Sri Lanka Criminal Defence Practice Manual

Bar Association Endorsements for
The Sri Lanka Criminal Defence Practice Manual

Jaffna Bar Association

"The Jaffna Bar Association fully endorses International Bridges to Justice's Criminal Defence Practice Manual and believes it will be a useful resource for all criminal defence lawyers practicing in Sri Lanka."

- Shantha Abimanasingham, President of Jaffna Bar Association

Trincomalee Bar Association

"This manual deeply analyzes many aspects of criminal litigation and the rights of the accused. This manual will assist attorneys, academics, jurists and civil society members"

- Subashini Chithravel, President of Trincomalee Bar Association

Mannar Bar Association

"I have no doubt that this book will be accepted and appreciated to the degree it deserves by a large segment of the Sri Lankan legal profession. At a time when revered and constitutionally enshrined legal principles such as "Fundamental rights," "Presumptions of innocence" and the rules regarding "confession" are at stake and peril, this book might go a long way in working against such tragedies. I am confident that this book is bound to be of much assistance and serve as a guideline to very many of the youngest in the legal arena."

- E. Caius Feldano, President of Mannar Bar Association

Kandy Bar Association

"This criminal defence practice manual opens our legal eye for new dimensions of systematic procedures to enhance the criminal justice system."

- E.M.P Kumari Abeyratne, President of Kandy Bar Association
- Bandara Karunanayake, Secretary of Kandy Bar Association

Vavuniya Bar Association

"We the members of the Vavuniya Bar are happy to have International Bridges to Justice's Handbook. Surely we believe it will be very useful to the lawyers."

- Anton Punithanayagam, Secretary of Vavuniya Bar Association

Appendix 1

MAGISTRATE COURT

Accused Charged

1. With offense under 8th column of the first schedule (Criminal Code, 10(b)).

2. With offense punishable under penal code with imprisonment not excluding two years or fine not exceeding 1,500 rupees (Criminal Code, 11(a)(ii)).

Trial by Judge Alone

Pre-Trial Matters

No Bail

- Remanded in custody pending trial

Bail

Bail Act §7:

- Undertaking to appear in court;
- Own Recognizance;
- Executing a bond with survey;
- Depositing reasonable sum of money; or
- Reasonable certified Bail amount.

Investigative Stage

- Charge
- Police Investigation
- Searches of person/place
- Detention
- Statements by accused
- Obtaining prosecution's evidence

Trial

1) Prosecution Case

- Opening statements
- Direct evidence
- Cross examination by defense

2) Defense Case

- Opening statement
  → Criminal Code § 184(3)
- Direct evidence
  → Criminal Code § 152 (1)
- Accused may testify
  →Criminal Code § 152(2)

Closing Statements

1) Prosecution Statement

2) Defense Statement

Verdict

(Criminal Code § 185)

Not Convicted

Convicted

- Sentencing (Criminal Code § 14)

Appeal

(Criminal Code § 320)

Appendix 2

HIGH COURT

Accused Charged

Offense within 8th column of first schedule Criminal Code § 10(b)

Trial by Judge

• All trials in High Court shall be before a judge (Judicature Act § 11(1)).

Trial by Jury

• Accused elects to be tried by jury prior to commencement of trial if the offence fails within the second schedule Judicature act (Criminal Code § 161 & Judicature Act § 11(2)).

Pre-Trial Matters

No Bail

• Remanded in custody pending trial

Bail

• Bail Act §7:
- Undertaking to appear in court;
- Own Recognizance;
- Executing a bond with survey;
- Depositing reasonable sum of money; or
- Reasonable certified Bail amount.

Investigative Stage

• Charge
• Police Investigation
• Searches of person/place
• Detention
• Statements by accused
• Obtaining prosecution's evidence

Trial

1) Prosecution's Case

• Opening statement
• Direct evidence
• Cross examination by defense

2) Defense's Case

• Opening statement
→ Judge Alone: Criminal Code § 201
→ Jury: Criminal Code § 221(1)
• Direct evidence
→ Judge Alone: Criminal Code § 201
→ Jury: Criminal Code § 221(1)
• Accused may testify (Criminal Code § 152(2)
→ Judge Alone: Criminal Code § 199(5)
→ Jury: Criminal Code § 218
• Cross examination by prosecution
→ Judge Alone: Criminal Code § 201(1)
→ Jury: Criminal Code § 221(2)

Closing Statements

1) **Prosecution Statement**
2) **Defense Statement**

Verdict

→ Judge Alone: Criminal Code § 203
→ Jury: Criminal Code § 234

Convicted

• Sentencing
→ Judge Alone: Criminal Code § 203
→ Jury: Criminal Code § 238

Not Convicted

• Accused released

Appeal

→ Judge Alone: Criminal Code § 235
→ Jury: Criminal Code § 234

ABOUT INTERNATIONAL BRIDGES TO JUSTICE

Founded in 2000, International Bridges to Justice (IBJ) is a global movement of justice-makers to end torture in the 21st century and strengthen the rule of law across the world. Founded in 2000, IBJ collaborates with state, civil, and community-based organizations to comprehensively reform criminal justice systems that respect the rights of every individual. IBJ works to ensure that legal counsel is provided to the accused at the earliest stages of the criminal process with the aim of significantly reducing instances of torture, human rights abuse and other prohibited treatment. IBJ's primary focus is the empowerment and support of the drivers of the criminal justice system—public defenders. IBJ is a registered U.S. charitable organization with programs currently in Burundi, Cambodia, China, Democratic Republic of Congo, Mexico, Myanmar, Rwanda, Sri Lanka, Syria, Vietnam, and Zimbabwe.[1]

IBJ'S VISION

We envision a world where the basic legal rights of every man, woman and child are respected in particular: the right to competent legal representation, the right to be free from torture and other cruel, inhumane and degrading treatment and the right to a fair trial. A world where each and every citizen is knowledgeable about his/her rights and is empowered to demand that they are upheld in practice. A world where international human rights standards and the rule of law are brought to life in the everyday practice of justice.

IBJ'S MISSION

In recognition of the fundamental principles of the Universal Declaration of Human Rights, IBJ is dedicated to protecting the basic legal rights of ordinary citizens in developing countries. Specifically, IBJ works to guarantee all citizens the right to competent legal representation, the right to be protected from cruel and unusual treatment or punishment, and the right to a fair trial.

IBJ'S APPROACH

IBJ works with legal aid lawyers, state institutions, legal aid organizations, community-based organizations, and other interested stakeholders to fulfill its mission. IBJ engages in a three-pillar programming approach to ensure effective and comprehensive criminal justice transformation:

Defender Capacity Building – as the drivers of the criminal justice system, we focus most of our support on the empowerment of public defenders/legal aid lawyers through skills development, training programs and materials, on-the-ground resource centres, international community-building and technical support.

Institutional Capacity Building – in recognition that implementation of the rule of law requires the cooperation of all participants within the justice community, IBJ joins with defenders, prosecutors, judges, court administrators, police, medical examiners, detention centre officials, local government representatives and legal academics in Criminal Justice Roundtable sessions to build mutual respect, exchange views and proposals, and establish the foundation for long-term criminal justice reform.

[1] https://www.ibj.org.

Rights Awareness - the lack of information and knowledge of legal rights by average citizens is a major factor enabling the continuation of rights abuses. IBJ administers advisement of rights campaigns through various communication tools (e.g. posters, brochures, street law sessions) to empower citizens to advocate for their rights and to seek legal recourse on their own or a family member's behalf.

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B. Bar Association of Sri Lanka
C. Legal Aid Commission

HOW TO USE THIS MANUAL

The first section of the Manual seeks to address certain foundational criminal law issues relevant to Sri Lanka as well as a number of transitional justice issues. ***Chapters 1 and 2*** sets out the rights of the accused as well as the rights and responsibilities of defence lawyers. ***Chapter 3*** provides guidance on how to approach and cultivate the client's trust and also addresses issues relevant to specific vulnerable groups (special populations) including children; women; lesbian, gay, bisexual, transgender, and intersex; and mentally disabled. ***Chapter 4*** provides guidance on how to approach and represent a client who has been subjected to torture or other forms of human rights abuse. ***Chapter 5*** assists in preparing for a case and how to develop the theme and theory – including specific pleas in Sri Lanka. ***Chapter 6*** provides an overview of court jurisdiction in Sri Lanka and ***Chapter 7*** explores the investigative stages of a case in Sri Lanka. This leads into ***Chapter 8*** and certain pre-trial matters and ***Chapter 9*** which sets out in detail trial and trial-related matters in Sri Lanka. ***Chapter 10*** provides a discussion of applicable rules of evidence and ***Chapter 11*** sets out post-trial issues such as sentencing, appeal and review. ***Chapter 12*** provides detail of other relevant Sri Lankan legislation – including the Prevention of Terrorism Act and related issues and ties into ***Chapter 13*** that sets out numerous criminal justice actors that might be encountered in Sri Lanka's criminal justice machinery. ***Chapters 14 and 15*** sets out certain appendices and model lawyer work products as well as a number of resources cited in the drafting of this Manual.

It is our sincere hope that all practitioners, whether they are newly qualified or seasoned, will find its contents, including its reference materials, useful.

INTRODUCTION

This Practitioner Manual is intended to provide substantive and operational legal guidance across all aspects of Sri Lanka's criminal justice system - including client rights and lawyer duties, procedural and evidentiary rules, pre-trial and trial matters as well as sentencing and appeals. In drafting this Manual numerous justice stakeholders, both within and outside of Sri Lanka, were consulted. The Manual focuses on Sri Lankan criminal and criminal procedural law and is primarily aimed at criminal defence lawyers representing clients charged with offences in Sri Lanka. We hope the Manual will also be of value to others operating in the country's criminal justice system – including (but not limited to) prosecutors, court registrars, police officers and prison wardens.

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PREFACE

In this post-conflict era, Sri Lanka is committed to reaffirming the rule of law, rebuilding its legal institutions, and regaining public trust in the criminal justice system. To do so, we must have the courage and fortitude to address the past by seeking the truth, holding perpetrators accountable, and ensuring reparations for victims. Equally importantly, we must look to the future by empowering our citizenry through greater rights awareness and the availability of resources, as well as strengthening our legal bodies and processes through the ongoing adoption of international standards and best practices.

During this transitional period, with so much at stake and with essential legal resources at a premium, this Practitioner Handbook is most eagerly welcomed. It fills a critical gap in the existing literature and provides legal practitioners, as well as members of the academic community and individual concerned citizens, with a much-needed reference guide during this pivotal moment in Sri Lanka's history. The Handbook is not only comprehensive in scope both in terms of the legal authorities at issue and the phases of criminal proceedings, but also is user-friendly, accessible to laypersons, impartial, practical, and insightful. By offering key information and practitioner tips regarding such topics as client interview checklists, trial preparation, and plea-bargaining, Sri Lankan lawyers, in particular, will find the Handbook beneficial, as it will enable them to represent their clients with greater skill, effectiveness, and success.

We are confident this Handbook will contribute significantly to Sri Lanka's post-conflict legal efforts and development. We strongly recommend it to anyone, at any level, engaged or interested in human rights issues, transitional justice, or criminal law matters generally.

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[i] Foundational Overview

Sri Lanka is a "common law" country. By contrast with a "civil law" tradition in which codified law in the form of statutes predominates, the common law tradition relies heavily on case law precedent (*stare decisis* and *ratio decidendi*) – the body of judicial opinions – to help interpret and apply national law. The legal framework is a mixture of legal systems of Kandyan law, Roman-Dutch law, English law, Thessavalamai and Muslim law.

The most authoritative decisions are those issued by the Supreme Court, followed in order of hierarchy by the Court of Appeals, High Court, District Courts, Magistrate's Courts and Primary Courts. The Magistrate Courts and High Courts are the only courts with primary jurisdiction with cases involving criminal law and the respective legal domains of each are stated in the Code of Criminal Procedure.

The principal sources regulating Sri Lankan criminal law are the following:

- The Sri Lankan Constitution;
- The Sri Lankan Code of Criminal Procedure;
- The Sri Lankan Evidence Ordinance;
- The Sri Lankan Penal Code; and
- The Sri Lankan Judicature Act.

In the High Court, the State of Sri Lanka through the Department of Attorney-General conducts criminal trials. Generally, murder cases and trials against the State are heard in the High Court while other criminal offenses are tried in the Magistrate's Court. The cases in the Magistrate's Court will be heard and determined by a single magistrate while a judge or jury will adjudicate cases in the High Court.

The Court of Appeal has the task of hearing appeals against the judgment of the lower courts. A bench of three judges will usually hear the appeal. The Supreme Court is situated in Colombo and is the final appeal of any case and will be heard usually before a bench of three justices. Sri Lanka has no Constitutional Court, as some other countries do, to interpret and apply constitutional provisions.

[ii] International Treaty Obligations & Other Applicable Global Legal Standards

Sri Lanka has ratified or acceded to a number of seminal international treaties related to human rights and criminal justice. Practitioners are encouraged to argue for judicial interpretations of Sri Lanka national law consistent with the international obligations in these treaties. These treaties and the corresponding dates of their signature, ratification, or accession by Sri Lanka are set forth below:

A. Universal Declaration of Human Rights (ratified 14 December 1955);
B. International Covenant on Civil and Political Rights (acceded to on 11 June 1980);
C. Convention on the Elimination of All Forms of Discrimination against Women (ratified on 5 October 1981) with ***acceptance of individual complaints procedures***;

D. The United Nations Convention on the Rights of the Child (acceded to on 12 July 1991); and
E. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (acceded to on 3 January 1994);
F. International Convention for the Protection of All Persons from Enforced Disappearance (ratified on 25 May 2016) with ***acceptance of individual complaints procedures***; and
G. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (acceded to on 5 December 2017);
H. Convention on the Rights of Persons with Disabilities (acceded to on 8 February 2016).

The 1969 Vienna Convention on the Law of Treaties states that countries must comply in good faith with the treaties that they have ratified, and that they may not invoke provisions of internal law to justify failure to uphold international agreements. Further, it is a well-established principle of international law that countries have a duty to bring internal law into conformity with obligations under international law. Although Sri Lanka is a party to many international human rights treaties, it has been criticized for not giving full effect to a number of legal responsibilities as set out in these treaties.

[iii] Transitional Justice in Sri Lanka

[A] Introduction

Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.[2] In broad terms, transitional justice aims to provide truth, accountability, reparation and justice.

Sri Lanka was embroiled in a 26-year civil war that ended in May 2009 and the effects of human rights abuses, enforced disappearances and lack of accountability and government transparency continues long after the end of the war. Following the Presidential elections in 2015, the government has made commitments towards transitional justice.

[B] Compliance with United Nations Resolutions

In October 2015, Sri Lanka co-sponsored the United Nations resolution 30/1 and pledged to set up four transitional justice mechanisms to promote "justice, reconciliation and human rights." These included an accountability mechanism involving international judges, prosecutors, and investigators; a truth and reconciliation mechanism; an office of missing persons; and an office for reparations. Thus far only the Office of Missing Persons has been established.

In June 2016, the Sri Lankan government adopted directives recommended by the Human Rights Commission to protect detainees from abuses, particularly at the time of arrest and ensuing detention, including medical and legal assistance, registration of arrest, etc. Sri Lanka has

[2] "What is Transitional Justice?" *International Centre for Transitional Justice: Justice Truth Dignity,* 2018, https://www.ictj.org/about/transitional-justice.

submitted periodic reports to the United Nations Committee Against Torture (CAT) and the United Nations Rights Committee (UNHRC). Both Committees have expressed serious concern over continued allegations of widespread torture and enforced disappearances.[3]

In March 2017, the United Nations Human Rights Council reviewed Sri Lanka's performance under the latest resolution (2015) and extended time for full implementation of the commitments made by Sri Lanka.

[C] Delayed Justice

Time limits must be placed on criminal cases to negate delays, abuse of power and to afford victims access to justice in a timely manner. Certain cases are heard only once a year because the courts do not have the capacity to accommodate them twice.[4] Cases are delayed due to judges and prosecutors being absent. Cases are postponed because there is no mechanism in place (such as a provision in the Judicial Services Commission) to hear cases by another judge in the absence of the one who normally heard the case.[5] A reported shortage of courthouses resulted in numerous criminal cases being transferred to Colombo, and often, due to the large number of cases, it is impossible to have them heard in a timely manner.

[D] Criminal Accountability

Criminal accountability for the atrocities committed during the 26-year Civil War is an important element of transitional justice. In 2010, President Rajapaksa set up the Lessons Learnt and Reconciliation Commission (LLRC), which was mandated to investigate events that took place between 2002 and 2009. This commission received international criticism for its limited mandate and its perceived bias.[6]

The Sri Lankan government has failed to establish a special court to investigate and prosecute alleged perpetrators. The government in 2017 asserted that there would be no international participation in prosecutions and that no *war heroes* (military personnel who fought the LTTE) will be touched.[7]

[E] Lack of Diversity in Justice System

Sri Lankan society is predominately Sinhalese, with significant Tamil and Muslim minorities. Sinhala and Tamil are both official languages, however, the diversity of the population is not reflected in the current justice system with the majority of judicial staff Sinhalese. Tamil speaking litigants often have difficulties navigating the justice system due to a lack of

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[3] Pinto-Jayawardena, Kishali. "Will International Treaties Protect Human Rights in Sri Lanka." Colombo Telegraph, 10 December 2013, https://www.colombotelegraph.com/index.php/will-international-treaties-protect-human-rights-in-sri-lanka/.

[4] "Truth Behind Law's Delay." *The Daily Mirror.* 24 October 2016. Web. 16 July 2018.

[5] "Truth Behind Law's Delay." *The Daily Mirror.* 24 October 2016. Web. 16 July 2018.

[6] De Jonge, F. (2015), *An Ad Hoc Hybrid Special Court for Sri Lanka: What Does it Take?* 25 September 2015. Available at http://www.peacepalacelibrary.nl/2015/09/an-ad-hoc-hybrid-special- court-for-sri-lanka-what-does-it-take/.

[7] Jayakody, Nadeshda. "To Prosecute or Not to Prosecute: The Need for Justice in Post-Conflict Sri Lanka." *United Nations University, Centre for Policy Research,* 13 December 2017, https://cpr.unu.edu/category/articles.

interpreters and court officials who speak Tamil. In addition, women in the legal profession are under-represented in higher-appointed judicial positions.

[F] Administrative Inefficiency in Courtroom Staff

Staff shortages have resulted in unnecessary delays in criminal cases. Additionally, administrative staff must be properly educated and trained to properly execute their duties. Adequate and qualified staffing is necessary to ensure that cases move through the system without delay and efficiently.

[G] The Judiciary

The role of the Judiciary in a democratic society provides a check and balance on the political branches of government. The current Sri Lankan Constitution fails to contain specific provisions for judicial independence or a separation of powers. According to a UN Report completed in March 2017 by the Special Rapporteur on the independence of judges and lawyers in Sri Lanka, there are credible concerns relating to the independence, impartiality and competence of the judiciary.[8] Judges of the Superior Court can be removed from office by a decision of the President after an impeachment procedure before Parliament.[9] The Executive has the power to arbitrarily remove a judge, which raises concerns on the level of control of the Executive over the Judiciary.

The Constitutional Council conducts the appointment and selection of superior court judges. The Constitutional Council is a ten member constitutional authority tasked with maintaining independent commissions and monitoring affairs. The role of the Constitutional Council is meant to mitigate the President's influence over the judiciary; however, the majority of the Council's members are politicians.[10] The procedure for appointment to the Judiciary by the Council continues to be unknown. The International Bar Association in 2009, cited *the lack of independent oversight and practice of executive presidential discretion over judicial appointments makes the judiciary vulnerable to executive interference and jeopardizes its independence*.[11]

The Judicial Service Commission establishes the process in which judges to the lower judiciary are appointed, transferred, removed and disciplined. Members of the Commission lack political autonomy as the President appoints them and therefore the recruitment of judges is likely influenced by political affiliations. Moreover, the nomination of judges should be based on their competence, not political affiliation.[12] According to the Special Rapporteur Report in 2017, in

[8] Pinto, Monica. "Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka." *United Nations Human Rights Council* (23 March 2017), Pg. 7, Para. 32.
[9] Pinto, Monica. "Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka." *United Nations Human Rights Council* (23 March 2017), Pg. 9, Para. 48.
[10] Pinto, Monica. "Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka." *United Nations Human Rights Council* (23 March 2017), Pg. 8, Para. 35.
[11] "Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka." *International Bar Association* (May 2009), Pg. 7.
[12] "Authority without Accountability: The Crisis of Impunity in Sri Lanka." *International Commission of Jurists*, International Commission of Jurists, 26 October 2012, Page 151, https://www.refworld.org/pdfid/50ae365b2.pdf.

the past there have been instances when judicial appointments did not follow the established procedure.[13]

The procedure for promoting judges remains relatively vague. There is concern that promotions are used as a tool to ensure political conformity on contentious issues such as human rights abuses and torture. Judges are often offered government or political offices following retirement.[14]

[1] Fundamental Rights of the Accused

[1.1] The Right to Mount a Defence

1. The accused has the right to explain evidence and the right to present evidence or witnesses for their own defence - Code of Criminal Procedure, Section 152.
2. Relevant International Standards:
    - In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it - International Covenant on Civil and Political Rights, Article, 14(3)(d).

[1.2] Presumption of Innocence

1. Every person shall be presumed innocent until he is proved guilty: provided that the burden of proving particular facts may be placed on an accused person – Sri Lankan Constitution, Section 13(5).
2. Relevant International Standards:
    - Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence - Universal Declaration of Human Rights, Article 11(1).
    - Every child alleged as or accused of having infringed the penal law has at least the following guarantees: To be presumed innocent until proven guilty according to law - Convention on the Rights of the Child, Article 40(2)(b).
    - Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law - International Covenant on Civil and Political Rights, Article 14(2).
    - Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence - ASEAN Declaration of Human Rights, Article 20(1).

[13] Pinto, Monica. "Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka." *United Nations Human Rights Council* (23 March 2017), Pg. 8, Para 37.
[14] Pinto, Monica. "Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka." *United Nations Human Rights Council* (23 March 2017), Pg. 7, Para. 33.

[1.3] Right Not to be Tortured or Ill-Treated

1. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment – Sri Lankan Constitution, Section 11.
2. The accused shall not be induced by threat, promise, or otherwise to disclose or withhold any matter within his knowledge - Code of Criminal Procedure, Sections 111 and 126.
3. Relevant International Standards:
    - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment - Universal Declaration of Human Rights, Article 5.
    - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment - International Covenant on Civil and Political Rights, Article 7.
    - The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity – Convention Against Torture, Article 1.
    - Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction – Convention Against Torture, Article 2(1).

[1.4] Right to Remain Silent (Right Against Self-Incrimination)

1. Confessions made to a Judge may be used as evidence against the accused only if they were made voluntarily. Also, the accused must be informed that he/she is not obliged to confess and that the confession may be used as evidence against him/her - Code of Criminal Procedure, Section 127.
2. Relevant International Standards:
    - In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality … not to be compelled to testify against himself or to confess guilt – International Covenant on Civil and Political Rights, Article 14(3)(g).

[1.5] Right to be Represented by a Lawyer

1. Every accused before any criminal court may of right be defended by an attorney-at-law, and every aggrieved party shall have the right to be represented in court by an attorney-at-law – Code of Criminal Procedure, Section 260.
2. Imposes a duty on a High Court judge to assign a lawyer to an accused person when indicted, which effectively gives the accused a right to legal aid – Code of Criminal Procedure, Section 195.
3. The Court of Appeal may assign a lawyer to any appellant in a criminal case if it appears desirable, in the interests of justice, that the appellant have legal aid and the appellant does not have sufficient means to obtain aid – Code of Criminal Procedure, Section 353.
4. Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court – Sri Lankan Constitution, Section 13(3).

5. The object of the Legal Aid Commission is to operate an effective legal aid scheme by providing legal advice, funds to conduct legal and other proceedings for and on behalf of deserving persons, to obtain the services of attorneys at law to represent deserving persons, and to provide any other assistance that are necessary to provide legal aid to deserving persons - Legal Aid Commission, Section 3.
6. To have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance – Legal Aid Commission, Section 4.
7. Every child shall have legal assistance provided by the State at State expense in criminal proceedings affecting the child, if substantial injustice would otherwise result – Legal Aid Commission, Section 5.
8. Relevant International Standards:
    - In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing – International Covenant on Civil and Political Rights, Article 14(3)(d).
    - Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources - UN Basic Principles on the Role of Lawyers, Principle 3.3.

