ask him or his pleader to adduce evidence. In **Queen v. Kularatne** and **Queen v. Pauline De Croos**, the judge considered whether there was sufficient evidence to prove the charges against the accused.

Whether such charges have been proved is the duty of the jury

Section 232 defines the role of the jury. Accordingly, it is the duty of the jury to decide which view of the facts is true and return the verdict, which under such view ought according to the direction of the judge to be returned.

Further, it is also their duty to determine the meaning of all technical terms and words used in an unusual sense which it may be necessary to determine whether such words occur in such documents or not.

In an instance where an accused has been charged for the offence of murder, it is the duty of the judge to enlighten the jury of the distinction between murder and culpable homicide. However, it is the jury that decides whether the accused has committed an offence according to section 293 or 294 of the Penal Code.

At the end of the trial, it is the jury that decides whether the accused is guilty of an offence or not. It is the duty of the judge to pass sentence on the accused.

It is the duty of the judge to address the jury before the commencement of the trial on the principles of law. In his summing up address to the jury the judge may also direct them briefly on the presumption of innocence, the burden of proof and such other principles of law as may be relevant to the case. If the jury has not been so properly directed by the judge before they reach a verdict, on appeal, the decision reached at the point of trial at the High Court could be found invalid.

Instances Where A Jury Can Be Discharged

The jury can be discharged when the trial is in progress at any stage. Usually the jury is discharged after verdict is given.

Firstly according to Sec 237: If the jury or the required majority cannot agree (if jury cannot give acceptable verdict) the judge shall discharge them after a lapse of time if he thinks it reasonable to do so. [See **Sec 234** ***Supra***]

Secondly according to Sec 215: During the course of trial, before verdict is returned, if any of the following happen the judge can order a new juror to be added or discharge the jury and order a new one. For instance if any juror is prevented from attending throughout the trial, (due to a sufficient reason) or the juror is absent & it's not practicable to enforce his attendance or the juror is unable to understand the language in which evidence is given or when interpreted the language in which it's interpreted.

Thirdly according to Sec 216: If the defendant becomes incapable of remaining in court or if the defendant cannot appear in court for a long time, due to ill health, the judge can discharge the jury.

Fourthly in the interest of justice the judge can discharge jury yet he cannot discharge jury, merely because he disagrees with verdict of jury.

Queen v Arnolis Appuhamy**- The judge must not influence jury with his views & opinions and he cannot force jury to accept his conclusions regarding the case. It is the sole responsibility of jury to return a verdict.**

Fifthly if bad character of defendant is revealed before the jury, even by mistake, judge can discharge jury for the reason that the bad character of accused is inadmissible as evidence in a criminal case.

Sixthly the jury maybe discharged for any other reason that may arise at any stage of the trial.

Queen v Kanagaratnam **-During the trial, it was discovered that a prosecution witness was a relative of one of the jurors and so the jury had to be discharged.**

State v Vidanagamage Edwin**- It was discovered that one of the jurors was married to a relative of a prosecution witness and it was reasonable to discharge the jury**

Queen v Pinhamy**- During the trial, a juror was seen talking to a witness. This was not a valid reason to discharge the jury.**

Queen v Podi Sigho - One of the five defendants fell ill during the trial and the judge separated that defendant's case & the case against the other 4 defendants was continued &

heard by the same jury. It was held that this procedure was correct however the Indictment must be amended. In this case, the name of defendant not present was not included so the Indictment should have been amended as: "…… accused & not present before court……" The Indictment must also be amended if the defendant dies during the trial for in such instance, the prosecution must establish, that based on common intention, the defendants present in court are also liable for acts committed by the defendant, not present in court.

Sections 215, 216 and 237 of the Criminal Procedure Code outline the provisions for this.

According to **section 215**, in the course of trial, any time before the return of the verdict, the judge can discharge a juror or the entire jury on the following;

- If that juror, with sufficient cause is prevented from attending the trial; or
- That juror absents himself and is not practicable to enforce his attendance; or
- When he is unable to understand the language in which the evidence is given or interpreted.

When a trial commences before a jury, it is normally conducted day-to-day and it is not unnecessarily delayed. Therefore, it is rather rare that a trial before a jury continues for more than one month. Due to the fact that such a trial is normally concluded within a short spell of time, in the instance where a juror incapacitated, the whole jury will be discharged rather than postponing the hearing to accommodate the juror.
Section 216 also states that the Judge may discharge the jury when the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the judge the interests of justice so require. An instance of "*in the interest of justice*" could be deemed as a situation where an accused's unfavourable character is brought to light and where such evidence is considered inadmissible.