[1.6] Right to Due Process

1. No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest - Constitution, Section 13(1).
2. Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law - Constitution, Section 13(2).
3. Relevant International Standards:
    - Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him - Universal Declaration of Human Rights, Section 10.
    - In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law – International Covenant on Civil and Political Rights, Article 14(1).
    - Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law – International Covenant on Civil and Political Rights, Article 9(1).

[1.7] Right to Equal Protection under the Law

1. All persons are equal before the law and entitled to the equal protection of the law- Sri Lankan Constitution, Section 12(1).
2. No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds – Sri Lankan Constitution, Section 12 (2).
3. Relevant International Standards:
   - Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty - Universal Declaration of Human Rights, Article 2.
   - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination – Universal Declaration of Human Rights, Article 7.
   - All persons shall be equal before the courts and tribunals – International Covenant on Civil and Political Rights, Article 14(1).

[1.8] Right against Double Jeopardy

1. Person once tried for an offense shall not be liable to be tried again for the same offense - Code of Criminal Procedure, Section 314.
2. Relevant International Standards:
   - No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country - International Covenant on Civil and Political Rights, Article 14(7).

[1.9] Right against *Ex Post Facto* Prosecution

1. Relevant International Standards:
   - No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed - Universal Declaration of Human Rights, Article 11(2). See also Article 13(6) of the Sri Lankan Constitution.
   - No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed - Convention on the Rights of the Child, Article 40(2)(a).

[1.10] Right to be Informed of Charges

1. The accused shall be informed as to the nature of the charge or allegation upon which he is arrested - Code of Criminal Procedure, Section 23(1).
2. The accused has the right to be read the charges against them at the commencement of a preliminary inquiry and upon reading over, the accused shall not be required to reply, and if a reply is made, it is not admissible in evidence against the accused - Code of Criminal Procedure, Section 146.
3. Relevant International Standards:
    - Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him - International Covenant on Civil and Political Rights Article, 9(2).

[1.11] Right to Bail

1. When an accused appears before a court for a bailable offence, the accused shall be released on bail - Code of Criminal Procedure, Section 402.
2. Relevant International Standards:
    - No one shall be subjected to arbitrary arrest, detention or exile - Universal Declaration of Human Rights, Article 9.
    - No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time - Convention on the Rights of the Child, Article 37(b).
    - Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment – International Covenant on Civil and Political Rights, Article 9(3).
    - Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful - International Covenant on Civil and Political Rights, Article 9(4).

[1.12] Right to Language Interpretation

1. Sinhala and Tamil shall be the languages of the courts throughout Sri Lanka and Sinhala shall be used as the language of the courts situated in all areas of Sri Lanka except those in any area where Tamil is the language of administration. Any judge, juror, party or applicant or any person legally entitled to represent such party or applicant, who is not conversant with the language used in a court, shall be entitled to interpretation and to translation into [Sinhala or Tamil] provided by the State, to enable him to understand and participate in the proceedings before such court and shall be entitled to obtain in [such language] any such part of the record or translation thereof – Sri Lankan Constitution, Section 24.
2. Whenever evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him - Code of Criminal Procedure, Section 275(1).

3. When documents are put in for the purpose of formal proof it shall be in the discretion of the court to cause only so much thereof as appears necessary to be interpreted - Code of Criminal Procedure, Section 275(2).
4. When the accused makes a statement to a Magistrate the whole statement shall be recorded in full and such record shall be shown or read to him in a language which he understands - Code of Criminal Procedure, Section 277(1).
5. Relevant International Standards:
    - In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him – International Covenant on Civil and Political Rights, Article 14(3)(a).

[1.13] Right Against Unlawful Arrests and Searches

1. No person shall be arrested except according to procedure established by law - Constitution, Section 13(1).
2. The person making an arrest shall touch or confine the body of the person to be arrested unless there is a submission to custody by word or action - Code of Criminal Procedure, Section 23.
3. Peace officer may search articles other than necessary wearing apparel and any such articles which there is reason to believe were the instruments or the fruits or other evidence of the crime - Code of Criminal Procedure, Section 29.
4. Women have the right to be searched by another woman with strict regard to decency - Code of Criminal Procedure, Section 30.
5. Relevant International Standards:
    - Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law – International Covenant on Civil and Political Rights, Article, 9(1).

[1.14] Right Against Unlawful Police Detention

1. Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law – Sri Lankan Constitution, Section 13(2).
2. The accused have the right to be released within 24 hours of being held in custody by the police - Code of Criminal Procedure, Section 37.
3. The accused have the right to be brought before the appropriate court without unnecessary delay upon arrest - Code of Criminal Procedure, Section 54.
4. When an investigation cannot be completed within 24 hours, the detention of the accused may be authorized for a total period of fifteen days and no more - Code of Criminal Procedure, Section 115.
5. As soon as the investigation is completed, and there is no allegation that the suspect has committed an offence, the Magistrate shall discharge him - Code of Criminal Procedure, Section 120(3).
6. Relevant International Standards:

- No one shall be subjected to arbitrary arrest, detention or exile - Universal Declaration of Human Rights, Article 9.
- No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time - Convention on the Rights of the Child Article 37(b).
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment - International Covenant on Civil and Political Rights, Article 9(3).
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful - International Covenant on Civil and Political Rights, Article 9(4).

[2] Duties and Responsibilities of the Defence Lawyer

[2.1] Overview & Sri Lankan National Framework

The Bar Association of Sri Lanka (BASL) was formed in 1974 and is a non-statutory body established under its own Constitution. The Constitution of the BASL determines that in order to practice law in Sri Lanka one must be admitted and enrolled as an Attorney-at-Law of the Supreme Court of Sri Lanka (BASL Constitution, Article 3.1) This is achieved by successfully completing law exams and taking a practical training course at the Sri Lanka Law College, followed by a six month apprenticeship under the supervision of a practicing attorney of at least eight years' standing. Upon qualification, attorneys are entitled to join the BASL, the representative body of the legal profession. The Attorney-General of Sri Lanka is the chief legal advisor and the primary lawyer in the Supreme Court of Sri Lanka.

Section 40 of the Judicature Act, provides for the Supreme Court to admit and enrol as Attorneys-at-Law, persons of good repute and of competent knowledge and ability, in accordance with Part VII of the Rules of the Supreme Court. Accordingly it is the duty of every legal practitioner to be equipped with relevant knowledge, skills and competency when discharging his/her professional services on reasonable standards.

The Supreme Court may make rules regulating generally the practice and procedure of the court including - the admission, enrolment, suspension, and removal of attorneys-at-law and the rules and conduct and etiquette for such attorneys-at-law (Constitution of Sri Lanka, Article 136(g)).

A strong and independent legal profession is essential for maintaining the rule of law and ensuring the protection of human rights. In order to perform their duties effectively, attorneys must be accorded all the domestic and international law guarantees which allow them to represent the interests of their clients in an independent and effective manner in criminal proceedings, as well as the other fundamental rights and freedoms.

[2.2] International Framework

The Basic Principles on the Role of Lawyers (the "UN Basic Principles") were formulated in 1990 to promote and ensure the proper role of lawyers. In its preamble the UN Basic Principles state that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled…requires that all persons have effective access to legal services provided by an independent legal profession." The International Bar Association has also adopted certain standards to assist in the task of promoting and ensuring the proper role of lawyers.

As individual rights holders, lawyers are entitled to the myriad rights and protections enshrined in international and regional human rights treaties. These include for example provisions on the right to life, liberty and the security of person, prohibition of torture or other cruel, inhuman or degrading treatment or punishment (other ill-treatment) and equality before the law.

[2.3] Specific Duties, Responsibilities and Rights of Defence Lawyers

[2.3.1] The Duty to Maintain Confidentiality of Client Information

No attorney-at-law or notary shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such attorney-at-law, or notary by or on behalf of his client, or to the state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course of and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure – (a) any such communication made in furtherance of any illegal purpose; and (b) any fact observed by any attorney-at-law, or notary in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment – Sri Lankan Evidence Ordinance, Section 126.

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional advised, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others – Sri Lankan Evidence Ordinance, Section 129.

Relevant International Standards:

- A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct - International Bar Association, Article 4.1.
- Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential - UN Basic Principles on the Role of Lawyers, Article 22.

[2.3.2] The Duty to be a Zealous Advocate

It is not enough that lawyers appear in court for the accused. They must be prepared both in the facts and law of the case, and argue vigorously for their clients' interests.

Relevant International Standards:

- Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice - UN Basic Principles on the Role of Lawyers, Article 12.
- The duties of lawyers towards their clients shall include: (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; and (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate - UN Basic Principles on the Role of Lawyers, Article 13.
- Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession UN Basic Principles on the Role of Lawyers, Article 14.
- Lawyers shall always loyally respect the interests of their clients - UN Basic Principles on the Role of Lawyers, Article 15.
- Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession - UN Basic Principles on the Role of Lawyers, Article 23.
- Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public – International Bar Association, Article 6.

[2.3.3] The Duty to Conduct Necessary Investigations

Failure to conduct a defence investigation may violate the client's right to defence, right to counsel and right to a fair trial. Defence lawyers cannot rely upon others to seek out favorable witnesses, investigate prosecution witnesses to determine bias or inaccuracies, or create necessary evidence such as photos.

Relevant International Standards:

- In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. International Covenant on Civil and Political Rights, Article 14(3)(b).

- It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time UN Basic Principles on the Role of Lawyers, Article 21.
- Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics - UN Basic Principles on the Role of Lawyers, Article 16.

[2.3.4] The Duty and Right to be Independent

One barrier to practice is an over-identification of the lawyer with the client. While lawyers need to be client-centered and ever mindful of their interests' lawyers should always remain independent professionals, providing representation consistent with the law and ethical standards.

Relevant International Standards:

- Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions - UN Basic Principles on the Role of the Lawyer, Article 18.
- Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority - UN Basic Principles on the Role of Lawyers, Article 20.
- A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case - International Bar Association, Article 1.
- The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free, fair and confidential legal assistance, including the lawyer's right of access to such persons. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities – International Bar Association, Article 12.

[2.3.5] The Duty to be Ethical

Relevant International Standards:

- Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ***ethics*** of the legal profession - UN Basic Principles on the Role of Lawyers, Article 23.

[2.3.6] The Duty to Avoid Conflicts of Interest in Representation

Lawyers have a duty in criminal trials to avoid conflicts of interest in representation. A conflict of interest arises when there is a potential for influence on the lawyer-client relationship that may affect the lawyer's duty of loyalty to the client, duty to render independent judgment to the client or duty to protect the client's interest.

It is important to note that the level of conflict is different in each case and should be addressed on a case specific basis. The following are examples of conflict of representation:

1. An accused pleads his guilt to his lawyer but wishes to plead not guilty – the lawyer cannot properly address the court knowing that the accused is guilty (i.e. knowingly represent an untruth to the court).
2. An accused disagrees with the lawyers' theory of the case – the lawyer cannot properly manage the case on a go forward basis when there is a breakdown in the lawyer-client relationship.

[2.3.7] The Right to Provide Representation in Court

Relevant International Standards:

- No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles - UN Basic Principles on the Role of Lawyers, Article 19.
- No court or administrative authority shall refuse to recognize the right of a lawyer qualified in that jurisdiction to appear before it for his client – International Bar Association, Article 9.
- A lawyer shall have the right to raise an objection for good cause to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing - International Bar Association, Article 10.

[2.3.8] The Right to Gain Access to Detained Clients

Relevant International Standards:

- All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings - UN Basic Principles on the Role of Lawyers, Article 1.
- Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status - UN Basic Principles on the Role of Lawyers, Article 2.
- Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources - UN Basic Principles on the Role of Lawyers, Article 3.

- Governments and professional associations of lawyers shall promote programs to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers - UN Basic Principles on the Role of Lawyers, Article 4.
- Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence - UN Basic Principles on the Role of Lawyers, Article 5.
- Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty eight hours from the time of arrest or detention – UN Basic Principles on the Role of Lawyers, Article 7.
- All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials - UN Basic Principles on the Role of Lawyers, Article 8.

[3] THE CLIENT

[3.1] Initial Client Interview

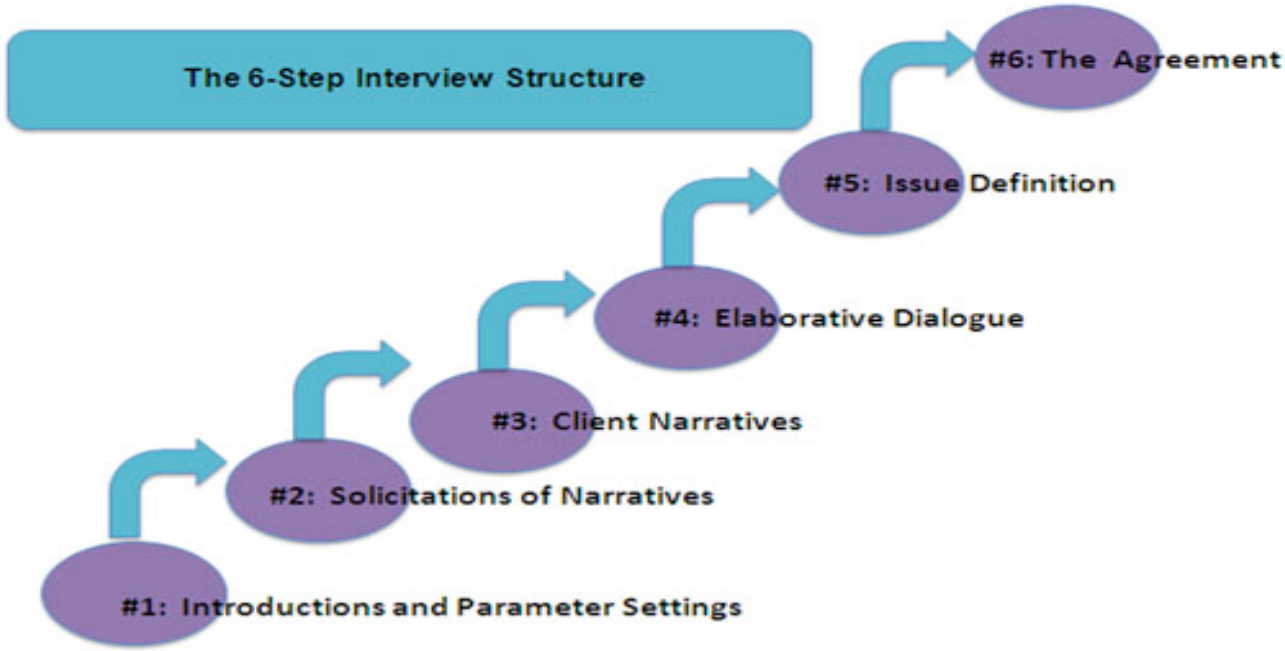
The initial interview with the client is potentially the most important meeting defence counsel will have with his/her client. It sets out an essential basis for the attorney-client relationship and affords the defence lawyer an opportunity to get to know the defendant and begin to understand the basic facts of the case.

During the initial interview, the defence lawyer will learn critical information such as the identity of witnesses, the identity of co-defendants, the location of evidence, and details concerning any potential violations of the defendant's legal rights. This information is vital to the development of a successful defence strategy and should be obtained as quickly as practicable.

Developing a good defence extends beyond just understanding your client's version of the events. While it is important to know your client's "story," it is also important to test that story against what others say. For example, if your client is charged with assaulting another, and he denies the assault, you should learn from others whether he is known to be a violent person. You should also consider whether, for example, the alleged victim is much larger than the defendant and therefore an unlikely target for assault.

The defence lawyer should use the initial interview as a forum to advise the defendant of his legal rights, explain the parameters of the attorney-client relationship and discuss the legal procedures involved in the case.

A simple structure to this is as follows:



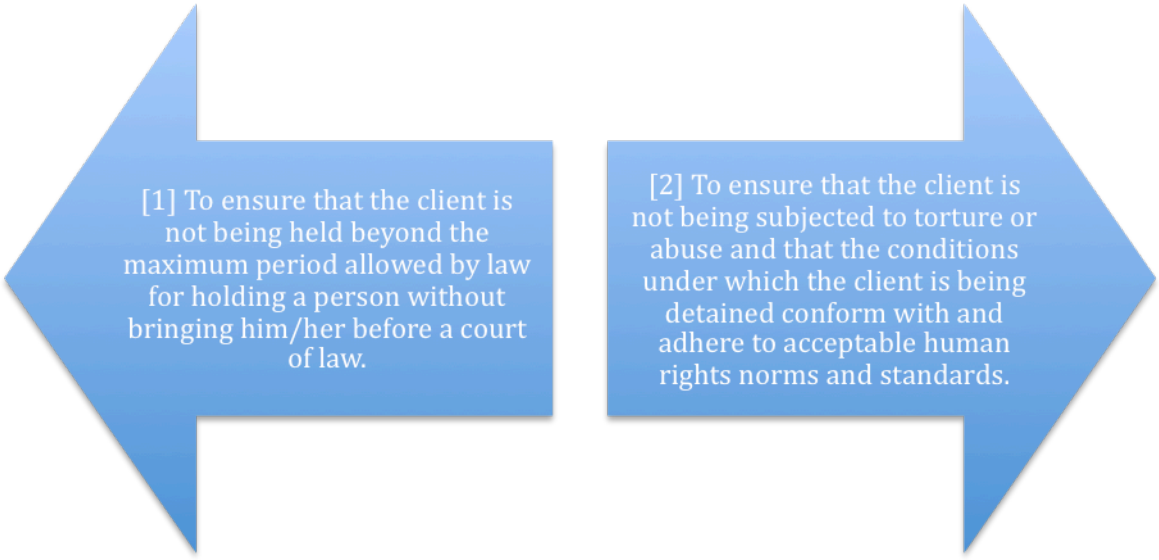
It is therefore very important for defence counsel to meet with his/her client as soon as possible in order to:

- Provide necessary legal assistance to the client as early as possible;
- Start gathering preliminary information about the case;
- Ascertain the client's version of the facts and events;
- Take instructions from the client;
- Start building a defence;
- Start developing the theory and theme of the case; and
- Consider and initiate any preliminary legal steps that need to be taken in order to safeguard the best interests of the client.

Empathy and compassion is imperative during the initial visit with the client. A defence lawyer must earn the clients trust in order to effectively represent the client. It is important to explain to the client that the meeting is privileged and confidential. The client should be informed not to discuss the charges or facts of the case with anyone, including friends and family. Lastly, stress the importance of honesty and to tell the truth at all costs.

Another important purpose of the initial client interview is to ascertain whether the police have reasonable grounds for keeping the client in custody.

The defence lawyer should be aware of the legal criteria for obtaining release of the client prior to trial – in Sri Lanka the difference between "bailable" and "non-bailable" offences is important:



[3.2] Practical Tips for Establishing the Lawyer-Client Relationship Through the Initial Interview

In order to gain the client's trust and elicit information relevant to, and necessary for, proceeding with the case, consider the following:

[3.2.1] Listen to your client's story:

- Use your basic listening and interviewing skills;
- Try to understand your client's concerns and position;
- Listen to and observe your client;
- Use body language that indicates to the client you are listening and paying attention;
- Indicate interest to the client by making steady eye contact;
- Encourage the client to provide a full narrative of what transpired;
- If possible, have the client write down his/her version of events;
- Let the client know you are there not to judge him/her.

[3.2.2] Be emphatic, yet firm:

- Show concern for the client;
- While showing concern, however, maintain professional distance and demeanor as counsel.

[3.2.3] Cede some control to the client during the beginning portion of the interview:

- Allow the client to 'vent;'
- Remember: you are the problem-solver and the client needs to explain his/her troubles and problems to you.

[3.2.4] Ask open-ended questions:

- Ask questions requiring an explanation or narrative from the client;
- Remember: open-ended questions are the WWWHW- questions: WHO, WHEN, WHY, HOW and WHERE;
- Avoid closed-ended questions – they provide less information than open-ended questions and have the effect of leading the client.

[3.2.5] Avoid confronting the client:

- Do not interrogate your own client;
- Try to avoid a direct line of questioning;
- Try, at this stage, to avoid pointing out any contradictions or inconsistencies in the client's account with other witness' accounts: that can come later in follow-up consultations and preparation for trial.

[3.2.6] Ask questions, but do not talk too much:

- An experienced interviewer listens more than he/she talks;
- Ask follow-up or probing questions if certain information is unclear.

[3.2.7] Always end the interview with a promise of positive action:

- No matter how big or small, leave your client with an indication of the next action or practical step you as defence counsel will take;
- Schedule a follow-up interview;
- Never make promises to your client you cannot keep.

[3.3] Establishing the Lawyer-Client Relationship

The client will form a first impression of defence counsel and defence counsel will similarly form a first impression of the client. One of defence counsel's primary objectives with the initial client interview will be to establish a positive attorney-client relationship based on mutual confidence, trust and respect. In order to provide the most effective legal representation, the defence lawyer should meet with the defendant as soon as possible to conduct an initial interview.

The lawyer has a right to interview his client in private without any police officer or prison officer present. The police cannot insist that the client be interviewed within their presence or with a police officer within earshot who can overhear what is being said between the lawyer and his client.

The defence lawyer should make sure to set aside enough time to conduct a thorough interview. In preparation for the initial interview, the defence lawyer should become familiar with the elements of the defendant's alleged crime and its accompanying punishment. If possible, the defence lawyer should also obtain copies of any relevant documents such as arrest warrants, search warrants, police reports, and any additional documents that relate to the criminal charges. The inability to obtain these documents should not delay the interview (if these cannot be

obtained before the initial interview, they should be obtained as soon as possible following the interview).

[3.4] Initial Client Interview Checklist

The following points serve as a useful guideline as to what information ought to be gathered during the initial interview with the client:

[3.4.1] Client Background Information

During the initial interview the defence lawyer should obtain the following background information from the defendant. This information allows the defence lawyer to get to know the defendant, as well as informs the lawyer's defence strategy:

- Name
- Address
- Telephone number(s)
- Date of birth
- Ties to the community (including time at current address, family relationships, immigration status (if applicable))
- Height, weight, and identifying features
- Armed services history
- Educational history
- Employment history
- Criminal history
- Family history
- Physical and mental health
- Immediate medical needs
- Emergency contact information

[3.4.2] Arrest

- When were you arrested?
- Where were you arrested?
- Who arrested you?
- Were you informed of the reason for your arrest?
- Did you understand the reason for your arrest?
- At the time of your arrest, were you shown an arrest warrant or summons?
- Were you able to read and understand the arrest warrant?
- Were you provided a copy of the warrant or summons?
- Were you informed of your legal rights?
- Was your family or work unit notified of the reasons for your detainment and of the place of custody within 24 hours of your detainment?
- Was anyone else arrested at the same time you were? If so, do you know their names, addresses and telephone numbers and how to contact their family members? Do you know what offenses they were charged with?

[3.4.3] Search and Seizure

- Were you strip-searched?
- What has been taken from your person?
- Were any of your clothes seized? Were any articles taken from your clothes?
- Were any of your bodily fluids or hairs taken for testing?
- Was a search conducted at the place of your arrest?
- Was a search conducted at your residence?
- Was a search conducted at your workplace?
- Do you know of any other people or places that were searched? If so, what are the people's names, addresses and telephone numbers? What are the addresses of the places searched, and what types of places are they (e.g., residences, workplaces)?
- Did you see the police or investigators seize any evidence?
- What objects were seized?
- Was there a search warrant, and did you see it? Did you understand it?
- Were there any witnesses present at the time of the search? If so, what are their names, addresses and telephone numbers?
- Was the search recorded? Did the investigators sign it? Did you sign it? Did anyone else sign it? Did anyone refuse to sign it, and if so, why?
- Did the investigators make a detailed list and duplicate copy of the articles and documents seized at the scene? Did they give a copy of the list to the owner of the seized items?

[3.4.4] Interrogation

- What was said to you at the time of your arrest?
- What was said to you after your arrest?
- Were you interrogated within 24 hours after your arrest?
- Who interrogated you? How many people interrogated you?
- Who initiated the conversation with you?
- How did you respond to them?
- What was your state of mind at the time?
- Were your statements recorded?
- Did you write your statement yourself?
- Were you allowed to adequately review and modify your statements?
- Were you allowed to write down your opinions?
- Have your co-defendants been interrogated? If so, do you know what they said about you?

[3.4.5] Requests for Legal Aid and Family

- Did you ask for a legal defender?
- Did anyone inform you that you could have a legal defender?
- When were you informed that you could have a legal defender?
- After your arrest, did you request to see a family member, friend or co-worker?
- Have you seen your family members, friends, or co-workers after the arrest?
- Was your family notified of the circumstances and the place where you were being held within 24 hours of your detention and arrest?

[3.4.6] Detention

- Describe the place where you were detained after your arrest.
- How many public security officers were present during your arrest?
- Were any compulsory measures taken against you before your interrogation?
- Were you threatened with physical abuse during and after the arrest?
- Were you treated with violence during or after the arrest?
- Were you verbally abused or threatened during and after the arrest?

[3.4.7] Information about the Alleged Victim

- Do you know the alleged victim? If so, describe your relationship with the alleged victim.
- Do you know the alleged victim's name, age, address, telephone number, and vocation? Does he have a criminal record?
- Has the alleged victim been physically or mentally injured? If so, what type of injuries and how serious are the injuries? Has the alleged victim recovered? Has the alleged victim suffered any property damage? If so, tell me about the nature and the extent of damage.
- Has the alleged victim received any compensation? If so, when, how much and who paid the compensation?
- What are your feelings towards the alleged victim?

[3.4.8] Information about the Co-Defendants

- Do you know the co-defendants? If so, describe your relationship with them.
- What are the names, ages, addresses, telephone numbers, vocations and criminal histories of the co-defendants?
- Do you know whether the alleged co-defendants have been arrested? If so, do you know what items, if any, were seized from them?
- Do you know what statements, if any, the co-defendants made about you? What is your response to their version of events?

[3.4.9] The Criminal Charges

- Do you understand the nature of the criminal charges against you?
- Do you understand the legal meanings of the charges?
- Do you understand the defences you might have to the charges?
- Is there anyone who can attest that they were with you at the time of the crime, but away from the scene of the crime? If so, what is their name, address and telephone number?
- What part of the charges do you believe to be inaccurate?
- Is there anyone else who was charged or who should be charged? If so, what are their names, addresses and telephone numbers? How would you describe their involvement in the case?

[3.4.10] Quick Investigation

- Who should I contact? What are their names, addresses and phone numbers?
- Are there any witnesses I should talk with? If so, can you give me their names, addresses and telephone numbers? What information do you think they might be able to provide? Do you think they are credible?
- Is there any evidence that must be secured? If so, can you tell me what it is and where I can find it? Do you know whether it has already been seized?

[3.4.11] In order to prevent unnecessary trouble or risks defence counsel is to avoid the following actions and behavior during the interview:

- To leak information about the case to the client, including information relating to written accusations and exposure;
- To instigate the client to lie about his part in the case;
- To lend your own cell phone to the client;
- To give material articles to the client in private;
- To bring a non-lawyer or the client's family members when meeting the client.

***ALWAYS REMEMBER*:** When interviewing a client, whether or not he is in custody, the lawyer must be careful not to concoct a defence for the client. The lawyer must find out what the client's story is – that is to say, what the client alleges are the facts of the case – and the lawyer may suggest possible defences for the client that are supportable on the basis of those facts. For a lawyer to invent or suggest defences for a client that go beyond the facts disclosed by the client is unethical.

[3.5] Special Populations

'Special populations' is a term that is generally used to refer to a specific disadvantaged or vulnerable group. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 10 states the following:

> *"Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures."*

For purposes of this Manual, four groups of special populations in Sri Lanka will be examined: juveniles, women, lesbian, gay, bisexual, transgendered and intersex (LGBTI), and the mentally ill.

[3.5.1] Juveniles

In Sri Lanka, juvenile justice issues are primarily considered in terms of *The Children and Young Persons Ordinance (1939)* (CYPO). The CYPO defines a "child" as a person under the age of 14 and a "young person" as a person between 14 and 16 years.

According to the Penal Code, a person is considered unable to commit an offence under the age of 8 (Penal Code, Section 75). Similarly anything done by a child above 8 years of age and under 12 years is not an offence, if such child has not attained sufficient maturity to judge the nature and consequences of his conduct on the particular occasion (Penal Code, Section 76).

[3.5.1.1] Jurisdiction

The CYPO establishes juvenile courts, or children's courts, as forums of summary hearing with the jurisdiction to hear any charge against a child or young person (CYPO, Section 2). The CYPO also provides for the appointment of children's magistrates to hear such cases in Sri Lankan magistrate's and municipal courts (CYPO, Sections 3(1) and 3(2)). The courts have extensive jurisdiction covering all cases of children in need of care and protection and any criminal charges against children other than scheduled offences such as murder, culpable homicide, attempted murder and robbery.

A Municipal Court sitting as a Juvenile Court shall have jurisdiction for offences committed under the Municipal Councils Ordinance (CYPO, Section 4(2)). The Magistrates Court sitting as a Juvenile Court shall have jurisdiction to hear and determine any case in which a child or young person is charged with any offence other than a scheduled offence (CYPO, Section 4(1)).

Where a child or young person is brought before a Juvenile Court for any offence which that court has jurisdiction to hear and determine, it shall be the duty of the court as soon as possible to explain to him in simple language the substance of the alleged offence (Child Act, Section 9(1)).

The Juvenile Court shall have jurisdiction over any offence other than an indictable offence (CYPO, Section 4(1)). The court shall, in the case of indictable offences and if it is of opinion that it is expedient that the case should be summarily disposed of, put to the young person the following or a similar question:

> *"Do you wish to be tried by this court or by a higher court*?"

It is important that the court, together with the above question, explain to the accused child that he/she may consult his parents or guardian or a friend before replying. It is also incumbent upon the presiding officer to explain to the child accused the effect of the matter being so tried and if the matter proceeds in the Juvenile Court and the presiding officer at any stage during the proceedings determines that the matte ought to be heard by a higher court, he/she shall direct that the matter proceed in such a higher court (CYPO, Section 9 (4)(b)(i)).

If the young person or child wishes to be tried by a higher court, the charge should be preferred in a Magistrate's Court of competent jurisdiction.

[3.5.1.2] Interviewing a Juvenile Client

Because of their particular vulnerability, juvenile clients often present unique challenges for the defence lawyer, one of the most important being the potential conflict of interest between the parent and the juvenile defendant.

To avoid potential complications it is necessary for counsel to assert him/herself at the start of the initial interview in order to make it clear that he represents the child and the child's interests and that in the event of a disagreement between the parent and the child, the lawyer must act on behalf of the child, not the parent. The defence lawyer must also consider whether or not the parent should remain in the room for the initial interview.

To preserve the attorney-client privilege, the defence lawyer may want to conduct the initial interview of a juvenile defendant without the defendant's parent present. Yet, other considerations such as the juvenile's age, mental condition, and stated preference may favor the parent's presence at the interview, despite the potential compromise of privilege. Defence counsel should be sensitive to the unique needs of the child defendant, who may be even more nervous and anxious at an initial client interview than his adult counterpart. Juvenile defendants may require more follow up questions and additional explanation of the process.

The defence lawyer should make sure the juvenile defendant understands everything discussed in the initial client interview and should conclude the interview with an opportunity for the juvenile to ask questions.

[3.5.1.3] Juvenile Detention

The CYPO requires that children and young offenders be detained separately from adults in police stations and courts and juvenile girls shall while detained, being conveyed or waiting, be under the care of a woman (CYPO, Section 13). Sections 14(1), 14(2) and 14(3) of the CYPO provides for bail and/or detention of children and young persons arrested.

Section 122A of the Penal Code makes provision for a medical examination in case of an offence alleged to have been committed by a child of, or above twelve years of age and under fourteen and is as follows:

> *(1)The officer in charge of the police station who is investigating an offence alleged to have been committed by a child of, or above, twelve years of age and under fourteen years, shall, with the consent of the parent or guardian of such child, cause the child to be examined by a multidisciplinary team comprising of the experts specified in subsection in order to obtain a report whether such child has attained sufficient maturity of understanding which enables the Magistrate having jurisdiction in the case to decide—*
>
> > *(a) The degree of responsibility of such child, taking into consideration the nature and consequences of the alleged offence; and*
> > *(b) Whether the child is in need of any therapeutic intervention.*

(2) The multidisciplinary team referred to in subsection (1) shall comprise of—

(a) The judicial medical officer of the relevant district;

(b) A pediatric or adolescent psychiatrist; and

(c) A psychologist.

(3) Where such parent or guardian of the child does not consent to the child being so examined, the officer in charge of the police station shall apply to the Magistrate having jurisdiction in the case, for an order authorising such multidisciplinary team to examine such child.

(4) In any event where the judicial medical officer of the relevant district is not available, the officer in charge of the police station who is investigating the offence shall obtain the assistance of a judicial medical officer of any other district to obtain the report referred to in subsection (1).

(5) Such multidisciplinary team shall submit its report to the officer in charge of the police station who shall submit such report to the Magistrate, in order to assist him to form his opinion as referred to in subsection (1) and to make his decision, taking into consideration the provisions of section 76 of the Penal Code.

(6) The child referred to in subsection (1) shall be subject to rehabilitation in the prescribed manner under the supervision and assessment of a paediatric psychiatrist and a psychologist.

[3.5.1.4] Court Procedure for Juveniles

In every case tried by a Juvenile Court, the court shall adopt the following procedure as outlined in section 9(5) of the Child Act:

(a) The court shall ask the child or young person whether he admits that he committed the offence;

(b) If the child or young person does not admit that he committed the offence, the court shall then hear the evidence of the witnesses in support of the charge;

(c) At the close of the evidence-in-chief of each such witness, the court shall ask the child or young person, or if it thinks fit the parent or guardian of the child or young person, whether he wishes to put any question to the prosecution's witnesses;

(d) The child or young person, or the parent or guardian may, if it is so desired, put any questions accordingly;

(e) The child or young person may, instead of asking any questions, make a statement, if he so desires;

(f) It shall be the duty of the court to put to every witness who gives evidence in support of the charge such questions as appear to the court to necessary;

(g) The court may put to the child or young person such questions as may be necessary to explain anything in any statement made by the child or young person;

(h) If it appears to the court that a prima facie case is made out, the evidence of any witness for the defence shall be taken and the child or young person shall be allowed to give evidence or to make any statement;

(i) If the child or young person admits that he committed the offence or if the court is satisfied on the evidence adduced that the child or young person committed the offence, he shall be asked if he desires to say anything in extenuation of the offence or in mitigation of punishment or otherwise.

[3.5.1.5] Sentencing Juveniles

According to the CYPO, if the child or young person is found guilty of an offence, he/she may be punished in the following manner:

- Committed to custody in a remand home for a period not exceeding one month (Section 25(1));
- Child of 12 years of a young person may be sent to an approved or certified school (Section 26(1));
- Handover to parents or guardians for custody on condition of keeping good behavior for one year (Section 27(1));
- Place him in charge of some fit person for three years (Section 27(1));
- Conditionally release him (Section 27(1));
- Fine him (Section 28(1));
- Order corporal punishment (6 strokes with a light cane for males only) (Section 29(1));
- Discharge him after due admonition (Section 30).

Convicted child prisoners are usually sent to the following institutions in Sri Lanka:

- Wathpitiwela Training School for Youthful Offenders,
- Pallansena Correctional Centre for Youthful Offenders or/and
- Taldena Correctional Centre for Youthful Offenders.

[3.5.2] Women

Women make up a relatively small percentage of crimes committed in Sri Lanka. At the beginning of 2017, female inmates made up just 4.9% of the total prisoner population in Sri Lanka (out of a total prisoner population for the same period of almost 21, 000).[15]

Women are often victims of domestic violence and rape in Sri Lanka and it has been reported that gender insensitivity is prevalent throughout all phases of the criminal justice system including: (i) law enforcement; (ii) prosecution; (iii) adjudication; (iv) correction; and (v) rehabilitation. It must be noted that similar to other jurisdictions that whenever it is necessary to cause a woman to be searched such search shall be done by another woman with strict regard to the accused's decency (Criminal Code, Section 30).

[15] "World Prison Brief data: Sri Lanka." December 2017, http://www.prisonstudies.org/country/sri-lanka.

It is further reported that the lack of gender sensitivity can be seen through the different actors of the criminal justice system including police constables, lawyers, judges, prison officials, judicial medical officers and others.[16] Issues reportedly confronting female prisoners and inmates in Sri Lanka's prisons (whether they are awaiting trial or convicted) include the following:

- A lack of an effective police presence – although the Women and Children's Bureau has taken steps to increase the number of women and children's desks in Sri Lanka such desks in each District of the country are unable to provide effective service delivery;
- Overcrowding and poor conditions in prisons;
- Lack of appropriate and sufficient shelters for female victims of crime - including transgender-women; and
- Assistance to and protection of victims of crime (in terms of the *Assistance to and Protection of Victims of Crime and Witnesses Act No.4 of 2015*) fails to recognize gender dimensions and does not make any specific reference to female victims of crime or afford any special protection to women on the ground of their vulnerabilities.[17]

[3.5.2.1] Abortion, Rape and Prostitution

Abortion remains a contentious legal issue in Sri Lanka with section 303 of the Sri Lankan Penal Code providing that anyone voluntarily causing a woman with child to miscarry is subject to up to three years' imprisonment and/or payment of a fine, unless the miscarriage was caused in good faith in order to save the life of the mother. The penalty is imprisonment for up to seven years and payment of a fine if the woman is "quick with child," (a term which, while not defined in the Code, refers to an advanced stage of pregnancy when there is perception of foetal movement, as opposed to "woman with child," which simply refers to "being pregnant").

A woman who induces her own miscarriage is subject to the same penalties. If the miscarriage is caused without the consent of the woman, whether or not she is quick with child, the person causing it is subject to up to 20 years' imprisonment and payment of a fine (Penal Code, Section 304). The same penalty is imposed if the woman's death results from any act carried out with intent to bring about a miscarriage, whether or not the offender knew that the act was likely to cause death (Penal Code, Section 305).

The Penal Code defines rape as sexual intercourse between a man and woman under several specified circumstances and penetration is sufficient to constitute an act of sexual intercourse. For a man to be accused of raping his wife, the couple must be judicially separated by court order. Living separately as a result of a breakdown in the marriage does not constitute the necessary separation. Where the spouses cohabit, a husband in Sri Lanka cannot be accused of rape.

[16] "Some aspects of criminal law discriminatory of women." *Daily News,* 14 December 2015, http://www.dailynews.lk/2015/12/14/features/some-aspects-criminal-law-discriminatory-women.
[17] "Some aspects of criminal law discriminatory of women." *Daily News,* 14 December 2015, http://www.dailynews.lk/2015/12/14/features/some-aspects-criminal-law-discriminatory-women.

A significant number of women in Sri Lanka are accused of prostitution and prostitution is a criminal offence in Sri Lanka under the *Vagrants Ordinance (1841*), *Brothels Ordinance (1889)* and the Penal Code.

Numerous concerns have been raised with this issue as it has the effect, due to legal vagueness and abuse, of discriminating against women by punishing only the female prostitutes without imposing any penalty on the male clients. Section 3(1)(b) of the Vagrants Ordinance stipulates that:

> "*Every common prostitute wandering in the public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner shall be deemed an idle and disorderly person, and shall be liable upon the first conviction to be imprisoned, or to a fine*."

Section 3(2) of the Vagrants Ordinance further provides that:

> "*A police officer may arrest without a warrant every person deemed to be an idle or disorderly person.*"

The term 'common prostitute' in the above section is not defined in the Vagrants Ordinance and it remains a vague legal term giving broad powers to the police to arrest without a warrant "any person deemed to be an idle or disorderly."[18]

Section 7 of the Vagrants Ordinance also stipulates that

> *"Any person in or about any public place soliciting any person for the purpose of the commission of any act of illicit sexual intercourse or indecency, whether with the person soliciting or with any other person, whether specified or not, shall be guilty of an offence, and shall be liable on summary conviction to imprisonment, or to a fine, or both."*

According to *Dharmadasa v. Thiadoman* 56 NLR 278, it's not required to solicit willingly or forcibly. If someone indirectly solicits it would be sufficient for the commission of this offence of "soliciting".

The above situation similarly is vague from a legal perspective and leaves the police with broad arresting powers.

[3.5.2.2] International Standards for Women in Prisoners

In regards to international standards, the UN Bangkok Rules provides guidance on gender-sensitive alternatives for both pre-trial detention and sentencing following conviction. The UN Bangkok Rules, as a guideline, for example determines that if a woman is sent to prison that they be provided with appropriate healthcare, treated humanely, preserve dignity during searches, protection from violence, and provide for prisoners' children.

[18] "Some aspects of criminal law discriminatory of women." *Daily News,* 14 December 2015, http://www.dailynews.lk/2015/12/14/features/some-aspects-criminal-law-discriminatory-women.

[3.5.3] Lesbian, Gay, Bisexual, Transgender and Intersex

Lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in Sri Lanka may face legal challenges not experienced by non-LGBTI residents. It remains a taboo subject and they are often associated with scandals.

Article 12 of the Sri Lankan Constitution recognizes non-discrimination based on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds as a Fundamental Right. This measure protects persons from stigmatization and discrimination on the basis of sexual orientation and gender identities. Article 12.1 of the Sri Lankan Constitution ensures equality for sexual orientation and gender identity and laws discriminating on the grounds of sexual orientation and gender identity are unconstitutional. Notwithstanding the aforementioned, both state and non-state discrimination and abuses against LGBTI population reportedly persists. [19]

Sections 365 and 365A of the Penal Code criminalize homosexuality in Sri Lanka by prohibiting "*carnal knowledge against the order of nature*" and "*gross indecency.*" This is commonly understood in Sri Lanka to criminalize all same-sex relations between consenting adults.

> Section 365: "*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be punished with fine and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount - determined by court to the person in respect of whom the offence was committed for injuries caused to such person.*"
>
> Section 365A: "*Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person."*

Sri Lankan law does not specifically criminalize transgender or intersex people but no laws ensure that their rights are protected, and police have reportedly used several criminal offenses and regulations to target LGBTI people - particularly transgender women and men who have sex with men involved in sex work. This includes the vaguely worded Vagrants' Ordinance, which prohibits soliciting or committing acts of "*gross indecency*" or being "*incorrigible rogues*"

[19] "Sri Lanka: Events of 2016."*Human Rights Now,* https://www.hrw.org/world-report/2017/country-chapters/sri-lanka#d91ede.

procuring "*illicit or unnatural intercourse*."[20] Some transgender women and men involved in the sex industry have indicated that repeated harassment by police, including instances of arbitrary detention and mistreatment, had eroded their trust in Sri Lankan authorities, and made it unlikely that they would report a crime. The community also reported abuse and harassment at the hands of medical authorities, leading many transgender people to self-medicate rather than seeking professional assistance. Sri Lankan law in this sense remains vague and ambiguous making it open for abuse.

Officer-in-Charge, Police Station (Maradana) v Galabada Wimalasiri & Another
(Supreme Court Case SC SPL LA No. 304/2009)

This was an application in terms of Section 9(a) of the High Court of Provinces (Special Provisions) Act No.19 of 1990. The Appellants were charged in the Magistrate's Court for committing an act of gross indecency between two persons in terms of Section 365A of the Penal Code (as amended). Both were found guilty and sentenced to imprisonment of one year and in addition a fine of Rs.1,500 with a default sentence of six months. On appeal the Supreme Court considered whether direct imprisonment/custodial sentence was proper in the circumstances. IT upheld the appeal against sentence but refused same against conviction. The court held that a non-custodial sentence more fit and proper sentence in present case and sentenced the appellants to 2 years rigorous imprisonment wholly suspended for 5 years in terms of Section 303(1) of the Code of Criminal Procedure Act.

[3.5.4] Mentally-Ill

If, as a result of interviews with the client, the defence lawyer considers that the client is not mentally fit to stand trial, the lawyer should liaise with the prosecutor in the case so that the mental condition of the accused can be brought to the attention of a magistrate and an order can be made for a psychiatric investigation into the mental competence of the accused to take place.

The defence lawyer must also consider whether the client was suffering from a mental disorder at the time that the accused committed the act constituting the charge. The mental disorder does not have to be a permanent disorder. The crucial question is whether the disorder existed at the time the "crime" was committed.

Where the crime is apparently motiveless, this should alert the defence lawyer to the possibility that the client may have been suffering from some form of mental instability when she/he committed the crime. In the case of murder, odd, inexplicable and bizarre behavior before, during or after the killing or from the way in which the accused instructs the lawyer or the way in which she/he behaves must not be ignored, as it may provide the basis for establishing that the accused had an unsound mind.

If the client was suffering from a temporary mental disorder at the time of the act but is now mentally stable, the accused may be reluctant to allow the lawyer to plead unsound mind. The client may fear that if this route is taken he or she may end up being incarcerated at a mental

[20] "Sri Lanka: Events of 2016."*Human Rights Now,* https://www.hrw.org/world-report/2017/country-chapters/sri-lanka#d91ede.

asylum for the criminally insane. The lawyer should explain to the client that if the defence succeeds and the court also decides that the accused is no longer suffering a mental disorder, it can simply order that the he be released from custody.

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to the law (Penal Code, Section 77). This section completely exonerates criminal responsibility from a defendant deemed to be of unsound mind at the time of the offence. The section provides the legal definition of insanity to be used within the judicial system of Sri Lanka.

None of the statues in Sri Lanka provides a legal definition of mental illness. The term used in the Penal Code refers to a mental illness as an 'unsoundness of mind.' The term 'unsound mind' is also used in the *Mental Health Ordinance of 1873*, the *Code of Criminal Procedure of Sri Lanka of 1979*, and the *Evidence Ordinance of 1895*, to refer to mental illnesses. The term 'unsoundness of mind' is considered to be wide enough in scope to include mental illnesses due to a disease of the mind as well as those due to retarded development such as mental retardation.

A request to perform an evaluation to determine criminal responsibility may originate from a Magistrate's court or from a higher court. The issue may be raised before or during the trial process. The prosecution, defence or the judge may raise the issue of mental unsoundness.

The assessment of a person for criminal responsibility due to unsoundness of mind requires specialist expertise and moves to call upon an expert for the determination. The criminal procedure act identifies medical officers as experts in the assessment of unsoundness in a defendant.

The defence of insanity is based on the principle that a person who is of unsound mind or insane at the time of the offense is unable to form the *mens rea* necessary for the act constituting the crime and thus not subject to punishment.

[3.5.4.1] Interviewing a Mentally ill Client

Defending a mentally ill client poses additional considerations for the defence lawyer. Many initial interviews with mentally ill defendants will take place in a hospital or institutional setting. In such circumstances, the defence lawyer should be careful to explain that he is an attorney and not a member of the hospital staff.

Checklist when interviewing a mentally ill client:

- The defence lawyer should explain to the mentally-ill defendant that their conversations are confidential and should not be discussed with the hospital staff;
- Evidence of a mental disability is of paramount importance to the formation of the defence lawyer's strategy, as it can be used to prove that the defendant lacked the criminal intent to carry out the alleged crime;
- Whether the defendant is institutionalized or not, the defence lawyer should closely observe the defendant for signs that he possess a mental illness;

- The defence lawyer should also seek information related to a possible mental illness through interviews with the defendant's family members; and
- The defence lawyer will most likely want to seek an expert opinion to evaluate the defendant's mental condition and aid in forming the most effective defence strategy.

[4] Representing a Client Who Was Subjected to Torture and/or Human Rights Abuse

[4.1] General Definition of Torture

Torture is any activity that results in unbearable and sometimes long-term suffering, whether psychological or physical, and which avoids, or at least delays, death. Its after effects can be physical (such as scars and/or mutilations) or psychological (such as trauma and/or post-traumatic stress). The absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become an accepted principle of customary international law.

Common forms of torture include, but are not limited to, the following:

> **Physical:** Beating, suspension in painful positions, electric shock, asphyxiation, chemical exposure, exposure to loud noises, bright lights, sexual assault, poor conditions of detention and/or starvation.
>
> **Psychological:** Verbal abuse, threats of death, further torture, harm to self or family/friends, mock execution, forced behaviors (ex. forced sexual intercourse or forced to engage in practices against one's religion) and/or sleep deprivation.

An aggravating fact of torture is that the torturer has complete control over the victim and this control is used to inflict either physical or psychological suffering on the victim. Possible objectives or motivations for torture include the following:

- Obtaining information from the victim;
- Coercing the victim to make admissions or/and confessions;
- Punishment of real and/or fabricated crimes;
- Terrorizing populations or political organizations by using members of a specific group as an example, leading to fear and passivity in the rest of the population who in turn are afraid of becoming victims themselves;
- Sadistic pleasure;
- Psychological preparation used to convince the victim that he/she is weak with the aim of obtaining complete victim submission; or/and
- Self-justification for the torturer who "is following orders" from a superior.

[4.2] International Legal Definition of Torture

Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as follows:

> *"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*

Article 16 of CAT also requires parties to prevent "*other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1*" in any territory under their jurisdiction. The CAT is similar to and follows the structure of other international human rights treaties such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These human rights instruments all confirm the right to be free from torture.

Torture is also defined in the Rome Statute as the "*intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused*."