In **King v. Fernando 47 NLR 97**, when the prior misdeeds of the accused were incidentally introduced to court, it was decided that this was a sufficient ground to discharge the jury.

Queen v. Sugathadasa 51 NLR 93 went on to Hold that when a report was introduced to the jury that weapons used for the purpose of house breaking were in the possession of certain suspects in remand prison, that it was prejudicial to the defendants. In this situation as well, the jury was discharged. The reason being that the defendants were in the custody of the same remand prison during the course of the trial.
However, it must also be noted that it is the duty of the judge to ascertain whether there is sufficient ground to discharge the jury.

In **King v. Pinhamy 57 NLR**, it was Held that simply due to the fact that a juror was seen talking to a prosecution witness, that it was not an adequate ground to discharge the jury.

Queen v. Podisingho 53 NLR 49, was a case that involved a number of accused that were tried before a jury. Here, one of the defendants fell critically ill during the trial. The trial judge ordered that the rest of the defendants be tried by the same jury, whilst the other defendant be tried later by another jury. This decision was upheld in appeal.

It must also be added that when a judge does not agree with the jury, that he cannot discharge the jury in the interests of justice. This was certified in **Queen v. Handy 61 NLR 265** and **Queen v. Arnolis 70 NLR 256.**

Section 237 further points out that if the jury or the required majority of them (i.e. 6-1 or 5-2) cannot agree, the judge shall after a lapse of such time as he thinks reasonable, discharge them.

Address to Jury

The defence addresses the jury first & prosecution replies it. **Judge gives final** address by summing up the evidence & laying down the law which **must guide the jury**. If judge **doesn't direct** jury on **an important fact** → amounts to a non-direction which could result in a favourable decision being given to defendant in appeal.
For example: if the charges are raised against several persons based on 'common intention' the Judge must explain 'common intention' and *how it differs* from 'similar intention'. The procedure to be taken, if the jury decides there is no 'common intention' and if judge directs jury that **'alibi' must be proved** by defence on a *balance of probability* **this is a misdirection**. If *judge misdirects the jury* → **it can be favourable to defendant** in appeal.

Sec 209(2): Judge must explain what an 'acceptable verdict' of the jury is. Verdict returned by jury can unanimous verdict. A six-to-one or a five-to-two is a divided verdict. But a four-to-three is not acceptable. Judge must also state what kind of verdict can be returned by the jury as in for example in a murder, the jury can return verdicts of "*guilty of murder*", "*not guilty of murder*", "*guilty of culpable homicide not amounting to murder*" and the *judge must state* on what **basis** such verdicts are given

Declaring Verdict of Jury

Sec 233: **After summing up, jury retires to consider verdict and they are committed to the charge of an Officer of the court.**
No person other than a member of the jury shall speak to any member of the jury unless judge gives permission.

Sec 234: When jury is ready to give verdict, the Registrar asks the foreman if it's a unanimous verdict (all jurors must be present). **If not unanimous**, judge can ask jury to retire for further consideration. Once jury returns to court, Registrar says (all jurors must be present) "do you find the accused person (naming him) guilty, or not guilty, of the offence (naming it) with which he is charged?" The foreman then states the verdict of the jury upon which the Registrar must ask whether the verdict is unanimous or divided and if it is divided, how it is divided (is it acceptable?). If not acceptable [See Sec 209(2) Supra] judge will direct jury to re-consider verdict. In such instance, if the jury cannot return an **acceptable verdict the jury must be discharged** & case must be tried **before another jury.**

Rajapakse v Republic- **Judge cannot discharge jury just because verdict is in favour of defendant & he disagrees with such verdict.**

Queen v Handy & Queen v Gunatilleke Appuhamy- **If judge doesn't agree with verdict of jury he has no power to force jury to return a verdict that he thinks is correct.**

Jinadasa v Attorney General**- when jury returns a verdict, court has no authority to question the basis of such verdict. Questions can be asked only to understand what the verdict is and the jury not bound to disclose reasons for verdict. For example if jury returns verdict of 'culpable homicide not amounting to murder' court has no authority to question what evidence was accepted to return such verdict. But judge can question jury to gather if the verdict was based on grave & sudden provocation or sudden fight.**

After The Jury Is Discharged

Section 239 stipulates that whenever the jury is discharged, the accused shall subject to the provisions of section 403, be detained in custody or released on bail as the judge may think fit and tried by another jury.

Visit To The Scene By The Jury

Sec 224: If the judge thinks the jury should view the place in which the offence charged is alleged to have been committed or any other place in which a transaction material to the trial is alleged to have occurred the judge will make order to that effect and the jury must be conducted in a body to such place under the care of an Officer of court, which will be shown by a person appointed by the judge.

Samarasinghe v Wijesinghe- necessary for jury to visit scene of crime, only if it will enable them to understand the facts better in an incident of shooting, better for jury to visit scene of incident & draw conclusions rather than a witness describing it to the jury.

Should judge accompany the jury

State v Aladin -if the judge doesn't accompany the jury to visit scene of crime it might prevent him from giving proper directions in his summing up.

Fernando v Queen -absolutely necessary for judge to accompany jury when visiting scene of crime the judge may call witness who gave evidence in court, to come to the scene of crime & request them to show different places. If questions need to be asked from witnesses, prosecution, defence, jury can inform judge & do so.

Queen v Julian -jury must visit scene of crime under the care of a Court Officer. Witnesses must be re-called to court & evidence of all they witnessed at scene of crime must be recorded.

There is no provision to the effect that the court or a lawyer should be present at this visit. However, in **Queen v. Aladdin 61 NLR 7**, it was Held that it was important that such presence was important when the jury visited the scene. The rationale behind a jury visiting the scene of the occurrence is to better understand the facts of each witness's testimony at the trial.

Queen v. Vincent Perera 65 NLR 265, went on to hold that a judge must record his reasons as to why he directed a jury to visit the scene, before the jury does so visit that scene.

Section 224 states that an officer of court shall conduct the jury to the scene. Normally, witnesses are also conducted to this venue along with the jury. With the permission of the court the jury can ask the witness questions. Those questions should be first forwarded to the judge and if the judge finds them suitable, he may allow the questions to be asked.

In some decisions it has been Held that a jury should not ask a witness to demonstrate various positions or acts committed at the crime. However, in **Queen v. Rathinam 71 NLR 275,** it was Held that a direction to a witness to demonstrate such positions or acts is considered legal.

Queen v. Arthur Perera 57 NLR 313, Held that an order for such demonstrations by a witness should be directed with caution as it could easily adversely influence the case.

When a witness demonstrates a certain act or position to the jury at the crime scene or answers their questions, he has to be re-examined on his demonstration or answers in open court.

Granting Pardon to Accomplice

Sec 256: In regard to any offence that can be tried exclusively by the High Court. The Magistrate inquiring into the offence (after obtaining the Attorney General's authority) the Attorney General himself may tender a pardon to a person directly/indirectly concerned in or privy to the offence with the intention of obtaining evidence on condition that he makes a full & true disclosure of all circumstances within his knowledge regarding the offence and persons concerned in offence (whether principal or abettor). The person accepting such pardon will be examined as a witness and if such person is not on bail, he is detained in custody until termination of trial

Limitations to the Granting of a Pardon

The offence committed must be one that can be tried only by the High Court. There must be a reason to believe that person was directly or indirectly a party to the offence or a part of conspiracy to commit offence. The object of granting pardon is to lead evidence of all facts known to him regarding the incident. The accomplice makes his statement to Magistrate regarding all facts known to him. The Statement is recorded by Magistrate under **Sec 127** & presented to the Attorney General. The Attorney General prepares documents granting pardon with conditions that he reveals all facts relating to the statement and the document is forwarded to Magistrate & conditions of pardon read to accomplice & his signature is obtained. In some instances, Magistrate can make application to the Attorney General & obtain his consent to grant a pardon or the Attorney General can request the Magistrate to grant a pardon after considering evidence.

If Accomplice Breaches Conditions of Pardon

Sec 258: If a person to whom pardon is granted wilfully conceals essential fact or gives false evidence he has not complied with conditions he may be tried for the offence pardoned or other offences connected to same matter.

Sec 259: Statement made by person pardoned, can be used as evidence under **Sec 258**. The sanction of Attorney General required to prosecute person for making false statement.

Queen v Abeysekera - If person to whom conditional pardon granted, deliberately breaches a condition or gives false evidence the facts must be decided upon by court.

Sec 257: The Attorney General can at any stage, after committing but before judgement, authorize Magistrate to tender pardon.