It must be borne in mind that torture is defined separately from cruel, inhuman or degrading treatment. "Cruel, inhuman or degrading treatment" includes acts that inflict mental or physical suffering, anguish, humiliation, fear or debasement, but that fall short of torture.

Most often the phrase "ill-treatment" is used in a generic sense to cover both torture and other methods of abuse prohibited by international law, including inhuman, cruel, humiliating, and degrading treatment, outrages upon personal dignity and physical or moral coercion. As indicated, the legal difference between torture and other forms of ill-treatment lies in the level of severity of pain or suffering imposed.

In addition, torture requires the existence of a specific purpose behind the act – to obtain information, for example. The various terms used to refer to different forms of ill-treatment or infliction of pain is usually explained as follows:

- *Torture*: the existence of a specific purpose plus intentional infliction of severe suffering or pain;
- *Cruel or inhuman treatment*: no specific purpose but a significant level of suffering or pain inflicted;
- *Outrages upon personal dignity*: no specific purpose yet coupled to significant level of humiliation or degradation.

Methods of ill-treatment may be both physical and/or psychological in nature and both methods may have physical and psychological effects.

[4.3] Legal Framework and Torture in Sri Lanka

Sri Lanka ratified the CAT on 3 January 1994 and torture is specifically outlawed in Sri Lanka by the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment Act 22 of 1994* (this piece of legislation was enacted to give domestic effect to the provisions of the CAT in Sri Lanka).

Sri Lankan courts have also ruled (See the matter of *De Silva v. Fertilizer Corporation [1989] 2 SLR 393*) that even mental aggression can constitute torture.

Yet, despite these laws and safeguards protecting individuals from physical or psychological harm, the reality is that lawyers in Sri Lanka are regularly confronted with detainees who have been the victims of ill-treatment or torture. In 2016, the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment stated categorically in his report on Sri Lanka (dated 7th May 2016) "*... that torture is a common practice carried out in relation to regular criminal investigations."*[21]

Recently, the Human Rights Commission of Sri Lanka (HRCSL) found that Sri Lanka's police "*seriously violated the human rights of the people*." According to the chairperson of the HRCSL, the Commission received 5,614 complaints in the first nine months of its work. Of these, 1,174 were against the police for illegal detention and torture. According to the HRCSL the most important difficulties stemmed from police conduct during detention and the interrogation phases. It was further highlighted that between January and September 2017 the Commission recorded 249 cases of torture, 298 cases of arbitrary detention and 323 cases of threatening behavior.[22]

During 2017, a subsequent UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment in Sri Lanka reported that "*the use of torture has been, and remains today, endemic and routine, for those arrested and detained on national security grounds" and that "80% of those most recently arrested under the Prevention of Terrorism Act in late 2016 complained of torture and physical ill-treatment following their arrest*."[23]

[21] "UN experts urge Sri Lanka to adopt urgent measures to fight torture and strengthen justice system's independence." *United Nations Human Rights,* Office of the High Commissioner, 10 May 2016, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19946&LangID=E.
[22] Perera, Melani Manel. "HRSCL slams police for serious human rights violations." *AsiaNews.it*, 8 January 2018, http://www.asianews.it/news-en/HRCSL-slams-police-for-serious-human-rights-violations-42767.html.
[23] "UN experts urge Sri Lanka to adopt urgent measures to fight torture and strengthen justice system's independence." *United Nations Human Rights,* Office of the High Commissioner, 10 May 2016, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19946&LangID=E.

[4.4] Preparing for and Conducting an Interview with a Client Who was Subjected to Torture and/or Human Rights Abuse

[4.4.1] Enquiring about Incidents of Torture and Approaching Your Client:

- Approach the client with sensitivity and respect;
- Keep in mind that torture survivors are ordinary people;
- Torture survivors may be reluctant to share information with you or feel guilt or shame as a result of the trauma and humiliation they have endured;
- Consider starting with appropriate "small talk" and more mundane questions to break the ice before transitioning to more difficult topics.

[4.4.2] Asking Questions:

- Use both open ("then what happened?") and closed/specific questions ("did the officer say anything while he was hitting you?") to elicit the responses you need;
- Ask your client permission before moving onto questions directly related to the possible torture;
- Remember to enquire about both physical and/or psychological torture.

[4.4.3] Interaction with the Client Guidelines:

- Stay calm;
- Avoid making sounds or facial expressions;
- Listen carefully and avoid distractions;
- While you should allow your client time to share their story, through a well-planned list of open and closed questions, make sure that you lead the interview to get the information you need for your client's legal matter;
- Refrain from physical comforting;
- Be aware of the client's as well as your own needs and boundaries;
- If your client is in custody, refrain from acts that would put your client's safety at risk;
- Be methodological and keep in mind the goals and purpose of the interview.

[4.4.4] Important Practical Tips:

- When more comfortable, explain to the client the importance of speaking up and reporting torture: it can be investigated and help bring about change;
- Meet with your client at the earliest point of the criminal justice process – if torture or abuse did occur, it is easier to identify earlier rather than later;
- Physical evidence is often the only proof to substantiate a claim of torture: If the client alleges that he/she had been tortured, insist that a medical examination be conducted;
- Remember that counsel may often be denied access to the client while injuries heal so as to conceal and eliminate evidence thereof;
- If you are illegally denied access contact the relevant court officials and insist on the client's right to meet with counsel at the earliest stage possible;
- If access to the client is further denied approach the court and file a 'denial of access' motion with the court as this may present evidence of torture.

[4.5] Practical Guidelines for Interviewing Victims of Torture:

- Try to tape-record a detailed statement from the victim and have it transcribed;
- The statement of the victim should be based on answers given in response to your non-leading questions;
- Non-leading questions do not make assumptions or conclusions and allow the victim to offer the most complete and unbiased testimony;
- Examples of non-leading questions are ***what happened to you, and where*** rather than ***were you tortured in prison*** (the latter question assumes that what happened to the witness was torture and limits the location of the actions to a prison);
- Avoid asking questions with pre-constructed lists, as this can force the individual into giving inaccurate answers if what actually happened does not exactly match one of the options;
- Allow the person to tell his or her own story, but assist by asking questions that increase in specificity;
- Encourage the person to use all his/her senses in describing what has happened to him or her;
- Ask what he or she saw, smelled, heard and felt. This is important, for instance, in situations where the person may have been blindfolded or experienced the assault in the dark.

[4.6] Sample Questions for Individuals who Allege Torture and/or Human Rights Abuse

While this is not an exhaustive list, the following questions may assist you in investigating and confirming whether your client was tortured or subjected to other forms of degrading treatment or punishment. Please keep in mind that answering these questions will be extraordinarily difficult for your client to answer. Be respectful, empathetic, and calming:

- When and where were you arrested?
- How many officers were present when you were arrested?
- Who seemed to be in charge?
- Were they wearing uniforms – if yes, what type?
- Did anyone in particular stand out?
- What did the people who arrested you say?
- Did they tell you why you were being arrested?
- Did they tell you about your rights?
- Have you been moved to any other location since you were arrested?
- Has anyone been able to visit you?
- Some other people who have been detained in this prison have been beaten up or tortured, did anything like that happen to you?
- Did the police (or other entity) ever beat you up or torture you on the street, in your home, or some other place?
- How many times has it happened? When did it happen and how long did it last?
- Where on your body did they beat or torture you? Can you please show me each part of your body where you were beaten or tortured?
- How many times did they hit you? If more than one person was involved, how many times did each one hit you?

- Did they say anything to you while they beat or tortured you? Were you threatened? Did they ask you to confess?
- Do you remember what you said to them?
- How many people did you see?
- What were they doing?
- Have you seen a judge or any other lawyer?
- Did anyone else see or hear you get beaten up or tortured?
- Have the officers done anything else to you that seemed odd or caused you discomfort?
- Is there anything else you would like to tell me?

[4.7] Reactions Commonly Observed in Victims of Torture

- Victims remain silent – this is often a natural reaction developed by the victim to deal with the trauma they have endured; OR
- Victims are extremely talkative – this is often a reaction developed by the victim who is outraged by what they have endured and they feel the need to 'purge' this outrage.
- Keep in mind that a victim may also show signs of both reactions and counsel needs to adapt his/her strategy on questioning and approach accordingly.

[4.7.1] When faced with a client who alleges torture or/and who appears to have been mistreated, who chooses to remain silent:

- Do not lose sight of the fact that he/she requires help to talk about his/her experience;
- Resist the temptation to speak on your client's behalf;
- Ask the client to tell the story of arrest from the beginning during which you ask for more particular details;
- Remember that asking your client for small details often results in him/her answering the bigger question of whether or not he/she was mistreated or tortured;
- Never finish or complete the client's sentences;
- Pay attention to the details of the victim's account of what happened to them – the victim's understanding of certain acts may be different from what is legally prescribed;
- Once the client has begun his/her narrative of events, do not interrupt – try to wait until its completed before asking follow up questions;
- Insofar as possible, allow the client to talk about the physical abuse before proceeding to the psychological effects of the abuse;
- Together with your client, create an inventory of the visible marks that resulted from the abuse, any witnesses, the perpetrator(s), their names (or nicknames) and/or their descriptions.

[4.7.2] When faced with a client who alleges torture or/and who appears to have been mistreated, who is outraged at his/her experience:

- Understand the client's need to vent – allow him/her an initial "purging" phase during the interview where the client can freely express his/her emotions;
- Use this time to identify possible important elements that can be used to direct the conversation later;
- Expect and make provision for the possibility of exaggeration;

- Explain to the client how certain details may aid or inform the creation of a defence;
- If possible, try to have the talkative client speak of the mental and psychological torture first;
- If the client's narrative or flow of the story is interrupted, change the subject for a while – for example talk about their family. After this, one can return to the details of the abuse or violence;
- Try and review the physical injuries only near the end of the interview;
- Together with the client draw up an inventory of any witnesses, the perpetrator(s), their names (or nicknames) and/or their descriptions to organize the narrative of what transpired.

[4.8] Information counsel should you have at the end of an interview with a client who was subjected to torture and/or human rights abuse

- The time and place of the alleged events;
- The details of the persons present during the event(s) – whether or not they participated in any violence;
- The exact role of each person and especially the nature of the violence inflicted;
- Details of any pressures or threats constituting mental harm and/or psychological torture;
- Details of all physical marks that the client has shown you; and
- Details of any witnesses who can testify as to the events.

[4.9] Practical steps to approach either the Prosecutor or Judge if access to the client who has been subjected to torture and/or abuse is denied

[4.9.1] Approaching the Judge

- As the ultimate arbiters of justice, judges play a special role in the protection of the rights of citizens;
- International standards create an ethical duty on the part of judges to ensure that the rights of individuals are protected;
- Principle 6 of the United Nations Basic Principles on the Independence of the Judiciary states that "*the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected;"*
- If access to the client is persistently denied approach the court and file a "denial of access" motion with the court.

[4.9.2] Approaching the Prosecutor

- Similarly, prosecutors have an ethical duty to investigate and prosecute a crime of torture committed by public officials;
- Article 15 of the United Nations Guidelines on the Role of Prosecutors states: "*Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences*;"

- If access to the client is persistently denied approach the prosecutor and indicate to him/her that if the situation persists a "denial of access" motion will be filed with the court.

Hapugodage Jagath Perera v Gothami Ranasinghe Inspector of Police, Officer-in-Charge of the Minor Crime Branch, Police Station (Mirigama) & Others **(Supreme Court case No. SC/FR 1006/2009)**

In this matter the Petitioner sought a declaration from the court that his fundamental rights guaranteed by Articles 11,12(1),13(1) and13(2) of the Constitution of Sri Lanka were violated by the 1st 2nd 3rd Respondents. This was done through having been assaulted by Sri Lankan police officers after the Petitioner was unlawfully arrested. The court found that the petitioner's fundamental rights as guaranteed by Article 11 and 12(1) of the Constitution were violated by the 2nd Respondent – the Petitioner also lost his teeth as a result of the severe police assault. The court held that the Petitioner was entitled to receive a sum of Rs.500,000/- from the State as compensation.

Janaka Batawalage v Inspector Prasanna Ratnayake, Police Station & 4 Others **(Supreme Court Case No. SC (FR) No. 393/2008)**

The Petitioner in this matter had been slapped, beaten and forced by police officers to give fingerprints. The Police also refused the Petitioner to be visited by his wife and others. After being visited by a JMO the JMO directed that the Petitioner be admitted to hospital. The Petitioner was thereafter also forced to sign a police statement containing information he did not provide. The JMO in casu addressed the Human Rights Commission of Sri Lanka and informed that the Petitioner had not been subjected to a medico legal examination. The court held that the Petitioner had been subjected to torture and degrading treatment and that the Petitioner had established, to the required degree of proof, that his fundamental rights guaranteed under Articles 11 had been violated. The court awarded the Petitioner a sum of Rs.150, 000/- and the State had to pay the Petitioner a sum of Rs.25, 000 in legal costs

[4.10] The Istanbul Protocol (2004)

The Istanbul Protocol provides certain guidelines regarding the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. It establishes international best-practice principles and guidelines for the assessment of individuals who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or other investigative bodies.

The Protocol is clear that for effective investigation of allegations of torture, the investigator should attempt to obtain the following information through the testimony of the alleged victim:

(i) *The circumstances leading up to the torture, including arrest or abduction and detention;*

(ii) *Approximate dates and times of the torture, including when the last instance of torture occurred;*

*** NOTE:** ***Establishing this information may not be easy, as there may be several places and perpetrators (or groups of perpetrators) involved. Separate stories may have to be recorded about the different places. Expect chronologies to be inaccurate and sometimes even confusing; notions of time are often hard to focus on for someone who has been tortured. Separate stories about different places may be useful when trying to get a global picture of the situation. Survivors will often not know exactly to where they were taken, having been blindfolded or semi-conscious. By putting together converging testimonies, it may be possible to "map out" specific places, methods and even perpetrators.***

(iii) *A detailed description of the persons involved in the arrest, detention and torture, including whether he or she knew any of them prior to the events relating to the alleged torture, clothing, rank, scars, birthmarks, tattoos, height, weight (the person may be able to describe the torturer in relation to his or her own size), anything unusual about the perpetrator's anatomy, language and accent and whether the perpetrators were intoxicated at any time;*

(iv) *Contents of what the person was told or asked: this may provide relevant information when trying to identify secret or unacknowledged places of detention;*

(v) *A description of the usual routine in the place of detention and the pattern of ill-treatment;*

(vi) *A description of the facts of the torture, including the methods of torture used.*

*** NOTE:** ***This is understandably often difficult, and investigators should not expect to obtain the full story during one interview. It is important to obtain precise information, but questions related to intimate humiliation and assault will be traumatic, often extremely so.***

(vii) *Whether the individual was sexually assaulted. Most people will tend to answer a question on sexual assault as meaning actual rape or sodomy.*

*** NOTE:** ***Investigators should be sensitive to the fact that verbal assaults, disrobing, groping, lewd or humiliating acts or blows or electric shocks to the genitals are often not taken by the victim as constituting sexual assault. These acts all violate the individual's intimacy and should be considered as being part and parcel of sexual assault. Often victims will say nothing about or even deny any sexual assault. It is often only on the second or even third visit, if the contact made has been empathic and sensitive to the person's culture and personality, that more of the story will come out.***

(viii) *Physical injuries sustained in the course of the torture;*

(ix) *A description of weapons or other physical objects used; and*

(x) *The identity of witnesses to the events involving torture.*

*** NOTE:** ***The investigator must use care in protecting the safety of witnesses and should consider encrypting the identities of witnesses or keeping these names separate from the substantive interview notes.***

[4.11] Gender Issues and Torture and/or Human Rights Abuses

The Istanbul Protocol addresses the issue of gender as follows:

> *Ideally, an investigation team should contain specialists of both genders, permitting the person who says that they have been tortured to choose the gender of the investigator and, where necessary, the interpreter. This is particularly important when a woman has been detained in a situation where rape is known to happen, even if she has not, so far, complained of it. Even if no sexual assault takes place, most torture has sexual aspects.*
>
> *The re-traumatization can often be worse if she feels she has to describe what happened to a person who is physically similar to her torturers, who will inevitably have been mostly or entirely men. In some cultures, it would be impossible for a male investigator to question a female victim, and this must be respected. However, in most cultures, if there is only a male physician available, many women would prefer to talk to him rather than a female of another profession in order to gain the medical information and advice that she wants. In such a case, it is essential that the interpreter, if used, be female. Some interviewees may also prefer that the interpreter be from outside their immediate locality, both because of the danger of being reminded of their torture and because of the perceived threat to their confidentiality. If no interpreter is necessary, then a female member of the investigating team should be present as a chaperone throughout at least the physical examination and, if the patient wishes, throughout the entire interview.*
>
> *When the victim is male and has been sexually abused, the situation is more complex because he too will have been sexually abused mostly, or entirely, by men. Some men would, therefore, prefer to describe their experiences to women because their fear of other men is so great, while others would not want to discuss such personal matters in front of a woman.*

[4.12] Out of Court Remedies for Torture Victims

Criminal defence lawyers have a duty to explain to victims of alleged torture at the hands of the law enforcement that they have additional remedies available outside of the criminal courts and formal criminal justice process.

Criminal defence lawyers should in addition to documenting the abuse with a Judicial Medical Officer, immediately compile letters to the Human Rights Commission, Attorney-General office, Inspector General of Police, and the National Police Commission of Sri Lanka outlining the following:

1. Day/time the accused was charged;
2. Name/rank of the arresting officer and whether he was in uniform or civilian clothed;
3. Name/rank of any officers engaging in torture activities;
4. Name and location of the police station and/or detention center;
5. If on behalf of a family member or friend, the relationship to the accused person;
6. How long the accused was detained prior to being released or brought in front of a Magistrate court.

[5] DEFENCE CASE THEORY & THEME

[5.1] Introduction & Drafting the Outline of the Case

A critical legal skill and tool of a lawyer is to organize and prepare a case around a central theory – or focal point. The theory of a case forms the defence of an accused and is a detailed, coherent and accurate version or 'story' of what happened. This is what case theory is all about: every case contains a story and it is the duty of a lawyer to tell this story on behalf of their clients. One's case theory must ultimately demonstrate that the client is entitled to relief: in a criminal case acquittal. The case theory is the strategic plan for conducting a case and defence on behalf of a client as well as the tactical presentation thereof. Case theory usually involves legal theory, factual theory and persuasive theory:

- *Legal theory*: the legal arguments for why either the prosecution or the accused should prevail;
- *Factual theory*: an explanation of how a particular course of events happened or could have happened; and
- *Persuasive theory*: argument as to why the accused should be acquitted as a matter of fairness and justice.

Following the initial consultation, it is important to begin to formulate the theory of the case. In doing so a number of questions will need scrutiny:

- Was the Defendant illegally arrested?
- Was the client tortured or/and mistreated in any way?
- Were there sufficient statutory grounds to arrest the accused?
- If the accused is/was detained, was it lawful?
- If a search was completed, was it lawful?
- If necessary, was an interpreter provided to the accused?
- Does the accused have the mental capacity to commit the crimes?
- Has the accused signed any documents, such as a confession?
- Does the accused want to plead guilty?
- Lay witness statements that need to be gathered?
- If the accused has an alibi, can this be substantiated?
- Has the statutory time limit for criminal prosecution expired?
- Can you prove the innocence of the accused?
- Can you justify the crime committed by the accused?
- Did the accused indeed commit the crime?
- Is there anyone who should take more responsibility than the client for the alleged offense?
- Is the client eligible for a lighter or mitigated punishment?
- Will the prosecution be able bear its' burden of proof?

The above is a non-exhaustive list – keep in mind it is a flexible guideline that will alter with facts of every individual case. After gathering the initial information, review the statutes or codes listed within the charge as well as the elements of the crime. Review the criminal code for the potential penalties that the accused will face should there be a judgment of guilty as charged.

[5.2] Determining The Case Theory

[5.2.1] Whatever the facts of a matter may be, a good case theory is:

- Not based on assumptions about any aspects or facts of the case;
- Takes into account and explains or argues away unfavorable facts or aspects of the case;
- Accepted by the presiding officer or/and jury without having to stretch their imagination;
- Built on facts; and
- Consistent with incontestable facts (if any).

[5.2.2] Why is it important to develop and have a case theory?

Having a good case theory is important as your case theory controls:

- Your case investigation;
- Your questions to your client;
- Your discovery and trial preparation;
- What is said in your opening statement;
- What is asked during chief and cross-examination;
- What questions to put to prosecution and defence witnesses;
- What is said during your closing argument; and
- What your case theme will be.

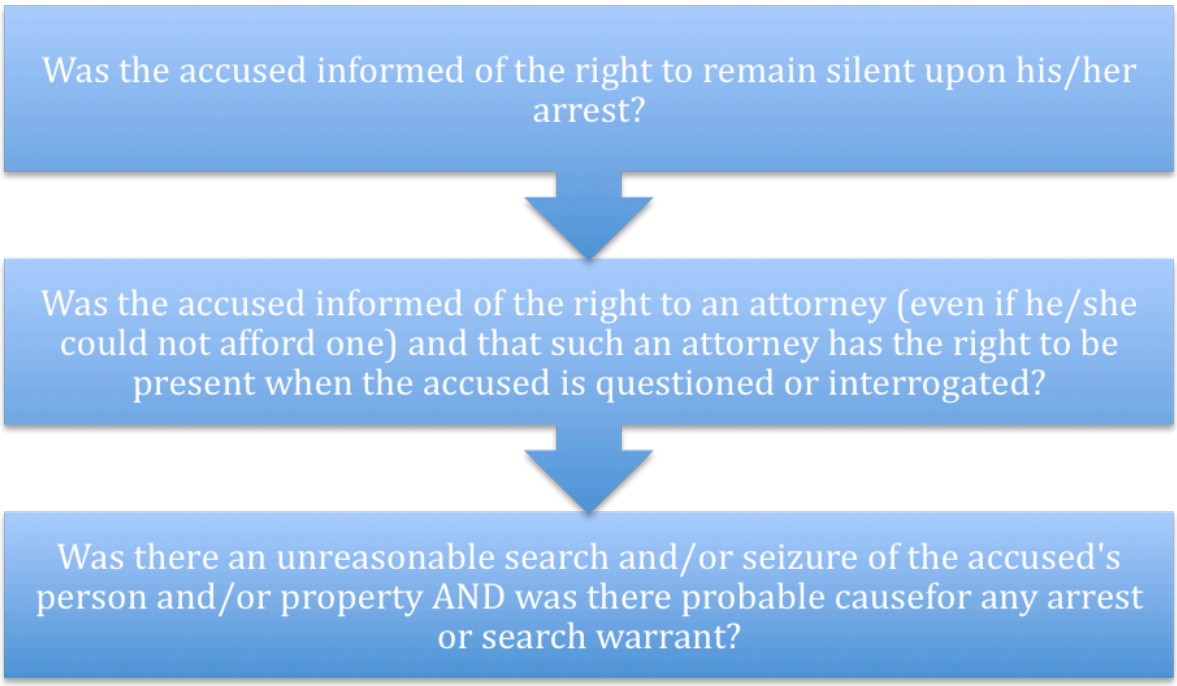
A thorough case theory thus provides a strategic roadmap of the case and ultimately how to present it tactically in court to a judge and/or jury.

[5.2.3] How do I go about creating and developing a theory of a case?

The **first** step in creating a case theory is to review the charge or indictment to determine precisely what the accused is being charged with. At this stage, it is critical to determine the essential elements of the crime and charge.

The **second** step is to thoroughly investigate the facts and background of the case. This is done through various actions:

- Interviews with the accused to obtain information, facts and instructions;
- Inspect and examine fully all documents, exhibits and other materials made available by the prosecution;
- If possible, interview eyewitnesses to the alleged crime to obtain their version of the facts;
- If possible, interview any other potential witnesses who may have information relevant to the case;
- If possible or applicable, examine the scene of the alleged crime;
- Control whether the accused's constitutional rights were violated, in particular:



The **third** step in determining one's case theory is deciding how to conduct the accused's defence in the courtroom:

- Determine whether any initial objections or *in limine* points should be raised before the client pleads: for example jurisdictional issues, defective charge or indictment etc;
- Identify the facts you will need to establish and prove in pursuit and presentation of the accused's defence;
- Identify how to prove those facts and what witnesses you need to call to establish those facts;
- Determine whether the prosecution's witnesses have any (or significant) credibility issues;
- Determine the strongest points in your case as well as that of the prosecution; and
- Determine the weak points in the prosecution's case as well as your own.

A lawyer should, from the outset, build a general theory of the case centered on the client's best interests, applicable law as well as the facts of the matter. This will not only help him/her evaluate what choices to make throughout the defence process but also guide his/her focus during the investigation of the matter and trial preparation.