TRIAL BEFORE A JUDGE

Sections 196 – 203 set out the procedure with regard to a trial before a judge. In effect, it resembles the procedure laid down regarding a trial before a jury. In this situation, the judge has also to consider the credibility of the evidence placed before the court. In an instance where trial commences before a jury, it will not be the duty of the judge to ascertain the credibility of such evidence but to determine whether there is sufficient evidence placed before court in order to call for a defence by the accused.

Section 200 further points out a situation when the case for the prosecution is closed and the judge either

- Wholly discredits the evidence on the part of the prosecution, or
- Is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or any other offence of which he might be convicted of such indictment.

In such an instance, he shall record a verdict of acquittal. If however the judge considers that there are grounds for proceeding with the trial, he shall call the accused for his defence. {Compare sections 200 (1) and 220 (1) & (2)}

In the case of a trial before a jury, once the case for the prosecution is closed and the evidence placed before court, in the opinion of the judge is weak, then he can ask the jury whether there is any necessity in continuing the trial. However, this could be done only with the consent of the prosecution. The judge is not in a position to direct the jury to acquit the accused on a question of credibility regarding the evidence placed before the court and where he is of that opinion. The rationale behind this is the fact that whether or not sufficient evidence has been placed before a court is a question of law and not one of fact. This was Held in **Queen v. Kularatne 71 NLR 529 and Queen v. Pauline De Croos 71 NLR 169**.

After the summing up of the judge, the jury retires into the jury room to consider their decision. They are not required to give any reason for their verdict.

Section 203 points out that where the case for the prosecution and defence are concluded, the judge shall record a verdict or acquittal or conviction giving reasons, within 10 days and on conviction and pass sentence on the accused according to law. However, in **Director General of Bribery Commissions v. Herman Fernando CA 55/97** (unreported), it has been Held that the 10 day period does not become mandatory in the event that there is just cause and reasonable ground for the judge to delay his verdict.

SUBMISSIONS OF THE PROSECUTION AND DEFENCE BEFORE A HIGH COURT

The present position in the legal system is that whenever the submissions are made before the court, the defendant has the right of reply whether evidence is called by the accused or not (**section 271(2)**). Therefore, the defence presents its submissions after the conclusion of the submissions of the prosecution.

When A Defendant Is Not Represented (Special Provisions)

Section 271(1) states that where an accused is not represented by a pleader, the court shall inform him of his right to give evidence on his own behalf. If he elects to do so, his attention shall be called to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

17. BAIL

Chapter 34 of the Criminal Procedure Code provides for the provisions of Bail. However, at present, the provisions regarding bail are governed by the Bail Act no. 30 of 1997. **Section 3(2)** of the Bail Act states that where there is reference in any written law to a provision of the Criminal Procedure Code relating to bail, such reference shall be deemed, with effect from the date of commencement of this act, to be reference to the corresponding provision of this act.

Guiding Principles Of The Bail Act

Section 2 of the Bail Act can be regarded as the guiding principle. As such, it states that the granting of bail shall be the rule and that the refusal to grant bail will be the exception.

Are The Provisions Of The Criminal Procedure Code Regarding Bail, Repealed With The Introduction Of The Bail Act?

It should be noted that the provisions regarding bail in the Criminal Procedure Code have not been repealed with the introduction of the Bail Act. According to **section 27** of the Bail Act, if any inconsistency lies between the Criminal Procedure Code or any other written law and the Bail Act (other than the Release of Remand Prisoners Act no.08 of 1991), the provisions of the Bail Act shall prevail.

Section 3(2) of the Bail Act states that where there is reference in any written law to a provision of the Criminal Procedure Code, relating to bail, such reference shall be deemed, with effect from the date of commencement of this act, to be reference to the corresponding provision of this act.

At present, the courts have not been asked to interpret the term "any other written law". However, the current position is that written law means any other law apart from the Bail Act, which effectively includes the Criminal Procedure Code itself as well.
For Example - **Section 36** of the Criminal Procedure Code makes reference to the provisions regarding bail in the Criminal Procedure Act. However, it should be noted that the reference with regard to section 36 is now made to the corresponding section in the Bail Act.

Section 3 of the Bail Act states that the Bail Act does not apply to some instances. However, there seems to be some conflict between the English act and the Sinhala act. According to **section 28,** under these circumstances, it shall be legal for the Sinhala version to prevail.

According to **section 3 (English version),** nothing in this act will apply to any person accused or suspected of having committed, or convicted of an offence under:
1. The Prevention of Terrorism (Temporary Provisions) Act no.48 of 1979,
2. Regulations under the Public Security Ordinance (Emergency Regulations), or
3. Any Written Law which makes express provision in respect of the release on bail where such person has been accused or suspected of having committed, or convicted of offences under that written law. E.g. Section 8 of the Offences against Public Property Act no.12 of 1982 states that if an offence is committed under this act in respect of public property amounting to more than Rs 25,000/- in value as per the certification of an ASP or an officer higher than that, then the accused will not be granted bail. He will be remanded until the conclusion of the trial. It could be argued that since these are special provisions, the application of the Bail Act would not be valid in respect of offences against public property.

The opposing view is that the Bail Act does not apply to only the Prevention of Terrorism Act and the regulations under the Public Security Ordinance. If any written law has provided for the release of an offender who has committed an offense under the first two laws then, the provisions of the Bail Act would not apply. (this is based on the **Sinhala version**)

The courts have so far not decided as to which of the interpretations should be accepted. However, currently, the case of **Kasthuriarachchi v. The Republic** is debating this issue.

Sec 115 (pg 18): If investigation cannot be completed within 24 hours the suspect must be brought before court & the Magistrate can order bail or he can remand but only for 15 days. For instance a suspect remanded for 7 days for investigation, if not completed, can be remanded for further 7 days. Yet cannot remand for another day since the maximum is 15.

Pathirana v OIC Nittambuwa & Dissanaike & others v OIC Hanguranketha

Sec 402: If the person is accused of a bailable offence, he has a right to be discharged on bail or if court thinks fit, discharged on executing a bond without sureties. The Magistrate can remand for 15 days only for non-bailable offences and on the expiration of 15 days, the Magistrate can grant bail to non-bailable offence.

Sec 115(3): Magistrate cannot grant bail for some offences in the Penal Code such as Murder, Offences against the State, Perjury to obtain conviction of Murder. Magistrate can grant bail for above, if the person is charged but not indicted or if he is brought before Magistrate but **"proceedings have not commenced"** for more than 3 months from date of remand.
The court has considered the meaning of **"proceeding not commenced":**

Attorney General v Punchi Banda -plaint need not be filed under **Sec 136**, for proceedings to commence. It was held that if report is filed that there is substantive evidence of the suspect's guilt.

Gunapala v OIC Galewella - However it was held here that the proceedings don't commence until plaint is filed under **Sec 136.**

Effect of Bail Act 30/1997

Sec 3(1): -there are 3 categories of suspects, not falling within the Bail Act. Those suspected of offences under **PTA.** Those suspected of offences under the **PSO** and those persons who've committed offences under other laws, which have provisions regarding bail.

Attorney General v Thilanga Sumathipala - accused charged with aiding and abetting a person to obtain an irregular passport & visa to travel to UK under Immigration & Emigration Act. The issue was whether the Court of Appeal has no jurisdiction to grant bail in cases connected to the **Immigration & Emigration Act**. In the *English translation*, there *three* instances when Bail Act doesn't apply. That are offences under the **PTA,** the **PSO** and any other written law. Therefore the three categories of offenders are excluded from bail by the C of A. [under the above 3 laws] However the **Sinhala** version stipulates *only two* instances which are the **PTA** and the **PSO**.
Under these specific laws there are four categories of offenders are who are excluded. Firstly those have committed an offence. Secondly those convicted of an offence. Thirdly those

accused of an offence and fourthly those suspected of an offence. Thus, all others fall under the provisions of the Bail Act.
All offences under the **Immigration & Emigration Act** are non-bailable & no person accused of such offence shall in any circumstances be admitted to bail. Thus, the prosecution argued that Court of Appeal has no jurisdiction to grant bail, however the court held that there is no prohibition in the **Immigration & Emigration Act** on court to grant bail and therefore bail can be granted. [*How did court arrive at this decision? Rationale?*] The court also stated that because of Fundamental Rights the Constitution is supreme and all other laws are subordinate to its provisions.

Sec 27: The provisions of Bail Act will prevail over any other Act [if there is a conflict] except the Release of Remand Prisoners Act.

Sec 3(2): If Bail is referred to in any law it is deemed to be according to the Bail Act

Bailable Offences

Sec 4: If a person is charged with a bailable offence & produced before court he has the right to be released on bail, subject to provisions of Bail Act.