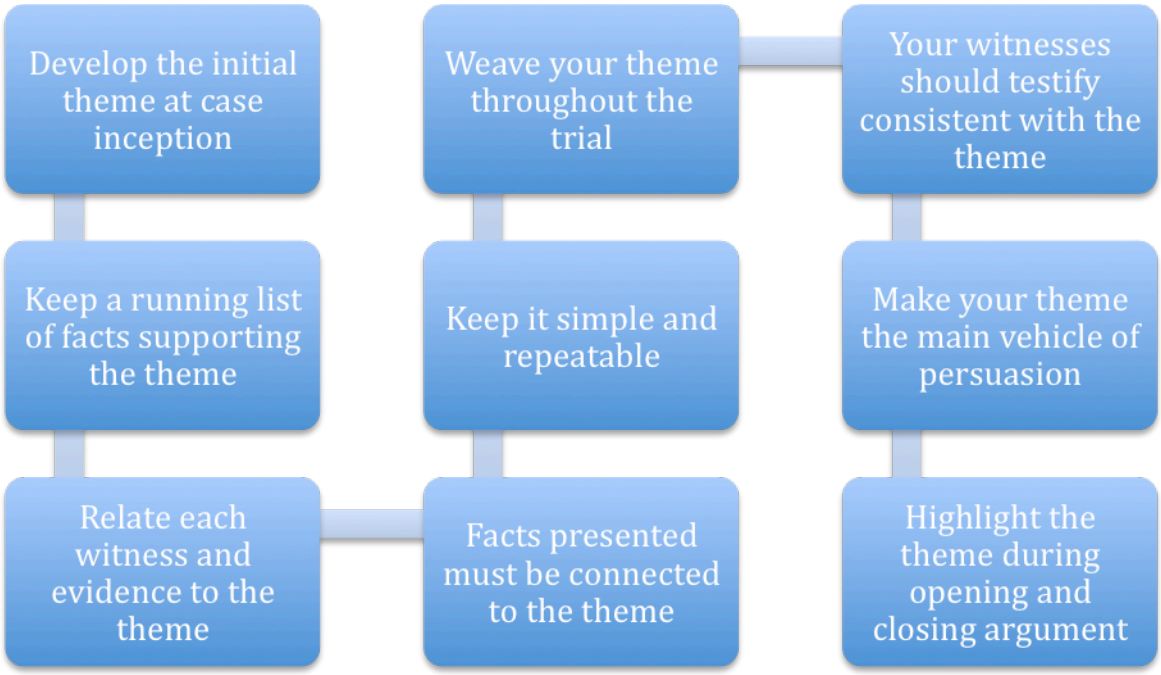
In this sense it remains the lawyer's duty to continuously emphasize and expand upon the facts and evidence supporting his/her client's version and theory of the case.

[5.3] Determining the Case Theme

An effective story (or theory) requires a clear theme to tie the different elements thereof together. It is important to remember that the *theme* of your case is but one element within the broader *theory* of what the case is about. A theory of the case includes a theme. The theme of the case is

a word, phrase or simple sentence that captures or illustrates the dominant emotion or reality of the theory of the case – the theme must be brief and easily remembered by the judge or/and jury.

The theme of a case is the critical element that ties the other elements thereof together. Practical tips for developing the theme of your case include the following:



[5.4] Storytelling and Presenting the Theory and Theme of the Case

In court a lawyer tells the client's story. For this he/she uses a theory of the case infused with a powerful theme. To defend a client effectively a lawyer must understand how to tell a story to the court - the more convincing the story is the more persuasive the argument becomes to the judge or jury who ultimately decides the facts of the case.

With the above elements in mind, storytelling allows the lawyer to set the stage, create atmosphere, introduce characters and organize evidence and ideas into a carefully planned framework. Without such a framework judges and/or jurors will understand and accept evidence and testimony in accordance with the prosecutor's argument.

By utilizing such a framework defence counsel can lead judges and/or jurors to understand and accept evidence and testimony favorable to their client and in the context of the client's experience. When telling your client's story in court it is important to create a positive environment for it is in this environment that the evidence presented will be evaluated. The following skills make for more effective storytelling in court:

- Varied tones and volume of voice;
- Proper rhythm and tempo when questioning witnesses;
- Proper rhythm and tempo when addressing either judge or jury;
- Body language and open hand gestures;
- Measured pauses for effect and emphasis;

- Eye-communication and maintaining eye contact; and
- Application of different rhetorical skills.

To effectively develop the theory of a case, counsel should objectively evaluate the prosecution's case. Balancing this with the client's instructions and version of the facts and applicable law counsel should proceed to structure a moving story based on the facts of the matter as well as any emotive factors that will collectively serve as a rebuttal.

A reasonable theory of the case must be conceptualized as early as possible as this will dictate the investigation of the case, witnesses, evidence to be tested and presented as well as arguments presented. By combining the above in a reasonable and convincing story defence counsel can persuade a judge or jury to acquit his/her client, mitigate his/her sentence or exempt the client from criminal responsibility.

[5.5] Defences

In the process of developing a theory of the case, a defence lawyer shall decide whether it is possible to exonerate the client from guilty. If so, the lawyer shall further consider how to prove the innocence of the client at trial.

The requirements for the various defences that can be raised in respect of criminal charges are set out in Chapter IV of the Sri Lankan Penal Code. It is imperative that defence lawyers familiarize themselves with the available defences as well as the essential requirements thereof. The following are possible defences for exonerating an accused from criminal liability under the Sri Lanka legal framework:

[5.5.1] Mistake of Fact

Nothing is an offence, which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be, bound by law to do it (Penal Code, Section 69).

For example:
- A, a soldier, fires on a mob by the order of his superior officer in conformity with the commands of the law. A has committed no offence.
- A, an officer of a Court, being ordered by that court to arrest Y and, after due inquiry, believing Z to be Y, arrests Z. A has committed no offence.

[5.5.2] Good Faith

Nothing is an offence, which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it (Penal Code, Section 72).

For example, A sees Z commit what appears to A to be murder. A in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons apprehending murderers in the act, seizes Z, in order to bring Z before the proper authorities. A has committed no offence though it may turn out that Z was acting in self-defence.

[5.5.3] Self-Defence

Self-defence and defence of a third party can be full defences if all the requirements for this defence are satisfied.

Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property (Penal Code, Section 74).

Every person has a right (subject to Section 92 of the Penal Code*)* to defend his own body, and the body of any other person, against any offence affecting the human body and the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass (Penal Code, Section 90).

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence (Penal Code, Section 92(4)).

[5.5.4] Misfortune

Nothing is an offence, which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner, by means and with proper care and caution (Penal Code, Section 73).

For example, A is at work with a hatchet; the head flies off and kills a man who is standing by. Here if there was not want of proper caution on the part A, his act is excusable and not an offence.

[5.5.5] Intoxication

Involuntary intoxication can be a full defence. Involuntary intoxication involves a situation such as where someone slipped a drug into the accused's drink and the accused consumed it without knowing that it contained the drug. If the accused lacked the *mens rea* for the crime because of the effects of the drug, he will have a full defence.

Nothing is an offence which is done by a person who, at the time of doing it, by reason of intoxication incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: provided that the thing which intoxicated him was administered to him *without his knowledge or against his will (*Penal Code, Section 78).

In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will (Penal Code, Section 79*).*

[5.5.6] Consent

Nothing, which is not included to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt is an offence by reason of any harm which it may cause, or be intended by the doer to cause to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer or be likely to cause to any such person who has consented to take the risk of that harm (Penal Code, Section 80).

Similarly, nothing which is not intended to cause death is an offence by reason of any harm it may cause, or be intended by the doer to cause (or be known by the doer to be likely to cause), to any person for whose benefit it is done in good faith and who has given consent, express or implied, to suffer that harm or to take the risk of that harm (Penal Code, Section 81*).*

[5.5.7] Threat

Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm or himself short of instant death, place himself in the situation by which he became subject to such constraint (Penal Code, Section 87*).*

For example, a person seized by a gang of housebreakers, and forced by threat of instant death to commit an act of harm, which would otherwise be an offence in law.

[5.5.8] Alibi

An alibi is a specific defence in terms of which an accused in essence pleads that he/she was, at the time when the crime was committed, in a different place.

If an accused raises an *alibi* defence in Sri Lanka, the requirements of section 126A of the Criminal Procedure Code must be adhered to. The section determines as follows, specifically indicating that an accused must provide notice of an *alibi* defence:

> *(1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has—*
>
> > *(a) stated such fact to the police at the time of his making his statement during the investigation; or*
> >
> > *(b) stated such fact at any time during the preliminary inquiry; or*
> >
> > *(c) raised such defence, after indictment has been served, with notice to the Attorney-General at any time prior to fourteen days of the date of commencement of the trial:*

Provided however, the Court may, if it is of opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.

(2) The original statement should contain all such information as to the time and place at which such person claims he was and details as to the persons if any, who may furnish evidence in support of his alibi.

(3) For the purposes of this section "evidence in support of an alibi" means evidence tending to show that by reason of the presence of the defendant at a particular place or in particular area at a particular time he was not, or was not likely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission.

It is imperative for counsel to canvass this with the accused and to take note of the specific requirements of the section if an *alibi* defence is to be raised.

[5.5.9] Departure from the Common Purpose or Joint Criminal Enterprise (JCE)

The doctrine of common purpose (also referred to as common design, joint enterprise or joint criminal enterprise) is a common-law legal doctrine that imputes the criminal liability of one participant to all the participants in a joint criminal enterprise for all the results arising from that enterprise.

A common application and example in illustration of the rule is to impute criminal liability for wounding a person to participants in a riot who knew, or were reckless as to knowing, that one of their number had a knife and might use it, despite the fact that the other participants did not have knives themselves. Another example can be illustrated as follows: a group comes together for a fight or to commit a crime, and either the participant knows or does not know that one of the group has a weapon. If the person knows that there is a weapon, it is foreseeable that it might be used and the fact that the other participants do not instruct the one carrying to leave it behind means that its use must be within the scope of their intention. However, if the person does not know of the weapon, this is a deliberate departure from the common purpose and this breaks the enterprise.

The Sri Lankan Penal Code recognizes and incorporates the doctrine of common purpose into Sri Lankan criminal law and determines as follows in sections 32 and 33 thereof:

Section 32: *When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.*

Section 33: *Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.*

Where an accused is charged and the prosecution alleges the group acted in common purpose, the defence to be raised is *departure*, ie, the accused must show that he/she actively disassociated himself from the common criminal enterprise (common purpose) in question.

It is important to note that mere repentance after commission of the crime, however sincere, is insufficient to amount to a defence of departure where common purpose is alleged. One person who has been an active member of a group with a common purpose may escape liability by withdrawing before the other(s) go on to commit the crime. Mere repentance without any action, however, still leaves the party liable to prosecution and conviction.

To be effective, the withdrawing party must actively seek to prevent the others from relying on what has been done. Any communication of withdrawal by the secondary party to the perpetrator must be such as to serve "unequivocal notice" upon the other party to the common purpose that, if he proceeds upon it, he does so without the further aid and assistance of the withdrawing party:

- If an accomplice only advised or encouraged the principal to commit the crime, he must at least communicate his withdrawal to the other parties; and
- Where an accomplice has supplied the principal with the means of committing the crime, the accomplice must arguably neutralize, or at least take all reasonable steps to neutralize, the aid he has given; or
- In more serious cases, it may be that the only effective withdrawal is either physical intervention or calling in the police.

Also, where one of the participants deliberately departs from the common purpose by doing something that was not authorized or agreed upon, that participant alone is liable for the consequences.

[5.5.10] Entrapment

[5.5.10.1] General

In criminal law, entrapment is a practice whereby a law enforcement agent induces a person to commit a criminal offence that the person would have otherwise been unlikely or unwilling to commit.

Entrapment occurs when an opportunity for the commission of an offence is created for the specific purpose of securing evidence, in order to obtain a conviction. It necessarily involves a degree of deception, and sometimes the law enforcement officer conducting the trap is ostensibly also involved in the illegal activity.

Entrapment often serves as a defence to criminal charges, and it's based on interaction between police officers and the defendant prior to (or during) the alleged crime. A typical entrapment scenario arises when law enforcement officers use coercion and other overbearing tactics to induce someone to commit a crime. Thus for purposes of criminal law entrapment is a practice whereby a law enforcement agent induces a person to commit a criminal offence that the person would have otherwise been unlikely or unwilling to commit.

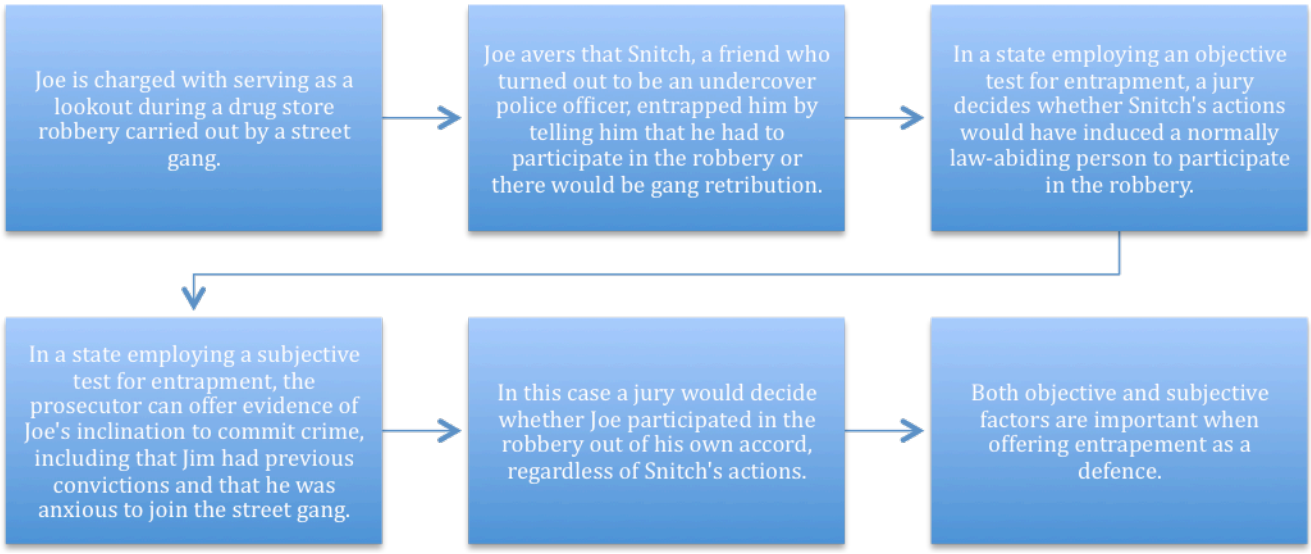
Because of these features, there is a concern that the technique can be abused, and that people who would otherwise not commit a crime, may be unfairly tempted into doing so.

[5.5.10.2] Objective vs Subjective Evaluation

Different jurisdictions employ either an *objective* or a *subjective* test to determine whether entrapment occurred and/or whether any evidence obtained by such entrapment will be allowed in evidence against an accused:

- ***Objective standard***: under an objective standard, when a defendant-accused offers entrapment evidence jurors or the presiding officer decides whether a law official's actions would have induced a normally law-abiding person to commit a crime;

- ***Subjective standard***: under a subjective standard, when a defendant-accused offers entrapment evidence, jurors or the presiding officer decides whether the defendant-accused's predisposition to commit the crime makes that defendant-accused responsible for his or her actions, regardless of any law official's inducements.



[5.5.10.3] Other Examples of Entrapment

Example #1: Joey is charged with selling illegal drugs to an undercover police officer. She testifies that the drugs were for her personal use. The reason she sold some to the officer is that at a party, the officer falsely said that he wanted some drugs for his father, who was sick with cancer and in a lot of pain. The officer even assured Joey that he wasn't a policeman.

The police officer's actions in this example do not amount to entrapment. The officer gave Berry an opportunity to break the law, but the officer did not engage in extreme or overbearing behavior.

Example #2: Annie is indicted with selling illegal drugs to an undercover police officer. She testifies that the drugs were for her personal use. The undercover officer, for more than three consecutive weeks, stopped by her apartment and pleaded with her numerous times to sell her some of her drugs because her mom was extremely sick and needed the drugs for pain relief. Annie says she kept refusing. When the official told her that the drugs would allow her mom to be pain free and more comfortable she broke down and sold her the drugs.

After this Annie was immediately arrested. The undercover police officer's persistent efforts and untruths are sufficiently extreme to constitute entrapment and may result in a not guilty verdict.

[5.5.10.4] English Law on Entrapment

In English law it is established that, while offering significant mitigation at sentence, there is no defence of entrapment (see *R v Sang* [1980] AC 402). However, it is also considered to be an abuse of court process for agents of the state to lure citizens into committing illegal acts and then seek to prosecute them for doing so. State-created entrapment of this sort will usually result in a stay of proceedings.

The leading English case on entrapment is *R v Loosely* [2001] UKHL 53. The case was concerned with the actions of undercover police officers carrying out test purchase operations. The case provides a useful guide when considering whether the conduct of the police amounted to inciting or instigating crime and the question deserving answer is whether the police did more than present a defendant with an unexceptional opportunity to commit a crime?

If the police conduct preceding the commission of the offence was no more than might have been expected by others in the circumstances this would ***not*** constitute entrapment. If, however, it went beyond this an ***abuse of process by the state*** may well be established.

[5.5.11] Judicial Excuse

Nothing which is done in pursuance of, or which is warranted by, the judgment or order of a court of justice (if done whilst such judgment or order remains in force) is an offence, notwithstanding the court may have had no jurisdiction to pass such judgment or order, provided the person doing the act, in good faith, believes that the court had jurisdiction (Penal Code, Section 71).

[5.5.12] Mistake of Law

Nothing is an offence, which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith, believes himself to be justified by law in doing it (Penal Code, Section 72).

[5.5.13] Incapacity (*Doli Incapax*)

Act of a child under eight years of age: nothing is an offence when the act is done by a child under the age of eight years (Penal Code, Section 75).

Act of a child between eight and twelve years – no sufficient maturity of understanding: nothing is an offence which is done by a child above eight years of age and under twelve, who has not attained sufficient maturity of understanding to judge the nature consequence of his conduct (Penal Code, Section 76).

[5.5.14] Insanity

Section 77 of the Penal Code determines that *"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*

When pleading insanity and raising insanity as a defence the critical elements are the following:

- Time when the act was committed;
- Unsoundness of mind of the accused;
- Incapable of knowing and understanding the nature of his act; and
- Whether it is wrong or contrary to the law.

[6] JURISDICTION

[6.1] Magistrate's Courts

The Magistrate's Courts of Sri Lanka have summary criminal jurisdiction. This is set out in section 9 of the Code of Criminal Procedure:

Subject to and in accordance with the provisions of this Code every Magistrate's Court shall have—

(a) power and authority and is hereby required to hear, try, determine, and dispose of in a summary way all suits or prosecutions for offences committed wholly or in part within its local jurisdiction, which offences by this Code or any other law in force are made cognizable by a Magistrate's Court or a District Court;

(b) Jurisdiction—

> *(i) jurisdiction to inquire into the commission offences - to inquire into all the offences committed or alleged to have of been committed wholly or in part within its local jurisdiction or in relation to which jurisdiction is by this Code given to such court to inquire into, to summon and examine all witnesses touching such offences, and to issue warrants and other processes to apprehend and summon all criminals and offenders and deal with them according to law; and*
>
> *(ii) to issue search warrants and to require sureties for the peace - to issue warrants to search or to cause to be searched all places wherein any stolen goods or any goods, articles, or things with which or in respect of which any offence has been committed are alleged to be kept or concealed, and to require persons to furnish security for the peace or for their good behaviour according to law; and*

(iii) to inquire into cases of sudden or accidental death - to inquire into all cases in which any person shall die in any prison or mental or leprosy hospital or shall come to his death by violence or accident, or when death shall have occurred suddenly, or when the body of any person shall be found dead without its being known how such person came by his death.

The summary criminal jurisdiction of the magistrate's courts is subject to section 10 of the Code of Criminal Procedure:

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.

[6.2] High Courts

The High Court is the highest court in each of the states of Sri Lanka and hears both civil and criminal cases.

In terms of section 12 of the Code of Criminal Procedure the High Courts are to try cases only upon indictment:

Subject to the provisions of this 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 for trial by or at the instance of the Attorney-General.

Section 9 of the Judicature Act specifically confers the following jurisdiction on the Sri Lankan High Courts:

(1) The High Court shall ordinarily have the power and authority and is hereby required to hear, try and determine in the manner provided for by written law all prosecutions on indictment instituted therein against any person in respect of:
(a) any offence wholly or partly committed in Sri Lanka,
(b) any offence committed by any person on or over the territorial waters of Sri Lanka;
(c) any offence committed by any person in the air space of Sri Lanka;
(d) any offence committed by any person on the high seas where such offence is piracy by the law of nations; (e) any offence wherever committed by any person on board or in relation to any ship or any aircraft of whatever category registered in Sri Lanka; or
(f) any offence wherever committed by any person, who is a citizen of Sri Lanka, in any place outside the territory of Sri Lanka or\on board or in relation to any ship or aircraft of whatever category.

(2) The jurisdiction of the High Court shall subject to the provisions of any other law:
(a) in respect of any offence committed wholly or partly in Sri Lanka referred to in paragraph (a) of subsection (1), be ordinarily exercised by the High Court held in a judicial zone within which such offence was wholly or partly committed;
(b) in respect of any offence committed in any place referred to in paragraphs (b) to (f) of subsection (1) shall be exercised by the High Court holden in the judicial zone nominated by the Chief Justice by a direction in writing under his hand - Provided that the Chief Justice may may, if he deems fit, direct by writing under his hand that the High Court holden in any zone nominated by him shall hear and determine any offence referred to in paragraph (a) would ordinarily have been heard and determined by the High Court holden in any other judicial zone.

All trials in the High Court shall be before a Judge of the High Court sitting alone without a jury (Judicature Act, Section 11).

Section 11(2) of the Judicature Act, determines that trials in the High Court shall be by jury before a Judge of the High Court where:

(a) at least one of the charges is an offence referred to in the Second Schedule; and
(b) the accused elects to be tried by a Jury.

The High Court has jurisdiction for triable offences under the Penal Code where the offence is listed in the eighth column of the First Schedule (Criminal Code, Section 10(b)).

[6.3] Court of Appeal

The Court of Appeal hears all appeals from the High Court and Magistrates Court.

Subject to the provisions of the Sri Lankan Constitution and of any law, the court is vested with the following specific jurisdiction:

- May in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgment, decree or sentence (Article 139(1));
- May further receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of First Instance (Article 139(2));
- Power to issue writs, other than writs of habeas corpus (Article 140);
- Power to bring up and remove prisoners (Article 142);
- Power to grant injunctions (Article 143);
- May inspect and examine any record of any Court of First Instance (Article 145).

[6.4] Supreme Court

The Supreme Court of Sri Lanka was created in 1972, after the adoption of a new Constitution. The Supreme Court is the highest and final superior court of record and is empowered to exercise its powers, subject to the provisions of the Constitution. The court rulings take precedence over all lower Courts. The Sri Lanka judicial system is complex blend of both common law and civil law. In some cases such as capital punishment, the decision may be passed on to the President of the Republic for clemency petitions.

The jurisdiction of the Supreme Court encompasses the following specific areas:

- Constitutional Matters;
- Fundamental Rights;
- Final Appellate Jurisdiction – both in criminal and civil matters;
- Consultative Jurisdiction;
- Election Petitions (Presidential Election);
- Breach of privileges of the Parliament;
- Other matters which Parliament may by law vest or ordain;
- Admission, Enrolment, Suspension and Removal of Attorneys-At-Law.

Article 132 of the Sri Lankan Constitution determines that:

> *The several jurisdictions of the Supreme Court is ordinarily exercised in Colombo unless the Chief Justice otherwise directs and, subject to the provisions of the Constitution, is ordinarily exercised at all times by a Bench of at least three Judges; the Chief Justice may, on his own motion or at the request of two or more Judges hearing any matter or on the application of a party, if the question involved is in the opinion of the Chief Justice one of general and public importance, direct that an appeal, proceeding or matter be heard by a Bench comprising five or more Judges.*

Appeals from a High Court Trial at Bar shall be heard by a Bench of five or more Judges.

[6.3] Jurisdiction for Offences Committed Under Other Laws

This is regulated by section 11 of the Code of Criminal Procedure Act. It determines as follows:

> *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.*

[7] INVESTIGATION STAGE

[7.1] Charge

Once the legal practitioner has informed the prosecutor dealing with the case that he is representing the accused, and the prosecutor will normally provide the legal practitioner with a copy of the charge and of any warned and cautioned statement made by the accused. If this has not been done, the legal practitioner should request that he be supplied with these documents.

The first task is to understand what the case against the accused is. The charge should be critically examined to see if it is legally competent and that adequate details have been provided to enable a proper defence to be prepared. The charge must contain details of the State case as are reasonably necessary to inform the accused of the nature of the charge and must set out:

1. The alleged time and place of the commission of the offence;
2. The person, if any, against whom it was committed;
3. The property, if any, in respect of which the offence was committed.

The Code of Criminal Procedure states that every charge shall state the offence with which the accused is charged (Criminal Code, Section 164 (1)). If the law, which creates the offence, gives it any specific name, the offence may be described in the charge by that name only (Criminal Code, 164(2)). If the law, which creates the offence, does not give it any specific name, so much of the definition of the offence must be stated as will give the accused notice of the matter with which he is charged (Criminal Code, Section 164(3)).

The law and section of the law under which the offence said to have been committed is punishable shall be mentioned in the charge (Criminal Code, Section 164(4)) and the fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case (Criminal Code, Section 165(5)). Furthermore, the charge shall when it is preferred, whether at the preliminary inquiry to committal for trial or at the trial, be read to the accused in a language which he understands (Criminal Code, Section 165(6)).

***The Attorney General v Bimbirigodage Sujith Lal (*Supreme Court Case SC (SPL) LA 232/14)**
This was an application for Special leave to appeal in terms of Article 128 of the Sri Lankan Constitution. The Respondent had been convicted of murder and sentenced to death and the court had to consider the question whether the trial Judge had failed to follow the provisions of section 195 (ee) of the Code of Criminal Procedure Act: The duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused elects to be tried by a jury in recognition of the basic right of an accused to be tried by his peers. The court found that a trial judge has an obligation not only to inquire from the accused whether he is to be tried by a jury but the judge must also inform that the accused has a legal right to that effect. Non-observance of this procedure is an illegality and not a mere irregularity. The court upheld the appeal against both conviction and sentence imposed on the accused.

The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed (Criminal Code, Section 165(1)).

When the accused is charged with criminal breach of trust or dishonest misappropriation of movable property, it shall be sufficient to specify the gross sum or, as the case may be, the gross quantity in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 174: provided that the time included between the first and last of such dates shall not exceed one year (Criminal Code, Section 165(2)).

When manner of committing offence must be stated. When the nature of the case is such that the particulars mentioned in section 164 and the preceding subsections of this section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose (Criminal Code, Section 165(3)).

What sense to be attached to words used in describing an offence. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable (Criminal Code, Section 165(4)). Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or those particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission (Criminal Code, Section 166).

The court may alter the charge. Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the jury is resumed (Criminal Code, 167(1)) and such alteration must be read and explained to the accused (Criminal Code, Section 167(2)). This is very important in Sri Lankan criminal law and practitioners must be wary of this fact: if a charge is amended and not read out and explained to the accused, the matter can be taken on appeal.

Poddana Tissamaharama & 15 Others v The Officer-in-Charge Police Station (Tissamaharama) & The Attorney General **(Supreme Court Case SC (SPL) LA No. 289/09)**

This was an application for Special Leave to Appeal in terms of Section 128(2) of the Constitution of Sri Lanka and the matter was concerned with an amendment of the charge sheet/indictment in Sri Lankan law and the case confirmed that the charge sheet must be read to accused if it is amended (Section 167(1) and (2) of the Sri Lankan Criminal Procedure Code) considered. It is a requirement under Sri Lankan law that when the charge sheet or indictment is amended the amended charge sheet or the indictment should be read and explained to the accused. Failure to do so makes the case defective against the accused.

The substitution of one charge for another in an indictment or the addition of a new charge to an indictment and in a Magistrate's Court the substitution of one charge for another or the addition of a new charge shall be deemed to be an alteration of such indictment or charge within the meaning of this section (Criminal Code, Section 167(3)).

For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 174, 175, 176 and 180 which said sections may be applied either severally or in combination (Criminal Code, Section 173).

Three offences of the same kind within a year may be charged together. When a person is accused of more offences than one of the same kind committed within the space of, twelve months from the first to the last of such offences he may be charged with and tried at one trial for any number of them not exceeding three, and in trials before the High Court such charges may be included in one and the same indictment (Criminal Code, Section 174(1)).

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 special or local law (Criminal Code, Section 174(2)).

[7.2] The Arrest

[7.2.1] Unlawful Arrest

Defence lawyers must know what constitutes a lawful arrest so that they can take appropriate action when their clients have been unlawfully arrested or detained.

In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested (Criminal Code, Section 23(1)).

The consequences of unlawfully arresting a person, not properly informing a person about the reason for his/her arrest or violating the accused's constitutional rights as a result of the arrest, could lead to a court finding that an accused person's rights were violated and this in turn could lead to the accused claiming compensation/damages.

Pankumburage Rohitha Anura Kumara v H. Harisan Hettihewa, Inspector of Police, Police Station, (Boralesgamuwa) & 7 Others **(Supreme Court Case No. SC /FR/ Application No 194/2013)**

This was an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka. The police in casu failed to properly explain the reasons for arresting and keeping the Appellants in detention. This happened after and initial lawful arrest but subsequent unlawful police detention after a bail bond was secured. The court held that the fundamental rights of the Petitioners under Articles 12 (1), and 13 (2) of the Constitution had been violated by the 2nd Respondent and several other Respondents who were not identified in these proceedings. The 2nd Respondent was ordered to pay Rs. 50,000/- and the State to pay Rs. 100,000/- as compensation to the Petitioner. The State was ordered to pay a further Rs. 50,000/- in legal costs.

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape (Criminal Code, Section 28).

If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, the person matting the arrest may use such means as are ***reasonable necessary*** to effect the arrest (Criminal Code, Section 23(2)).

The arresting officer shall not have the right to cause the death of a person who is not accused of an offence punishable with death (Criminal Code, Section 23(3)).

A police officer can access a space without a warrant, if to avoid the person being arrested an opportunity to escape. If ingress to such place cannot be obtained under section 24 it shall be lawful in any case 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 (Criminal Code, Section 25).

While making an arrest, police officers have the power to break open doors and windows for the purposes of liberation. Any person authorised to make an arrest may break open any outer or inner door or window of any place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein (Criminal Code, Section 27).

[7.2.2] Arrest without Warrant

Section 32 of the Code of Criminal Procedure, outlines when a peace officer may arrest without warrant:

> *(1) Any peace officer may without an order from a Magistrate and without a warrant arrest any person—*
>
> *(a) who in his presence commits any breach of the peace;*
> *(b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;*
> *(c) having in his possession without lawful excuse (the burden of proving which excuse shall be on such person) any implement of house-breaking;*
> *(d) who has been proclaimed as an offender;*
> *(e) in whose possession anything is found which may reasonably be suspected to be property stolen or fraudulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing;*
> *(f) who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody;*
> *(g) reasonably suspected of being a deserter from the Sri Lanka Army, Navy or Air Force;*

(h) found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence;

(i) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of Sri Lanka, which if committed in Sri Lanka would have been punishable as an offence and for which he is under any law for the time being in force relating to extradition or to fugitive persons or otherwise liable to be apprehended or detained in custody in Sri Lanka.

(2) Anything in this section shall not be held to interfere with or modify the operation of any enactment empowering a peace officer to arrest without a warrant.

***Omaththa Mudalige Don Gamini v Inspector of Police, Special Unit, Criminal Investigation Department & Others* (Supreme Court Case No. SC/FR 81/2011)**

This matter was concerned with detainment and arrest of the Appellant following an open police warrant. The application was made in terms of Articles 17 and 126 of the Constitution of Sri Lanka. The Appellant sought a declaration that his fundamental rights guaranteed under Article 11, 12(1), 12(2), 13(1) 13(2) and 14(1) (g) of the Constitution were violated by the Respondents. The court found that the Appellant had indeed been detained and arrested following the open police warrant but that the arrest was illegal. The court held that the 1st and 2nd Respondents violated fundamental rights of the Appellant guaranteed by Article 12(1) of the Constitution and the State was ordered to pay Rs 300 000 compensation to the Appellant.

A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case (Criminal Code, Section 36).

Police officers must report the charge to the appropriate court. Officers in charge of police stations shall report to the Magistrates' Courts of their respective districts the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise (Criminal Code, Section 38).

Any person who has been arrested without a warrant by a peace officer shall not be discharged except on his own bond or on bail or under the special order in writing of a Magistrate (Criminal Code, Section 39).

[7.2.3] Arrest with Warrant

The person executing a warrant of arrest shall notify the substance thereof to the person arrested, and if so required by the person arrested shall show him the warrant or a copy thereof signed by the person issuing the same (Criminal Code, Section 53).

The person arrested is to be brought before the court without delay. The person executing a warrant of arrest shall (subject to the provisions section 51 as to security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person, and he shall endorse on the warrant the time when and the place where the arrest was made (Criminal Code, Section 54).

A warrant of arrest may be executed at any place in Sri Lanka (Criminal Code, Section 55).

When a warrant of arrest is executed outside the local limits of the jurisdiction of the court by which it was issued the person arrested shall, unless the court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate's Court within the local limits of the Jurisdiction of which the arrest was made or unless security be taken under section 51, be brought before such last-mentioned Magistrate's Court (Criminal Code, Section 58(1)).

The Magistrate's Court before which the person arrested is brought shall, if the person arrested appears to be the person intended by the court which issued the warrant, direct his removal in custody to such last-mentioned court; Provided that if the offence be bailable and the person arrested be ready and willing to give bail to the satisfaction of the court before which he shall have been brought, or a direction has been endorsed under section 51 on the warrant and such person is ready and willing to give the security required by such direction, such last-mentioned court shall take such bail or security as the case may be and forward the bond to the court which issued the warrant (Criminal Code, Section 58(2)).

Where a police officer has reasonable grounds to believe that a person is one for whose arrest a warrant of arrest has been issued, he may notwithstanding anything to the contrary in this Chapter arrest that person in execution of the warrant although the warrant is not in his possession for the time being (Criminal Code, Section 59).

[7.2.4] Arrest in Non-Cognizable Cases

A non-cognizable offence is one in which a peace officer may not arrest without warrant.

When any person in the presence of a peace officer is accused of committing a non-cognizable offence and refuses on the demand of such peace officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such peace officer in order that his name or residence may be ascertained, and he shall within twenty-four hours from the arrest exclusive of the time necessary for the journey be taken before the nearest Magistrate's Court unless before that time his true name and residence are ascertained, in which case such person shall be forthwith released on his executing a bond for his appearance before a Magistrate's Court if so required (Criminal Code, Section 33(1))

When any person is accused of committing a non-cognizable offence and a peace officer has reason to believe that such person has no permanent residence in Sri Lanka and that he is about to leave Sri Lanka, he may be arrested by such peace officer and shall be taken forthwith to the nearest Magistrate who may either require him to execute a bond with or without a surety for his

appearance before a Magistrate's Court or may order him to be detained in custody until he can be tried (Criminal Code, Section 33(2)).

[7.2.5] Arrest by Private Persons

Section 35 of the Criminal Procedure Code outlines the procedure in which a private person may arrest an accused:

> *Any private person may arrest any person who in his presence commits a cognizable offence or who has been proclaimed as an offender, or who is running away and whom he reasonably suspects of having committed a cognizable offence, and shall without unnecessary delay make over the person so arrested to the nearest peace officer or in the absence of a peace officer take such person to the nearest police station. If there is reason to believe that such person comes under the provisions of section 32 a peace officer shall re-arrest him. If there is reason to believe he has committed a non-cognizable offence and he refuses on the demand of a police officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false or is a person whom such officer has reason to believe is about to leave Sri Lanka, he shall be dealt with under the provisions of section 33. If there is no reason to believe that he has committed any offence he shall be at once discharged.*

[7.2.6] Arrest by Magistrate

A Magistrate may arrest when the offence is committed in the presence of a Magistrate within the local limits of his jurisdiction he may himself arrest or order any person to arrest the offender and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody (Criminal Code, Section 40).

Any Magistrate may at any time arrest or direct the arrest in his presence within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant (Criminal Code, Section 41).

[7.2.7] Arrest of Person in Respect of Child Abuse

Section 43A of the Code of Criminal Procedure provides special provisions regarding persons arrested in respect of child abuse:

> *(1) The provisions of sections 36 and 37 shall not apply in relation to persons suspected or accused of child abuse.*
>
> *(2) A police officer making an arrest, without a warrant, of any person suspected or accused of child abuse, shall without unnecessary delay and within twenty four hours of the arrest, produce such person before a Magistrate having jurisdiction in the case.*
>
> *(3) The Magistrate before whom a person arrested under subsection (2) is produced may upon a certificate being filed by a police officer not below the rank of a Superintendent of Police or in his absence the officer acting on his behalf, to the effect that it is necessary to*

detain such person in custody for the purpose of investigation, make an order permitting the detention of such person in police custody for a period not exceeding three days.

(4) Upon the conclusion of the investigation or upon the completion of the period of detention specified in the order made under subsection (3), which ever occurs first, such person shall be produced before the Magistrate and the provisions of this Act, shall apply, to and in relation to such person.

[7.3] Searches

The Code of Criminal Procedure sets out certain general provisions relating to searches from sections 73 to 79.

[7.3.1] Search of Persons Arrested

Section 29 of the Code of Criminal Procedure provides special provisions regarding persons arrested in respect of child abuse:

> *Whenever a person:*
>
> *(a) is arrested by a police 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 bail; or*
>
> *(b) 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 necessary wearing apparel found upon him, and any of such articles which there is reason to believe were the instruments or the fruits or other evidence of the crime may be determined until his discharge or acquittal.*

[7.3.2] Searching of Women

Whenever it is necessary to cause a woman to be searched the search shall be made by another woman with strict regard to decency (Criminal Code, Section 30).

[7.3.3] Search of Place

An officer making an arrest with or without a warrant may search a place if the believe the person to be arrested is inside. If any person acting under a warrant of arrest or having authority to arrest 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 (Criminal Code, Section 24).

All persons within the place which is being searched under a warrant may be lawfully detained in the house until the search is completed and subject to section 30 they may be searched if the thing sought be in its nature capable of being concealed on a person (Criminal Code, Section 26).

[7.4] Seizures of Property and Documents

Whenever any property or documents are seized pursuant to a search warrant the relevant officer effecting such seizure must make a list of all items seized. This is made clear by section 75 of the Code of Criminal Procedure:

> *The person executing the search warrant shall make a list of all things seized in the course of the search and of the places in which they are respectively found and shall sign such list.*

Property or items that have been seized or attached may be restored to the rightful owner if the conditions of section 62 of the Criminal Procedure Code are met:

> *If within one year from the date of the attachment any person whose property is or has been at the disposal of the Minister under section 61 appears voluntarily or is apprehended and brought before the court by whose order the property was attached and proves to the satisfaction of such court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or if the same has been sold the net proceeds of the sale or if part only thereof has been sold the net proceeds of the sale and the residue of the property, shall after satisfying there out all costs incurred in consequence of the attachment be delivered to him.*

[7.5] Subpoenas

Issue of process is regulated by section 139 of the Code of Criminal Procedure, which stipulates as follows:

> *(1) Where proceedings have been instituted under paragraph (a) or paragraph (b) or paragraph (c) of section 126 (1) and the Magistrate is of opinion that there is sufficient ground for proceeding against some person who is not in custody:*
> *(a) If the case appears to be one in which according to the fourth column of the First Schedule a summons should issue in the first instance, he shall, subject to the provisions of section 63, issue a summons for the attendance of such a person;*
> *(b) If the case appears to be one in which according to that column a warrant should issue in the first instance, he shall issue a warrant for causing such person to be brought or to appear before the court at a certain time.*
>
> *(2) Where proceedings have been instituted under paragraph (d) of section 136(1), the magistrate shall forthwith examine on oath or affirmation the person who has brought the accused before the court and any other person who may be present in court and able to speak to the facts of the case.*

(3) Where proceedings have been instituted under paragraph (e) or (f) of section 136(1), the magistrate shall issue a summons for the attendance of the person named in the warrant or complaint, or a warrant for causing such person to be brought or to appear before the court at a certain time, according as the fourth column of the First Schedule provides that the case is one in which a summons or a warrant should issue in the first place.

Section 255 of the Code of Criminal Procedure, states that the court also has the power to compel the attendance of any witness it may deem necessary to the proceedings:

(1) If for the purpose of any inquiry or trial in a magistrates court the prosecutor or the accused applies to the magistrate to issue process to compel the attendance of any witness or the production of any document or other thing the magistrate shall issue such process unless for reasons recorded by him deems it unnecessary to do so.

(2) If the magistrate suspects that process to compel the attendance of any witness is applied for the purpose of vexation or delay or of defeating the ends of justice he may require the applicant to satisfy him that there are reasonable grounds for believing that evidence of such witness is material, and if he is not so satisfied may reuse to summon the witness (recording reasons for such refusal) or may before summoning him require such sum to be deposited as he thinks necessary to defray the expense of obtaining the attendance of the witness.

[7.6] Post-Mortem Examinations

Post-mortem examinations are regulated in terms of section 373 of the Code of Criminal Procedure:

(1) The Magistrate or any inquirer empowered in that behalf by the Minister shall, if he considers it expedient, call upon the Government medical officer of the district, or any other medical practitioner, to hold a postmortem examination of the dead body, and to report to such Magistrate or inquirer regarding the cause of death.

(2) For the purposes of post-mortem examination under subsection (1), the magistrate may, if the body has already been buried, cause that body to be disinterred.

[7.7] Detention

When a client is in police custody and the lawyer believes that the client is being physically maltreated but the authorities are obstructing access to the client. Here the lawyer will have to make an urgent application to the High Court to order that he be allowed immediate access to his client in order to check upon his physical condition.

Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such

period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate (Criminal Code, Section 37).

Whenever an investigation cannot be completed within the period of twenty-four hours fixed by section 37, and there are grounds for believing that further investigation is necessary the officer in charge of the police station or the inquirer shall forthwith forward the suspect to the Magistrate having jurisdiction in the case and shall at the same time transmit to such Magistrate a report of the case, together with a summary of the statements, if any, made by each of the witnesses examined in the course of such investigation relating to the case (Criminal Code, Section 115(1)).

The Magistrate before whom a suspect is forwarded under section 115 of the Code of Criminal Procedure, if he is satisfied that it is expedient to detain the suspect in custody pending further investigation, may after recoiling his reasons, by warrant addressed to the superintendent of any prison authorise the detention of the suspect for a total period of fifteen days and no more. The provisions of section 264 shall apply to every such warrant. If at the end of the said period of fifteen days proceedings are not instituted the Magistrate may subject to subsection (3) either discharge the suspect or require him to execute a bond to appear if and when so required (Criminal Code, 115(2)).

Subject to the provisions of the Code of Criminal Procedure, a Magistrate shall not release on bail or otherwise any person who has:

> *(a) surrendered himself to court, or*
>
> *(b) been arrested, consequent on an allegation that he has committed or has been concerned in committing or is suspected its have committed or to have been concerned in committing an offence punishable under sections 114, 191 and 296 of the Penal Code: provided however that such person shall, subject to the provisions of the Criminal Procedure (Special Provisions) Law, No. 15 of 1978, be released on bail if proceedings are not instituted against him in a Magistrate's Court or the High Court before the expiration of a period of three months from the date he surrendered to court or is arrested unless the High Court on application made by the Attorney-General directs otherwise.*

A High Court may (subject to the provisions of the Code of Criminal Procedure in special circumstances release such person on bail before or after the expiration of the period of three months referred to in the preceding provisions of this subsection (Criminal Code, Section 115(3)). The detention ordered under subsection (3) of section 115 shall be for periods of fifteen days at a time (Criminal Code, Section 120(2)).

During the period that a suspect is in the lawful custody of a superintendent of prison, a court may upon an application by the police officer in charge of a police station, authorise such or any other police officer to have access during reasonable hours to such suspect for the purpose of the investigation. The court may on an application by an officer in charge of a police station authorise him or any other named police officer to take the suspect in the company of an officer

of the Prisons Department from place to place (other than to a police station) if in the opinion of such court such action is considered necessary for the purpose of the investigation: the aforesaid is possible provided that during the period a police officer has access to a suspect or takes him from place to place under the provisions of this subsection, the suspect shall be deemed to be an accused person in the custody of such police officer for the purpose of the application of subsection (1) of section 27 of the Evidence Ordinance (Criminal Code, Section 115(4)).

Subject to the provisions of section 37 of the Code of Criminal Procedure, every inquirer and officer in charge of a station shall have power to authorise the detention of a person during an investigation (Criminal Code, Section 118(2)).

[7.8] Police Interrogation

Any information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer (Criminal Code, Section 109(1)). If such information is given orally to a police officer or to an inquirer, it shall be reduced to writing by him in the language in which it is given and be read over to the informant: provided that if it is not possible for the officer or inquirer to record the information in the language in which it is given the officer or inquirer shall request that the information be given in writing. If the informant is unable to give it in writing, the officer or inquirer shall 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 he understands (Criminal Code, Section 109(2)).

Such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it and such information or a copy thereof as is feasible shall be entered without delay by such police officer or inquirer in a book hereinafter referred to as "the Information Book" to be kept by the officer in charge of the police station at his police station or by the inquirer as the case may be. Such Information Book shall be in such form as the Minister may provide by regulations made in that behalf: provided that until the Minister by regulations provides the form of the Information Book, the form or forms in use on the day immediately preceding the appointed date shall continue to be valid for use (Criminal Code, Section 109(3)).

If the police officer who receives the information is not himself the officer in charge of the police station, then such police officer shall forthwith report the facts of such information to the officer in charge of the police station (Criminal Code, Section 109(4)).

Where an offence is committed in the presence of a police officer he may proceed to record the statement of any person present at or about the scene of the offence and the statement of any suspect, and if such police officer is not himself the officer in charge of the police station of the area in which the offence is committed, he shall forthwith report the facts to the officer in charge of such police station (Criminal Code, Section 109 (4A)).

Further to the above, section 109(5) of the Code of Criminal Procedure determines as follows:

> *(a) If from information received or otherwise, an officer in charge of the police station or inquirer has reason to suspect the commission of any offence, he shall himself make an*

investigation or authorise the making of an investigation under this Chapter in the manner hereinafter set out;

Provided however, if the offence is a cognizable offence or he has reason to-apprehend a breach of the peace, he shall, in the case of every inquirer, forthwith submit a report to the Magistrate's Court having jurisdiction in respect of such offence and in the case of an officer in charge of the police, station, forthwith submit a report to his own immediate superior and proceed in person to the spot to investigate the facts and circumstances of the case and to take such measures as may be necessary for the immediate discovery and arrest of the offender;

Provided further, that an officer in charge of a police station may depute one of his subordinate officers to proceed to the spot to make such investigation and to take such measures as may be necessary for the discovery and arrest of the offender.

(b) If it appears to an officer in charge of a police station or an inquirer that there is no sufficient ground for entering on an investigation he shall not be bound to investigate the case.

Any police officer or inquirer making an investigation may by order in writing require the attendance before himself of any person being within the limits of the station of such police officer or any adjoining station or within the local limits of the jurisdiction of such inquirer who, from the information given or otherwise, appears to be acquainted with the circumstances of the case, and such person shall attend as so required. If any person when required to attend by an inquirer refuses or fails to do so, the inquirer may thereupon in his discretion issue a warrant to secure the attendance of such person as required by such order as aforesaid (Criminal Code, Section 109(6)).

Any police officer or inquirer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and shall reduce into writing any statement made by the person so examined, but any oath or affirmation shall not be administered to any such person. The whole of such statement shall be recorded in full in the manner set out in section 109(2) of the Criminal Procedure Code. If the police officer or inquirer asks any question in clarification such question and the answer given thereto shall be recorded in form of question and answer. Such record shall be shown or read to such person or if he does not understand the language in which it is written, it shall be interpreted to him in a language he understands and he shall be at liberty to explain or add to his statement. The person making the statement shall then sign that statement immediately at the place where the statement is concluded.

The police officer or inquirer recording the statement shall append below each statement recorded by him the following certificate:

"I.....hereby declare that I have faithfully and accurately recorded the statement of the above named…"

If such statement is not recorded in the Information Book, a true copy thereof shall as soon as may be convenient be entered by such police officer or inquirer in the Information Book. Any

alterations in such statement shall be initiated by the person making it and any portion of the statement that requires to be deleted as a result of the alteration shall be scored off in such a manner as would not make that portion illegible (Criminal Code, Section 110 (1)). Such person shall be bound to answer truly all questions relating to such case put to him by such officer or inquirer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture (Criminal Code, Section 110(2)).