Sec 116 (CCPA): Police Bail is when the OIC conducts an investigation regarding the Bailable Offence & that there is sufficient evidence to prove offence must be produced in court & released on security to appear in court.

The OIC has this power under **CCPA** & **Bail Act.** There is a new provision of Bail Act which reads thus:

Sec 6: OIC can release a person suspected of a bailable offence, who is produced before court on security to appear before court within 24 hours but, if the OIC is of the opinion that the public will react & a breach of peace will occur, then he will forward the suspect to the Magistrate & the Magistrate can grant bail under **Sec 7** or refuse bail under **Sec 14.**
If the person ordered bail in police station & signs security to appear in court, breaches security & doesn't appear he commits an offence under **Sec 6** & after the summary-trial, the person is imprisoned for term not *exceeding 6 months.*

BAIL REGARDING AN OFFENCE PUNISHABLE WITH DEATH OR LIFE IMPRISONEMENT

Section 13 of the Bail Act states that a person suspected or accused of being concerned in committing or having committed an offence punishable with death or with life imprisonment, shall not be released on bail except by a judge of the High Court.

Section 115(3) of the Criminal Procedure Code amended by Act no.68 of 1979 states that where a person is accused of committing an offence under sections 114, 191, and 296 of the Penal Code, the Magistrate shall not release such person on bail. This section also states that such an accused could be granted bail only if the proceedings against him are not instituted in a Magistrate's Court or a High Court before the expiration of 3 months of the date of surrender or arrest, unless an application to the High Court made by the AG directs otherwise.

However, in Section 27 of the Bail Act. The provisions of the act would apply if there is an inconsistency. Therefore, the current legal position is that only a Judge of the High Court can grant bail to such an offender.

If such an accused is to be released on bail within the 3 months for any of the offences committed under the above provisions of the Penal Code, special circumstances must be shown. However, the new provision does not provide for that. Further, the powers of a High Court Judge are not only limited to the 3 offences mentioned above.

Release Of Persons When A Bailable Offence Is Being Investigated By The Police

According to **Section 6** an officer-in-charge of a police station need not produce a suspect before a Magistrate having jurisdiction over the offence, where the offence being investigated by the police is a bailable one. Such officer shall, not later than 24 hours of the suspect being taken into custody, release him on a written undertaking and order such suspect to appear before the Magistrate on a given date.
However, if the officer is of opinion that the public reaction to the alleged offence is likely to give rise to a breach of the peace, then he shall forward such suspect in custody before a Magistrate. The Magistrate shall make an order either under section 7 or 14 as appropriate. Under **section 6(2)** , where a suspect fails to appear before a Magistrate on the due date after he is released on a written undertaking, shall be guilty of an offence under this Act. Upon conviction after summary trial, he shall be punished with simple imprisonment for a term not exceeding 6 months or with a fine not exceeding Rs 1000/- or with both.

Manner In Which A Person Suspected Or Accused Of A Bailable Or Non-Bailable Offence May Be Released On Bail.

In such a circumstance, **section 7** states that the Court having jurisdiction to release such person,
a) On an undertaking given by him to appear when required,
b) On his own recognizance,
c) On his executing a bond with one or more sureties,
d) On his depositing a reasonable sum of money as determined by court, or
e) On his furnishing reasonable certified bail of the description ordered by court.

A bond could be signed by the suspect himself or at times with sureties. In that instance, the other persons who signed the bond will also have to be present on the day court orders so and shall continue to attend until the court directs otherwise. If the defendant is not present on the day mentioned by court, the sureties would be obliged to pay the sum specified in the bond.

Section 10 states that in determining whether such a person is a sufficient surety, the court shall have regard to whether such person is likely to be able to secure the attendance of the person suspected or accused, in terms of the bond.

According to **section 12**, once a person is released on bail, he shall give to the court the address upon which all notices and processes may be served on him. Thereafter if he cannot be found or for any other reason service on him cannot be effected, any notice for him left at that address will deem it to be duly served on him. However, if he gives an address which to his knowledge is false, then he shall upon conviction in a summary trial, be punished with simple imprisonment not exceeding six months or a fine not exceeding Rs 1000/- or both.

Types of Bail that can be Granted

Personal Bail - Suspect executes a bond on an undertaking given by him to appear when required or on his own recognisance.

Surety Bail - Suspect & sureties execute a bond, that the suspect will be present in court on a future date. If the suspect doesn't appear, suspect & sureties are obliged to the pay sum due on the bond.