Statements to police officer or inquirers are to be used in accordance with the Evidence Ordinance. A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court: Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time. Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code (Criminal Code, Section 110(3)).

Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall be or they be entitled to see them merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply: Provided that where a preliminary inquiry under Chapter XV is being held in respect of any offence, such statements of witnesses as have up to then been recorded shall, on the application of the accused, be made available to him for his perusal in open court during the inquiry (Criminal Code, Section 110(4)).

Any inquirer or police 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. But any inquirer or police 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 (Criminal Code, Section 111).

Whenever any officer in charge of a police station or an inquirer making an investigation in a cognizable case officer considers that the production of any document or thing is necessary to the conduct of the investigation, and there is reason to believe that a person to whom summons or order under section 66 has been or might be issued will not produce such document or other thing as directed in the summons or order, or when such document or other thing is not known to be in the possession of any person, such officer or inquirer may search or cause search to be made for the same in any place (Criminal Code, Section 112(1)).

Such officer or inquirer shall practicable conduct the search in person (Criminal Code, Section 112(2)). If he is unable to conduct the search in person and there is no other person competent to

make the search present at the time, he may require any *Grama Seva Niladhari* to make the search and he shall deliver to such *Grama Seva Niladhari* an order in writing specifying the document or other thing for which search is to be made and the place to be searched, and such *Grama Seva Niladhari* may thereupon search for such thing in such place (Criminal Code. Section 113(3)).

A Grama Seva Niladhari is a Sri Lankan public official appointed by the central government to carry out administrative duties in a *Grama Seva Niladhari* division, which is a sub-until of a divisional secretariat. The *Grama Seva Niladhari* is responsible for keeping track of criminal activitiy in their area and issuing character certificates on behalf of residents when requested by them. They may arrest individuals if sworn in as a Peace Officer.

When any subordinate police officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police station (Criminal Code, Section 113).

If upon an investigation it appears to the officer in charge of the police station or the inquire that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate's Court, such officer or inquirer shall if such person is in custody release him on his executing a bond with or without sureties as such officer or inquirer may direct to appear if and when so required before a Magistrate's Court having jurisdiction to try or inquire into the offence (Criminal Code, Section 114).

If upon an investigation it appears to the officer in charge of the police station or the inquirer that the information is well founded such officer or inquirer shall forward the suspect under custody before the Magistrate's Court having jurisdiction in the case, or if the offence is bailable and the suspect is able to give security, shall take security from him for his appearance before such court (Criminal Code, Section 116(1)).

When the officer in charge of a police station or an inquirer forwards a suspect before, a Magistrate's Court or takes security for his appearance, he shall send to such court any weapon or other article or document or specimen or sample which it may be necessary to produce before such court, and shall require the complainant (if any) and so many of the persons who appear to such an officer or inquirer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate's Court therein named and give evidence in the matter of the charge against the suspect (Criminal Code, Section116(2)).

The Magistrate may on application made by a police officer or inquirer forward any weapon or other article or document or specimen or sample to the Government Analyst, Government Examiner of Questioned Documents, Registrar of Finger Prints or Government medical officer, as the case may be, for analysis and report to the court (Criminal Code, Section 116(3)).

The officer or inquirer in whose presence the bond referred to in subsection 116(1) or subsection 116(2) is executed shall send such bond to the Magistrate's Court (Criminal Code, Section 116(4)).

If any complainant or witness refuses to execute such bond, such officer or inquirer shall report the same to the Magistrate's Court having jurisdiction which may thereupon in its discretion issue a warrant or summons to secure the attendance of such complainant or witness before itself to give evidence in the matter of the charge against the suspect (Criminal Code, Section 116(5)).

Any Magistrate having jurisdiction to hold an inquiry into any offence which is being investigated by an inquirer may at any stage withdraw the case from such inquirer and himself inquire into and try such case or commit the same for trial (Criminal Code, Section 119).

Every investigation shall be completed without unnecessary delay. Where such investigation cannot be completed within fifteen days the officer in charge of the police station or the inquirer shall transmit to the Magistrate's Court having jurisdiction in the case, a report of the facts and the progress of the investigation at the end of the fifteen days and thereafter at the end of every period of fifteen days until completion of the investigation (Criminal Code, Section 120(1)).

As soon as the investigation is completed the officer in charge of the police station shall forward to such court a report in the prescribed form. If in the report there is no allegation that the suspect has committed or been concerned in the committing of any offence the Magistrate shall discharge him. If the report alleges that the suspect has committed or been concerned in committing an offence he shall be prosecuted in accordance with the provisions of this Code (Criminal Code, Section 120(3)).

Where any officer in charge of a police station considers that the examination of any person by a medical practitioner is necessary for the conduct of an investigation he may, with the consent of such person, cause such person to be examined by a Government medical officer. The Government medical officer shall report to the police officer setting out the result of the examination (Criminal Code, Section 122(1)).

Where the person referred to in subsection (1) does not consent to being so examined, the police officer may apply to a Magistrate within whose jurisdiction the investigation is being made for an order authorising a Government medical officer named therein to examine such person and report thereon. Where such an order is made such person shall submit to an examination by such Government medical officer who shall report to the Magistrate setting out the result of the examination (Criminal Code, Section 122(2)).

Where any officer in charge of a police station is of opinion that it is necessary to do so for the purpose of an investigation, he may cause any finger, palm or foot impression or impression of any part of the body of any person suspected of the offence under investigation or any specimen of blood, saliva, urine, hair or finger nail or any scraping from a finger nail of such person to be taken with his consent (Criminal Code, Section 123(1)). Where the person referred to in subsection 123(1) does not consent to such impression, specimen or scraping being taken, such police officer may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order authorising a police officer to take such impression, specimen or scraping and such person shall comply with such order (Criminal Code, Section 123(2)).

Any officer in charge of a police station may, where it is necessary for the purpose of the investigation to compare any handwriting, cause a specimen of the handwriting of any person to be taken with his consent (Criminal Code, Section 123(3)). Where such person refuses to give a specimen of his handwriting the officer in charge of the police station may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order requiring such person to give a specimen of his handwriting, and such person shall comply with such order (Criminal Code, Section 123(4)).

Every Magistrate to whom application is made in that behalf shall assist the conduct of an investigation by making and issuing appropriate orders and processes of court and may, in particular hold, or authorise the holding of, an identification parade for the purpose of ascertaining the identity of the offender, and may for such purpose require a suspect or any other person to participate in such parade, allow a witness to make his identification from a concealed position and make or cause to be made a record of the proceedings of such parade (Criminal Code, Section 124).

Anything to the contrary in this or any other law notwithstanding it shall be lawful for any police officer not below the rank of Assistant Superintendent of Police to take over at any stage any investigation under this Chapter for any offence and to conduct and direct such investigation and for such purpose to cause the investigation or any part of it to be conducted by any police officer of his choice or by a team of specially selected police officers drawn from any part of the Island (Criminal Code, Section 125).

[7.9] Statements Made by the Accused

Where the client has already made a statement to the police and this has been recorded, the lawyer should ask the police to allow him to see this recorded statement and he should request that he be provided with a copy of this statement.

Where the client has not yet made a statement to the police, the lawyer, having listened to what his client has to say, will have to decide on what advice to give his client about making a statement. In general terms the client should not be rushed into making a statement before careful consideration has been given to the matter.

Section 126 of the Code of Criminal Procedure determines as follows insofar as statements to magistrates of peace officers are concerned:

> *No inducement to be offered - except as provided for in Chapter XXI any peace officer or person in authority shall not offer or make or cause to be offered or made any inducement, threat or promise to any person charged with an offense to induce such person to make any statement having reference to the charge against such person. Any peace officer or other person shall not prevent or discourage by any caution or otherwise any person from making any statement which he may be disposed to make of his own free will.*

The defence lawyer will advise the client to make a statement in circumstances where a statement will be beneficial to his client's interests. An innocent person will clearly proclaim his innocence at the outset and the failure not to so proclaim it will look suspicious. Adverse

inferences may be drawn from such failure at later juncture. If it seems clear to the lawyer that his client is innocent and that his innocence can be very easily established by, for instance, checking an alibi, it is sensible that the client makes a statement as soon as possible so that the client's story can be investigated and the matter can be cleared up and the client can obtain his release.

As indicated in Chapter 5 of the Manual, if an accused wishes to rely on an *alibi* as a defence, he/she must give notice thereof and raise it in accordance with the requirements set out in section 126A of the Code of Criminal Procedure.

The lawyer will often advise the client to allow the lawyer to draft the statement based on the client's instructions so that the statement is carefully worded and sets out the client's case clearly and in logical sequence and includes only relevant detail. The lawyer would then inform the police that he is preparing a statement that his client will sign and hand over to the police. The client should also be told that the police seek to obtain a statement from him, he should inform them that his lawyer is compiling a statement for him and that it will be submitted in due course.

Section 127 of the Code of Criminal Procedure sets out certain procedures and powers insofar as it relates to the powers of magistrates to record statements or confessions:

> *(1) Any magistrate may record any statement made to him at any time before the commencement of any inquiry or trial.*
>
> *(2) Such statement shall be recorded and signed in the manner provided in section 227 and dated, and shall then be forwarded to the magistrates court by which the case is to be inquired into or tried.*

If the statement being recorded by the magistrate constitutes a confession, section 127(3) is important:

> *(3) A magistrate shall not record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily and when he records any such statement he shall make a memorandum at the foot of such record to the following effect:*
>
> *"I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct and it contains accurately the whole statement made by him".*

In some cases it may be better for the client not to make any statement at all to the police. This would be the case where, for instance, from the information at hand it seems that the police have no evidence of the commission of the alleged crime against the client and that they are hoping to construct their case around incriminating statements from the accused.

[7.10] Right to Remain Silent

The Constitution of Sri Lanka does not guarantee the right to silence, although section 110(2) of the Criminal Procedure Code protects an accused's right to silence. This section states that the suspect is bound to answer the questions of a police interrogator but that the suspect does not have to provide answers that could expose him to a criminal charge. An exception to this is section 5 of the Prevention of Terrorism Act (PTA), which provides that the failure to report any information related to an act of terrorism is a punishable offence. In essence, the PTA retracts an accused right to silence.

Section 24 of the Evidence Ordinance states that confessions taken by inducement, threat or promise are inadmissible.

If the accused wishes to remain silent, lawyers should thus consider whether they want to give notice to the court through a motion that the accused will not give a statement to the court, relying instead on legal defences such as insufficiency of the evidence or presented through other defence witnesses. In order to comport with Sri Lanka law, the lawyer should assert for the accused that he or she does not wish to testify as a witness, and that his or her testimony as the accused is a general denial of the charges.

The lawyer must carefully prepare the client to remain steadfast in his or her silence. If need be the lawyer must make and record objections to ongoing questioning of a client who is determined to remain silent.

[7.11] Maltreatment of Client by Police

If, when the lawyer interviews his client in custody, he discovers that his client has been, subjected to physical mistreatment in order to force him to confess, he should complain immediately to the Officer in Charge of the police station and demand that his client be medically examined as soon as possible. If a medical examination is refused, the lawyer should either take the matter up with the Police Headquarters. It is particularly important that the client be medically examined as soon as possible where he has already made an incriminatory statement as a result of the alleged mistreatment.[24]

[7.12] Obtaining Prosecutorial Evidence

The legal practitioner should ask the prosecutor for a list of the witnesses the State intends to call to give evidence at the trial. A defence lawyer is not allowed to interview a State witness before the witness gives evidence, so it is important to know who the witnesses are going to be.

This process, also generally referred to as 'discovery' is set out in section 158 of the Criminal Procedure Code:

> *(1) When an accused has been committed for trial he shall, if he demands it at a reasonable time before the trial, be furnished with a certified copy of the statements to the police of the witnesses who have testified before the magistrate and of the statements*

[24] See Chapter 4 insofar instances where a client has allegedly been tortured or/and subjected to human rights abuse.

(if any) to the police of the accused, by the officer-in-charge of the police station where the relevant books are kept, on payment therefor at such rate as may be prescribed by the Minister by regulation.

(2) When an indictment has been forwarded against any person in respect of an offence which is not shown to be triable by a magistrates court in the eighth column of the First Schedule, the Attorney-General may, in the interests of justice, make available to the accused or his Attorney at law and for perusal, the statement to the police of any witness not listed in the indictment.

It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time (UN Basic Principles, Article 21).

[8] PRETRIAL MATTERS

[8.1] Bail

Bail and the granting (or not) thereof in Sri Lanka is regulated by the *Bail Act (No. 30 of 1977)*.

Keeping in mind the duty to be zealous advocate, applying for the granting of bail in Sri Lanka should be one of counsel's main considerations, given the guiding principle in the Act. Section 2 of the Bail Act makes it very clear that in Sri Lanka:

> *"Subject to the exceptions as hereinafter provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be, that the **grant** of bail be regarded as the **rule** and the **refusal** to grant bail as the **exception**."*

This section gives defence lawyers in Sri Lanka a very firm base to contend for the accused's release – especially at the outset of proceedings or as early as possible. It is imperative, pursuant to the above section, that defence lawyers should advocate for the release of the accused as early as possible - including through informal advocacy to the police, representation at remand hearings and formal bail applications as well as during all stages of an inquiry and trial.

The provisions of bail are broadly classified into two categories:

1. Bailable (section 4 of the Bail Act); and
2. Non-Bailable (section 5 of the Bail Act) cases.

The specific sections determine as follows:

> *Persons committing or concerned in the commission of a bailable offence to be released on bail: A person suspected or accused of being concerned in committing, or having committed a bailable offence, shall, subject to the provisions hereinafter provided, be entitled to be released on bail* (Bail Act, Section 4).

> *Persons committing or concerned in the commission of non-bailable offence to be released at discretion of court: Subject to the provisions of section 3, a person suspected or accused of being concerned in committing, or having committed a non-bailable offence may at any time be released on bail at the discretion of the court* (Bail Act, Section 5).

The court will take into consideration whether there is sufficient grounds for further inquiry or trial and whether the accused shall be released on his executing a recognizance in such sum and with or without a surety (Criminal Code, Section 403(2)).

Section 6(1) of the Bail Act addresses the issue of release of persons where bailable offences are being investigated by the police:

> *Where an offence being investigated by the police is a bailable offence, the officer in charge of the police station shall not be required to forward the suspect under its custody before the Magistrate having jurisdiction over such offence, but such officer shall not later than twenty four 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 - Provided that where the officer in charge is of the opinion that public reaction to the alleged offence being investigated is likely to give rise to a breach of peace he shall forward the suspect in custody before a Magistrate having jurisdiction over such offence, and the Magistrate shall thereupon make an order under section 7 or section 14 as he may consider appropriate.*

Section 6(2) of the Bail Act regulates the situation where a suspect has been released pursuant to section 6(1), but fails to appear in court subsequent to his release. It reads as follows:

> *A suspect released by an officer in charge of a police station on a written undertaking given by such suspect under subsection (1), who fails to appear before the Magistrate on the given date, shall be guilty of an offence under this Act and shall on conviction after summary trial, be punished with simple imprisonment for a term not exceeding six months or with a fine not exceeding one thousand rupees or with both such imprisonment and fine and the Magistrate shall in his discretion order the release of such suspect on bail subject to conditions as specified or remand him to custody, as the case may be.*

[8.2] Bail Information Checklist

If the client wishes to apply for bail, the following **checklist** for relevant bail information and questions can be useful:

- The Client's financial circumstances;
- Was the client employed with a stable employment situation;
- Names, addresses, and phone numbers of possible sureties.
- Other sources of funds;
- The client's residential address;
- The client's marital status;
- Does the client have children and/or dependants;
- Is the client a flight risk;

- Does the client have a passport;
- Is the client prepared to report to a police station (daily, weekly, twice weekly, monthly);
- Whether or not the prosecution is going to oppose the bail application;
- The nature and seriousness of the charges as well as the strength of the prosecution's case;
- Whether the client has a criminal record or list of any previous convictions (similar or other offences);
- Whether the client has any outstanding warrants of arrest against him/her in other matters (different case numbers);
- Does the client have any pending charges of a similar nature against him/her;
- Whether the client has medical/psychiatric/psychological or substance abuse condition;
- If the client has a criminal record, ascertain whether the client is on parole or probation;
- If a bail hearing is going to take place, ascertain if the prosecution will be calling the investigating officer or/and any other witnesses;
- Consider the question whether the client will pose any danger or threat to the alleged victim in the matter or to any proposed prosecution witnesses.

When an accused is brought before the Magistrates court for a bailable or non-bailable offence, the court may, in its discretion, release such person (Bail Act, Section 7):

- On an undertaking given by him to appear when required;
- On his own recognizance;
- On his executing a bond with one or more sureties;
- On his depositing a reasonable sum of money as determined by court; or
- On his furnishing reasonable certified bail of the description ordered by the court.

The Magistrates court does not have discretion for non-bailable cases involving the following provisions of the Penal Code:

- Section 114 - Offences Against the State – "Waging or attempting to wage war, or abetting the waging of war, against the state."
- Section 191 - False Evidence and Offences against Public Justice – "Giving or fabricating false evidence with intent to procure conviction of a capital offence."
- Section 296 - Offences Affecting the Human body – "Whoever commits murder shall be punished with death."

In regards to the above Penal Codes, the Magistrate court requires the sanction of the Attorney-General to allow bail. For any other non-bailable offence in the Penal Code, the Magistrate may in his discretion release such person on bail (Criminal Procedure Code, Section 403(3)).

When releasing an accused on bond, the sum of money to be furnished, the court shall do so with regard to the ***nature of the offence*** the suspect or accused is alleged shall and ***shall not be excessive*** (Bail Act, Section 11(1)). The Court has the discretion to reduce that amount while the accused is remanded custody (Bail Act, Section 11(2)).

The amount of every bond, shall be determined with regard to the circumstances of the case and shall not be excessive. The Court of Appeal may in any case direct that any person in custody be admitted to bail or that the bail fixed by the High Court or Magistrate be reduced or increased, or that any person enlarged on bail by a Judge of the High Court or Magistrate to be remanded in custody (Criminal Code, Section 404).

Once bail has been granted, the Magistrate may attach conditions that he may think fit, in the light of the facts of the particular case (including conditions prohibiting the applicant from leaving Sri Lanka or requiring the applicant to surrender his passport to court) and shall specify:

(a) The non-bailable offence or offences in respect of which the order is made; and
(b) The manner in which bail shall be furnished by the applicant at the time of his arrest (Bail Act, Section 22).

Before an accused is released on bail or released on his own bond, the money shall be paid, and when he is released on bail, conditioned that such person shall attend at the time and place mentioned in the bond and shall continue to attend until otherwise directed (Criminal Code, Section 405).

As soon as the bond has been executed, the accused shall be released, the prison shall issue an order of release to the officer in charge of the prison (Criminal Code 406(1)) and Bail Act, Section 8). However, if the person is liable for some other matter than that shall not be deemed to require the release (Criminal Code, Section 406(2)).

When an accused is released on bail, he must provide an address (Bail Act, Section 12(1)).

When an accused is released with a surety, the surety is responsible for the accused on bail. If a surety through mistake, fraud or otherwise is insufficient, the court may issue a warrant of arrest directing the person released on bail to be brought before it and may order him to find sufficient sureties. Failing to do so, the accused may be committed to prison (Criminal Code, Section 407).

A surety may apply to the court to discharge the bond as far as it relates to the accused (Criminal Code, Section 408(1)). On the application of such, the court shall issue a warrant of arrest directing the person released to be brought before it (Criminal Code, Section 408(2)). Upon appearance of the accused (either voluntary or by warrant), the court shall direct the bond to be discharged and shall call upon the person to find other sufficient sureties and if he fails to do so commit him to custody (Criminal Code, Section 408(3)).

A surety may at any time arrest the accused for which he is providing a surety, where such person is absconding and forthwith bring him before the court, which shall discharge the surety's bond and shall call upon the accused to find another surety, failure to do so shall commit the accused to custody (Criminal Code, Section 408(4)).

The Provisions of the Bail Act do not apply to persons accused or inspected of having committed, or convicted of, an offence under, PTA (Bail Act, Section 3(1)).

[8.3] Pleas

[8.3.1] Not Guilty & Guilty Pleas

When the client denies committing the act he/she is accused of, a plea of not guilty is entered (the various defences coupled to a plea of not guilty are set out in Chapter 5 of the Manual).

If during the initial consultation or any meetings thereafter, the accused has professed guilt and is willing to plead guilty, it is important to explain the procedures of doing so.

In the Magistrates Court, if the accused pleads guilty, the verdict of guilt will be recorded and punishment will be imposed (Criminal Code, Section 183). That being said, the accused may with leave of the Magistrate withdraw his plea of guilt at any time before sentence is passed upon him, and in that event the Magistrate shall proceed to trial as if a conviction has not been entered (Criminal Code, Section 183).

In the High Court, a trial by judge without a jury, the accused pleads guilty and it appears to the satisfaction of the Judge that he rightly comprehends the effect of the plea, the plea shall be recorded on the indictment and he may be convicted thereon (Criminal Code, Section 197).

At the commencement of a trial by jury, the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged (Criminal Code, Section 204).

If the accused pleads guilty and it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea, the plea shall be recorded on the indictment and he may be convicted thereon: Provided that when the indictment so pleaded to is one of murder the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused person had pleaded not guilty (Criminal Code, Section 205).

If the accused pleads not guilty but states that he is willing to plead guilty to lesser offence for which he might have been convicted on that indictment and the prosecuting counsel is willing to accept such plea, the Judge may if he thinks that the interests of justice will be satisfied by so doing order such plea of guilt to be recorded and may pass judgment thereon accordingly, and thereupon the accused shall be discharged of the offence laid in the indictment and such discharge shall amount to an acquittal (Criminal Code, Section 207).

Kattadige Amarasena v The Democratic Socialist Republic of Sri Lanka **(Supreme Court Case SC (SPL) LA No. 59/2014)**

This was an application for Special Leave to Appeal under Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended) read with Articles 128 & 154P 3(b) of the Constitution of Sri Lanka. The Appellant had been convicted of murder and sentenced to death for the murder of his wife. As a defence the Appellant raised a plea in mitigation of grave and sudden provocation. The appeal against conviction and sentence was dismissed and the test for a not guilty based on grave and sudden provocation in Sri Lankan criminal law was discussed and laid down by Court.

[8.3.2] Negotiating a Plea Deal

A plea deal is any agreement in a criminal case between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor (Criminal Code, Section 207). The Judge may if he thinks that the interests of justice will be satisfied by doing so order such plea of guilt to be recorded and may pass judgment thereon (Criminal Code, Section 207).

It often transpires that a client admits to what he/she is accused of and wants to plead guilty right from the outset of proceedings. It may also happen that a client, although maintaining his/her innocence (and not guilty plea), indicates that he/she does not wish to proceed with a trial. As a defence lawyer, with your client's permission (instructions), you may approach the Prosecutor in the case and negotiate a plea deal (it may also happen that the prosecutor approaches you as defence counsel with a possible plea deal for consideration).

IMPORTANT PRACTICE NOTE: Take time to scrutinize the state's case and the strength of its evidence again for possible weaknesses. Remember to approach a case with extra caution if a prosecutor approaches you outright at the beginning of or before the trial with a plea bargain proposal: usually, if the prosecution has a strong case in most material aspects, it will prosecute the matter in full. Conversely, if the prosecution's case is weak, it may want to conclude a plea deal in order to try and obtain an easy conviction.

Defence counsel may want to talk to the prosecutor to try to narrow down the areas of dispute between the defence and the State and thus save time when the case is tried. The client may wish to see whether the prosecutor is prepared to accept a plea of guilty to a lesser charge than that charged against his client instead of having a full-scale argument in court as to whether the more serious crime was committed.

Defence counsel may even wish to discuss with the prosecutor whether there is indeed any case for his client to answer on the basis of the evidence at the disposal of the State and whether the charge should not be withdrawn. In this case, the defence lawyer may put on the table the defence case and query with the prosecutor whether there is any case for the accused to answer.

In essence, a plea deal consists of the following four elements:

1. The Defendant is charged with a crime;
2. The Defendant does not wish to proceed forward with the charges (whether guilty or not);
3. The Defendant is willing to plead guilty to a lesser serious charge than the original charge; and
4. The prosecution is willing to accept the guilty plea on the lesser charge.

The benefit of a plea bargain is that both parties avoid a lengthy criminal trial and may allow defendants to avoid the risk of conviction at trial on a more serious charge.

[8.4] Preliminary Inquiry

Preliminary inquiry is an inquiry into a case, which appears not to be triable summarily by magistrate's court but triable by the High Court.