Cash Bail - Suspect deposits a reasonable sum as determined by court, that suspect will be present in court on a future date. If he does not, the bail becomes state property.

Certified Bail – A deed of monetary value deposited in court. For example if a certified bail is 500,000/= it is necessary that a deed of property to the same value be deposited.

Sec 7(1) proviso: If the person appears before court on summons, he is released on bail. However if he undertakes to appear when required or on his own recognisance and unless for reasons recorded the court orders otherwise. [*What does this mean?*]

Amount of Bail ordered by Court

Sec 11: When court determines the quantum of the bond it must consider the nature of offence the suspect is alleged with and the punishment specified for it by law and the means of such suspect to pay the bail so the amount should not be excessive.

Sec 10: In order to determine if a person is a sufficient surety, the will court consider if such person is able to secure the attendance of the suspect.

Sec 9: If due to a mistake, fraud etc… or if insufficient sureties have been accepted the court may issue a warrant of arrest to bring the person released on bail, before it & order him to find such sufficient sureties and if he fails the court may commit him to prison.

Accused released on Bail must supply address

Sec 12: If a person is released on bail he must give the address to which all notices & processes maybe served. Thereafter, if he cannot be found or the service cannot be affected for some other reason to such address, any notice left for him at such will be deemed to be duly served. If he knowingly gives a false address and he commits an offence, then on conviction after a summary trial he can be imprisoned for term not exceeding 6 months or with a fine not exceeding 1000 or both.

Bail for Offences Punishable with Death Penalty or Life Imprisonment

Under the **Code of Criminal Procedure Act** if it is a bailable offence then he is entitled to bail. If it is a non-bailable offence he could be remanded for a maximum of 15 days. However **Sec 14 of the Bail Act** doesn't have such limitations.

Sec 14: If a person suspected of committing a bailable or non-bailable offence appears like a rabbit out of a hat, or he is brought before or surrenders to court the court may refuse to release the person on bail. Sometimes if the application is made on that behalf by the police

after issuing notice on the person & hearing him the court can cancel the subsisting order of bail. If the court has reason to believe that the person will not appear to stand inquiry or trial or will interfere with the witness or evidence against him or obstruct the course of justice or will commit an offence while on bail the court may refuse bail. Also if court has reason to believe that the gravity of the offence & public reaction to the offence may cause public unrest bail maybe refused.

Anuruddha Ratwatte & Others v Attorney General -Bail was granted to defendants. The decision of a three judge bench of High Court to hold the defendants in remand from the date of the commencement of the trial was challenged. The Court held that if bail is cancelled after granting it, it must be done after a proper inquiry & for one of the reasons stated in **Sec 14.** None of the reasons in **Sec 14** existed in this case and thus the cancelling of bail was illegal.
A person suspected of or accused of murder or a party to a murder cannot be released on bail by a Magistrate. It is the High Court that can grant bail for offences punishable with the death penalty or life imprisonment *vide* **Sec 13.**

Maximum period suspect can be held in remand

Sec 16: The maximum period is 12 months but if the time needs to be extended order must be obtained from the Attorney General to extend the period by making an application to the relevant Provincial High Court. The period can be extended by only 3 months at a time and all extensions of the periods must add up to not more than 12 months.

Maximum Period One Can Be Held On Remand (Detained Custody)

Section 16 states that subject to the provision in section 17, no person shall be detained in custody unless sentenced by a court, for a period exceeding 12 months from the date of his arrest. However, notwithstanding these provisions, **section 17** empowers the AG to extend that period in excess of 12 months, after good and sufficient reasons are recorded. Such extended detention order however, shall not exceed three months at a time and 12 months in aggregate. (*Note S.3 – it does not apply to PTA, Emer.Regs. etc*)

ANTICIPATORY BAIL

This is based on the McNaughten Rules by which it is intended to prevent political prisoners from being taken into custody purely with the objective of remanding them. Unlike in India, this is a new provision that has been introduced to criminal procedure in Sri Lanka.

Section 21 of the Bail Act makes provision for this. Previously, bail could only be granted to a person who has already been arrested. However presently, where a person has reason to believe that he may be arrested on account of his being suspected of having committed or been concerned in committing a non-bailable offence, he could make use of this provision. As such, he may with notice to the officer in charge of the police station of the area in which the offence is alleged to have been committed, apply to the Magistrate having jurisdiction over the area in which such offence is alleged to have been committed. Thereafter, an order could be made for his release on bail, in the event of his arrest of on the allegation that he is suspected of having committed or having been concerned with the commission of that offence.

According to Indian judicial decisions, the rationale behind the introduction of such a provision was to prevent the remanding of innocent people through pressure placed by certain influential personalities.

Such an application shall be accompanied by an affidavit made by the applicant. The court to which the application was made shall fix the date for the inquiry into the application, which shall not be later than 7 days from the date of such application. Further, the court shall issue notice of such date to the applicant and the officer in charge of the police station.

After listening to both sides, the Magistrate may grant bail if he considers it fit. Accordingly, such person may be released on bail for any offence stated in the order or any other offence constituted by the acts constituting the offence specified in the order.

Further, such person shall make himself available for interrogation by a police officer as and when required. However, it could only be done between 6.00 a.m. and 6.00 p.m.

Section 26 further states that upon application made by the officer in charge of the police station investigating the offence, the Magistrate who made the order under section 21 or a Magistrate otherwise having jurisdiction in the case may, issue a warrant for the presence in court of the applicant in whose favour such order has been made. The Magistrate shall record the reasons for the issue of such warrant.

Conditions included in Anticipatory Bail

Sec 22: The Magistrate will order the suspect to hand over his passport to the court and the order must state the offence for which Anticipatory Bail was granted. The order won't prevent a suspect from being arrested for some other offence. *[Check this. I couldn't find it in the Act].* If he is arrested he must be released on bail. The order may specify the quantum of bail. The Magistrate must notify the Emigration & Immigration Controller that Anticipatory Bail was granted to prevent departure from the country. A person to whom Anticipatory Bail was granted cannot be kept in custody for the offence for which Anticipatory Bail was granted or another offence which constituted on the same facts. However he can be arrested for an offence, which has no connection with such offences.

Sec.23: If a person who has been granted Anticipatory Bail is arrested, he must be released immediately.

Sec 24: A person who is granted Anticipatory Bail can be kept in custody for investigation and can be detained from 6am to 6pm.

Can Anticipatory Bail be granted in Respect of Any Offence?

The Bail Act specifically states that Anticipatory Bail can be obtained from the Magistrates Court. *So?*

Sec 3: The Bail Act doesn't affect certain other Acts and therefore Anticipatory Bail cannot be obtained for offences committed under such other Acts. In **Ravi Karunanayake's Bail Application** the Prosecution said that the Bail Act didn't apply. However court granted Anticipatory Bail on the basis that the Bail Act applied to offences under the **Public Property Act**. The Attorney General appealed against this decision.

Granting of Bail by Court of Appeal

Sec 404 (CCPA): Notwithstanding anything to the contrary in CCPA or any other law the Court of Appeal may direct any person in custody to be granted bail or bail be fixed by the High Court or Magistrates Court be reduced or increased or where any person is enlarged on bail by a Judge of the Magistrates Court or the High Court to be remanded in custody.

Powers of the Court of Appeal regarding the granting of Bail

Gnanapathipillai – The power of the Court of Appeal is an appellate jurisdictional power. Therefore it can release a person on bail only where an appeal is filed against the refusal to grant bail. This decision was upheld in **Republic v Father Singaraya & Another** that the Court of Appeal has only appellate jurisdiction regarding a bail application.

Attorney General v Thilanga Sumathipala*: -* **A three judge bench decided an important legal principle**. But the judgement does not specifically state that under **Sec 404** that the Court of Appeal has no appellate jurisdiction. A person charged under the Immigration & Emigration Act is not entitled to bail. Therefore since no court has been given jurisdiction to grant bail the prosecution said that a person could not file a Bail Application for the 1st time in the Court of Appeal. The applicant however said that **Sec 404** granted the Court of Appeal original jurisdiction regarding bail. The court held that if there is no court from which bail can be obtained it is contrary to the Fundamental Rights of personal liberty and therefore if the provisions state bail cannot be granted, those provisions are invalid.

Sec 402: When a person appears or is brought before the court & he is prepared to give bail at any time he shall be released on bail.
Provided however that if the court thinks fit it can discharge him on a bond without sureties for his appearance.

Sec 403: When a person is charged with a non-bailable offence the court can exercise its discretion when granting bail yet however in **Anuruddha Ratwatte's Bail Application** & **Sec 27 of the Bail Act** it is clear that the provisions of the Bail Act supersedes all other Acts regarding Bail.

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