According to section 145 of the Code of Criminal Procedure, when the accused appears or is brought before the Magistrate's Court, the Magistrate shall:

> *(a) 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; or*
> *(b) 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.*

The Magistrate conducting a preliminary inquiry shall at the commencement of such inquiry read over to the accused the charge or charges in respect of which the inquiry is being held, but upon such reading over the accused shall not be required to make any reply thereto; if any such reply is made, it shall not be recorded by the Magistrate; nor shall any reply be admissible in evidence against the accused (Criminal Code, Section 146).

The officer in charge of the police station where the relevant Information Book is kept shall at the commencement of the inquiry furnish to the Magistrate two certified copies of the notes of investigation and all of statements recorded in the course of the investigation (Criminal Code, Section 147).

The Magistrate shall then in the presence of the accused and in the manner hereinafter provided, the statements on oath or affirmation of those who know the facts and circumstances of the case, and put them in writing (called the depositions): provided that the Magistrate shall not except where the Attorney-General otherwise directs summon and record the evidence of any expert witness shall only cause such witness's report to be produced and filed of record (Criminal Code, Section 148(1)).

Subject to the proviso to subsection 148(1) the accused may put questions to each witness produced against him and the answer of the witness thereto shall be part of his deposition.

When the accused is not able to attend the inquiry, an attorney-at-law may appear for the accused and the inquiry shall proceed as far as it is practicable (Criminal Code, Section 148(4)).

Any variance between facts stated in the charge read over to the accused under section 146 and the evidence adduced thereof at the time or place of which the offence or act is alleged to have been committed shall not be deemed material if it be proved, in the case of the time, that the charge was in fact laid within the time limited by law for laying the same and, in the case of the place, that the jurisdiction of the court is not ousted thereby (Criminal Code, Section 149(1)) any variance in any other respect between the facts stated in the charge and the evidence adduced in support thereof shall not be material: provided that the accused shall not be convicted of any offence other than that which he has been charged with unless such other offence is one which he may be lawfully convicted under the provisions of the code (Criminal Code, Section 149(2)).

Upon such variance appearing the Magistrate may make an amendment to the charge as he deems fit and may permit any witness to be recalled and further questioned upon matters relevant to the variance or amended charges (Criminal Code, Section 149(4)).

After the completion of the examination of the witnesses called on behalf of the prosecution, the Magistrate shall read the charge to the accused and explain the nature thereof in ordinary language and inform him that he has the right to call witnesses and, if he so desires, to give evidence on his own behalf (Criminal Code, Section 150).

The Magistrate shall then address to the accused the following words or words to the effect:

> "*Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and put in evidence at your trial*" (Criminal Code, Section 151(1)).

Before the accused makes any statement in answer to the charge, the Magistrate shall state to him and give him clear understanding that he has nothing to hope from any promise or favour and nothing to fear from any threat which may be held out to him to induce him to make any admission or confession of his guilt (Criminal Code, Section 151(2)).

Any statement the accused makes in answer to the charge shall be recorded (Criminal Code, Section 151(3)).

The Magistrate will then ask the accused whether he desires to give evidence on his own behalf and whether he desires to call witnesses (Criminal Code, Section 152(4)).

If the accused wishes to call witnesses but that they are not present in court, the Magistrate may adjourn the inquiry and issue process or steps to compel the attendance of such witnesses (Criminal Code, Section 152(5)).

If the Magistrate considers that the evidence against the accused is not sufficient to put him on his trial, the Magistrate shall forthwith for reasons to be recorded by him order him to be discharged (Criminal Code, Section 153).

If the Magistrate considers the evidence sufficient to put the accused on his trial, the Magistrate shall commit him for trial before the High Court (Criminal Code, Section 154).

The Magistrate shall at the time of committing the accused for trial, require the accused to state orally there and then the names of persons (if any) whom he wishes to be required to give evidence at his trial, distinguishing between those whom he proposes to call to speak to facts and those who are merely to speak to character (Criminal Code, Section 155(1)).

The Magistrate will prepare the list of witnesses and issues a notice on each witness requiring him to appear before the court of trial on the date specified (Criminal Code, Section 155(2)).

When an accused has been committed for trial he shall, if he demands it at a reasonable time before the trial, be furnished with a certified copy of the statements to the police of the witnesses

who have testified before the Magistrate and of the statements (if any) to the police of the accused, by the officer-in-charge of the police station where the relevant books are kept, on payment therefore at such rate as may be prescribed by the Minister by regulation: provided that until a rate is so prescribed the rate shall be twenty-five cents for a hundred words (Criminal Code, Section 158(1)).

Every inquiry held shall be concluded within one month of the commencement of the proceedings unless the Magistrate, for reasons to be recorded, finds it necessary to prolong the inquiry beyond the period of one month (Criminal Code, Section 163).

[8.5] Trial Preparation

Following the completion of the initial consultation with the accused, it is important to explain the upcoming legal proceedings to him/her to prepare for trial. Underneath is a guideline of some of the issues that ought to be considered, discussed with and explained (where applicable) to the client during the process of preparing the client for trial:

[8.5.1] General Case Assessment:

- Charging document;
- Any possible defences?;
- Are there any co-accused?;
- Theory and theme of the case;
- Police reports;
- State witness and exhibit lists;
- Probable cause affidavits;
- Bailable vs non-bailable offence;
- Jury vs non-jury matter.

[8.5.2] Charges:

- Charge or indictment;
- Applicable statutes, ordinances and legislation;
- Types of pre-trial motions (suppression) that may be brought.

[8.5.3] Initial Legal Review:

- Jurisdictional issues;
- Statute of limitations applicable or not;
- Speedy trial issues or/and plea negotiations with the prosecution;
- Do any defences need experts/notices/motions;
- Can client aid and assist in own defence;
- Initial sentencing assessment;
- Max/Min penalties (if applicable);

[8.5.4] Defence Witness Assessment:

- Witness list;
- Any statements from witnesses;
- Any additional witnesses that should be called;
- Are any special subpoenas needed - for example medical records;
- Does the client wish to testify or remain silent?

[8.5.6] Experts:

- Forensic expert(s) needed?
- Psychologist?
- Medical doctor/JMO?
- Expert to value property or damage
- Forensic, crime scene experts, eyewitness identification experts needed?

[8.5.7] Plea and Sentence Preparation (if applicable):

- Plea agreement(s) on each count?
- Sentencing mitigation materials?

Upon receipt of the Prosecutions discovery, review all of the tangible evidence including documents, police reports, audio and video-tape recordings, arrest or search warrant, diagrams, reports, witness list, and demonstrative and physical evidence. The summary of the facts that the state relies upon in bringing the charges will establish the initial probable cause for the court in order to justify the accused charges.

Consider benefits and disadvantages of having the client testify. It is important to explain to the client the right to non-self incrimination and right to silence.

[9] TRIAL

[9.1] Magistrate Court Proceedings

If the accused pleads not guilty in a trial in the Magistrates Court, the Prosecutor must first give an outline of the nature of the State case and the material facts on which he relies. The Defence will be requested to give an outline of his defence and a summary of the evidence which each witness will give in sufficient detail to inform the State of all the material facts on which the accused relies in his defence.

The basic structure of initiating proceedings in the magistrate's court is set out in section 136 of the Code of Criminal Procedure:

(1) Proceedings in a Magistrate's Court shall be instituted in one of the following ways:

> *(a) on a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such court has jurisdiction either to inquire into or*

try: provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant; or

(b) on a written report to the like effect being made to a Magistrate of such court by an inquirer appointed under Chapter XI or by a peace officer or a public servant or a servant of a Municipal Council or of an Urban Council or of a Town Council; or

(c) upon the knowledge or suspicion of a Magistrate of such court to the like effect; provided that when proceedings are instituted under this paragraph the accused or when there are several persons accused any one of them, shall be entitled to require that the case shall not be tried by the Magistrate upon whose knowledge or suspicion the proceedings were instituted, but shall either be tried by another Magistrate or committed for trial; or

(d) on any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to, inquire into or try; or

(e) upon a warrant under the hand of the Attorney-General requiring a Magistrate of such court to hold an inquiry in respect of an offence which such court has jurisdiction to inquire into; or

(f) on a written complaint made by a court under section 135.

(2) The written report under paragraph (b), the warrant of the Attorney-General under paragraph (e), and the written complaint under paragraph (f) of subsection (1) may be forwarded by post or by messenger to the Magistrate's Court or delivered by hand to a Magistrate of such court and shall form part of the proceedings.

(3) Except as herein provided any written complaint shall not be entertained by a Magistrate.

Thereafter, the magistrate shall conduct a preliminary enquiry to determine whether the matter ought to be heard by the Magistrates Court or High Court in terms of section 145 of the Code of Criminal Procedure.

[9.1.1] Preliminary Inquiry Proceedings by Magistrate to Determine Whether to Commit the Matter to the High Court or Discharge

Section 145: Preliminary inquiry

When the accused appears or is brought before the Magistrate's Court, the Magistrate shall in a case—

(a) 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; or

(b) 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.

The accused shall be informed of the charge:

Section 146: Accused to be Informed of charge

A Magistrate conducting a preliminary inquiry shall at the commencement of such inquiry read over to the accused the charge or charges in respect of which the inquiry is being held, but upon such reading over the accused shall not be required to make any reply thereto; if any such reply is made, it shall not be recorded by the Magistrate; nor shall any such reply be admissible in evidence against the accused.

After presentation of the prosecution case and its' evidence, the defence is entitled to present its' case:

Section 152: Evidence for the defence

(1) Immediately after complying with the requirements of section 151 relating to the statement or the accused, and whether the accused has or has not made a statement, the Magistrate shall ask the accused whether he desires to give evidence on his own behalf and whether he desires to call witnesses.

(2) If the accused in answer to the question states that he wishes to give evidence but not to call witnesses, the Magistrate shall proceed to take forthwith the evidence of the accused, and after the conclusion of the evidence of the accused, his Attorney-at-Law (if the accused is represented) shall be heard on his behalf, if he so desires.

(3) If the accused in. answer to the question states that he desires to give, evidence on his own behalf and to call witnesses, or to call witnesses only, the Magistrate shall proceed to take either forthwith, or, if a speech is to be made by an Attorney-at-Law on behalf of the accused, after the conclusion of the speech, the evidence of the accused, if he desires to give evidence himself, and of any witness called by him who knows anything relating to the facts and circumstances of the case or anything tending to prove the innocence of the accused.

(4) If the accused states that he has witnesses to call, but that they are not present in court, and the Magistrate is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused, the Magistrate may adjourn the inquiry and issue process or take other steps to compel the attendance of such witnesses.

(5) Evidence given by the accused or any such witness as aforesaid shall be taken down in writing and the provisions of section 148 shall apply in the case of witnesses for the defence as they apply in the case of witnesses for the prosecution, except that the Magistrate shall not bind over to attend the trial any witness who is a witness merely to the character of the accused.

The magistrate will thereafter consider discharge of the case or possible commitment thereof to the high court for trial:

Section 153: Discharge

(1) If the Magistrate considers that the evidence against the accused is not sufficient to put him on his trial, the Magistrate shall forthwith for reasons to be recorded by him order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts:

Provided that nothing contained in this section shall prevent the Magistrate from either forthwith or after such adjournment of the inquiry as may seem expedient in the interests of justice, proceeding to investigate any other charge upon which the accused may have been summoned or otherwise brought before him, or which, in the course of the charge so dismissed as aforesaid, it may appear that the accused has committed.

(2) Anything in this section shall not be deemed to prevent the Magistrate from discharging the accused at any stage of the case if for reasons (to be recorded by him) he considers the complaint to be groundless.

Section 154: Commitment for trial

(1) If the Magistrate considers the evidence sufficient to put the accused on his trial, the Magistrate shall commit him for trial before the High Court.

(2) Upon the committal of the accused for trial before the High Court, the accused may state to Court that he is willing to plead guilty to a lesser offence if he is indicted in the High Court and the Magistrate shall record such statement:

Provided however, the fact that such a statement had been made shall in no way prevent the accused from proceeding to trial in the High Court:

Provided further the fact that such a statement had been made shall in no way prejudice the accused at the trial.

(3) Where the accused, on indictment in the High Court states that he is willing to plead guilty to a lesser offence for which he might have been convicted on that indictment and the Court is willing to accept that plea, the Judge shall in sentencing the accused, have regard to the fact that the accused had indicated in the Magistrate's Court his willingness to plead guilty to the lesser offence.

(4) The fact that the accused has made a statement under subsection (2) shall not be read and construed as imposing any obligation on the Court or the Attorney-General to accept a plea of guilt made by the accused in the High Court to a lesser offence for which he might have been convicted on the indictment filed in that High Court.

[9.1.2] Trial Where the Magistrate Court May Hear the Matter Summarily

When the magistrate court hears a matter summarily, the general procedure is set out from sections 182 to 192 of the Criminal Procedure Code:

Section 182: Particulars of case to be stated to accused

(1) Where the accused is brought or appears before the court the Magistrate shall if there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2) The Magistrate shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted.

Section 183: Admission of offence by accused

(1) If the accused upon being asked if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence: provided that the accused may with the leave of the Magistrate withdraw his plea of guilt at any time before sentence is passed upon him, and in that event the Magistrate shall proceed to trial as if a conviction has not been entered.

(2) If the accused does not make a statement or makes a statement which does not amount to an unqualified admission of guilt the Magistrate shall ask him if he is ready for trial and—

> *(a) if the accused replies that he is ready for trial shall proceed to try the case in manner hereinafter provided, but*
>
> *(b) if the accused replies that he is not ready for trial by reason of the absence of witnesses or otherwise the Magistrate shall, subject to the provisions of subsection (3) of section 263, either postpone the trial to a day to be then fixed or proceed forthwith to try the case in manner hereinafter provided.*

But anything herein contained shall not prevent the Magistrate from taking in manner hereinafter provided the evidence of the prosecution and of such of the witnesses for the defence as may be present, and then, subject to the provisions of subsection (3) of section 263 for reasons to be recorded by him in writing adjourning the trial for a day to be fixed by him.

Section 184: Procedure on trial

(1) When the Magistrate proceeds to try the accused he shall take all such evidence as may be produced for the prosecution or defence respectively.

(2) The accused shall be permitted to cross-examine all witnesses called for the prosecution and. called or recalled by the Magistrate.

(3) The complainant and accused or their pleaders shall be entitled to open their respective cases, but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused.

Section 185: Verdict

If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence.

Section 186: Power of Magistrate to discharge accused at any time

Anything hereinbefore contained shall not be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so: provided that, if the Magistrate is satisfied, for reasons to be recorded by him, that further proceedings in the case will not result in the conviction of the accused, he shall acquit the accused.

Section 187: What to be done when different offence disclosed in course of proceedings

(1) If from the facts admitted or proved it appears that the accused has committed an offence within the jurisdiction of the Magistrate to try other than that specified in the charge, the Magistrate may convict the accused of such offence, but before he so convicts he shall frame a charge and shall read and explain it to the accused, and such of the provisions of Chapter XVI as relate to altered charges shall apply to the charge framed under this section.

(2) If from the facts admitted or proved it appears that the accused has committed an offence—

(a) falling within the list of offences set out in the Second Schedule to the Judicature Act, the Magistrate shall not convict but shall stay proceedings under this Chapter and commence the proceedings afresh under Chapter XV; or

(b) not falling within the list of offences in that Schedule but still not triable summarily by him, the Magistrate shall not convict but shall stay proceedings and report the case to the Attorney-General and then abide his instructions.

Section 188: Accused may be acquitted in the absence of complainant

(1) If the summons has been issued on a complaint under section 136(1)(a) upon the day and hour appointed for the appearance of the accused or at any time to which the hearing may be adjourned the complainant does not appear the Magistrate shall notwithstanding anything hereinbefore contained acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other hour or day, and may in addition make an order for payment by the complainant of State costs as hereinafter provided:

Provided that if the complainant appears in reasonable time and satisfies the Magistrate that his absence was due to sickness, accident or some other cause over which he had no control, then the Magistrate shall cancel any order made under this subsection.

(2) If the summons has been issued on a complainant under section 136(1)(a) or (c) as the case may be, and on the day fixed for trial the prosecution is not ready the court may discharge the accused unless for some reason the court thinks proper to adjourn the hearing of the case to some other hour or day.

(3) The order of discharge referred to in subsection (2) shall operate as an acquittal where either—

(a) it is not set aside and the case against the accused is not reopened within a period of one year from the date of such order; or

(b) the case has been duly reopened and an order of discharge is made for the second time:

Provided that where an application to set aside the order of discharge is pending before a Magistrate or any other court in revision, the order of discharge shall not operate as an acquittal at the end of the period of one year until the Magistrate or such court makes order refusing the application to set it aside [S 188(3) subs by s 2 of Act 15 of 1989.]

Section 189: Withdrawal of charge by complainant

If a complainant at any time before judgment is given in any case under this Chapter satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw the case the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused, but he shall record his reasons for doing so:

Provided, however, that anything herein contained shall not be taken to extend the powers of a Magistrate to allow the compounding of offences under the provisions of section 266.

Section 190: Accused may be discharged by Magistrate with sanction of Attorney-General

In any case tried under this Chapter otherwise than upon a complaint under section 136(1), paragraphs (a), (c) and (d), the Magistrate may with the previous sanction of the Attorney-General, for reasons to be recorded by the Magistrate, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction and may thereupon discharge the accused.

Section 191: By whom prosecution under this chapter maybe conducted

(1) Subject to subsection (2) the Attorney-General, the Solicitor-General, State Counsel or a pleader generally or specially authorised by the Attorney—General shall be entitled to appear and conduct the prosecution in any case tried under this Chapter, but in the absence of the Attorney-General, the Solicitor-General, a State Counsel and any pleader as aforesaid the complainant or any officer of any Government Department or any officer of any Municipality, Urban Council or Town Council may appear in person or by pleader to prosecute in any case in which such complainant or Government Department or Municipality or Urban Council or Town Council is interested:

Provided that in the absence of the Attorney-General, the Solicitor-General, a State Counsel or a pleader generally or specially authorised by the Attorney-General, the Magistrate may, where an Attorney-at-Law does not appear for the complainant, permit

any Attorney-at-Law to appear and conduct the prosecution on behalf of the person against whom or in respect of whom the accused is alleged to have committed the offence.

(2) If the complaint is one filed under paragraph (a) of subsection (1) of section 136, the Attorney-General, Solicitor-General, a State Counsel or pleader specially or generally authorised by the Attorney-General shall, except where such complaint has been filed against an officer or employee of the State in respect of a matter connected with or relating to the discharge of the official duties of such officer or employee, not have a right to appear for the complainant without his consent.

Section 192: Trial may proceed in absence of accused

(1) Where the accused—

(a) is absconding or has left the Island; or
(b) is unable to attend or remain in court by reason of illness and either had consented to the commencement or continuance of the trial in his absence or such trial may commence and proceed or continue in his absence without prejudice to him; or
(c) by reason of his conduct in court is obstructing or impeding the progress of the trial, the Magistrate may, if satisfied of these facts, commence and proceed with the trial in the absence of the accused.

(2) Where in the course of or within a reasonable time of the conclusion of the trial of an accused person under paragraph (a) of subsection (1) the accused person appears in court and satisfies the court that his absence from the whole or part of the trial was bona fide, then—
(a) where the trial has not been concluded, the evidence led against the accused up to the time of his appearance before court shall be read to him and an opportunity afforded to him to cross-examine the witnesses who gave such evidence; and
(b) where the trial has been concluded, the court shall set aside the conviction and sentence, if any, and order that the accused be tried de novo.

(3) The provisions of subsection (2) shall not apply if the accused person had been defended by an Attorney-at-Law at the trial during his absence.

[9.2] Magistrates Court Flow Chart: See Chapter 15 - Appendices

[9.3] High Court Proceedings

When the accused is indicted for trial in the High Court, she/he must be served with the indictment, which sets out the details of the charge against her/him and a notice of trial. At the same time, she/he will be served with:

(a) A document containing a list of witnesses the State will call at the trial and a summary of the evidence which each witness will give, sufficient to inform the accused of all material facts upon which the State relies; and

(b) A notice requesting the accused to give an outline of his defence if any to the charge and to supply the names of any witnesses he proposes to call in his defence, together

with a summary of the evidence which each witness will give, sufficient to inform the State of all material facts on which he relies in his defence.

The general provisions for trials in the High Court are set out in sections 193 to 195 of the Code of Criminal Procedure:

Section 193: By whom trials before High Court to be conducted

In every trial before the High Court the prosecution shall be conducted by the Attorney-General or the Solicitor-General or a State Counsel or by some pleader generally or specially authorised by the Attorney-General in that behalf.

Section 194: Attorney-General may withdraw prosecution

(1) At any stage of a trial before the High Court under this Code before the return of the verdict the Attorney-General may, if he thinks fit, inform the court that he will not further prosecute the accused upon the indictment or any charge therein, and thereupon all proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same.

(2) The information under this section may either be oral or in writing under the hand of the Attorney-General.

(3) The prosecuting counsel may with the consent of the presiding Judge at any stage of the trial before the return of the verdict withdraw the indictment or any charge therein and thereupon at proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same.

Section 195: Duty of Judge upon receipt of indictment

Upon the indictment being received in the High Court, the Judge of the High Court presiding at the sessions of the High Court held in the judicial zone where at the trial is to be held shall—

(a) cause the accused to appear or to be brought before him;

(b) cause a copy of the indictment with its annexes to be served on each of the accused who will be tried upon that indictment;

(c) inform the accused of the date of trial;

(d) subject to the provisions of section 403 direct the accused to execute a bond to appear in court for his trial or by warrant addressed to the superintendent of any prison authorise the detention of the accused pending his trial;

(e) cause the accused to be finger-printed and forward the prints to the Registrar of Finger Prints for examination and report to the prosecuting State Counsel;

(ee) if the indictment relates to an offence triable by a jury, inquire from the accused whether or not he elects to be tried by a jury.

(f) where trial is to be by a jury direct the accused to elect from which of the respective panels of jurors the jury shall be taken for his trial and inform him that he shall be bound by and may be tried according to the election so made;

(g) where the accused on being asked by court so requests, assign an Attorney-at-Law for his defence.

[9.3.1] High Court: Trial by Judge Without Jury

This procedure is set out from sections 196 to 203 of the Code of Criminal Procedure:

Section 196: Arraignment of accused

When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilt or not guilty of the offence charged.

Section 197: Plea of guilty and sentencing

(1) If the accused pleads guilty to—
(a) the offence with which he is indicted; or
(b) a lesser offence for which he could be convicted on that indictment and the Court and the Attorney-General are willing to accept that plea,
and it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea, the plea shall be recorded on the indictment and he may be convicted thereon:

Provided that when the offence so pleaded to is one of murder, the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused had pleaded not guilty.

(2) The Judge shall in sentencing the accused have regard to the fact that he so pleaded.

Section 198: Refusal to plead or plea of not guilty

If the accused does not plead or if he pleads not guilty, he shall be tried.

Section 199: Counsel to open his case and call witnesses

(1) The trial shall commence by the prosecuting counsel stating his case to the court.

(2) The witnesses for the prosecution shall then be examined.

(3) All statements of the accused recorded in the course of the inquiry in the Magistrate's Court, if there had been one, shall be put in and read in evidence before the close of the case for the prosecution.

(4) It shall be lawful for the court to call any witnesses not called by the prosecution if the interests of justice so require but such witnesses should be tendered for cross-examination by the prosecuting counsel and by the accused.

(5) The accused shall be permitted to cross-examine all witnesses called for the prosecution.

Section 200: Court may acquit without calling for defence, or call for defence

(1) When the case for the prosecution is closed, if the Judge wholly discredits the evidence 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 of any other offence of which he might be convicted on such indictment, he shall record a verdict of acquittal; if however the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence.

(2) If the accused or his pleader announces his intention not to adduce evidence, the prosecuting counsel may address the court a second time in support of his case for the purpose of summing up the evidence against the accused.

Section 201: Accused may make his defence

(1) If the accused or his pleader announces his intention to adduce evidence, the accused or his pleader may enter upon his defence and may examine his witnesses (if any) and the accused person or his pleader may then sum up his case.

(2) The prosecuting counsel will be entitled to cross-examine all the witnesses called by the defence to testify on oath or affirmation.

Section 202: When prosecuting counsel entitled to call witnesses in rebuttal

If any evidence is adduced on behalf of the accused the prosecuting counsel may with the leave of the Judge call witnesses in rebuttal.

Section 203: Judge to pass judgment

When the cases for the prosecution and defence are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefor and if the verdict is one of conviction pass sentence on the accused according to law.

[9.3.2] High Court: Trial by Jury

If the trial is heard by way of a jury, the general procedure to be followed is set out in sections 204 to 208 of the Code of Criminal Procedure:

Section 204: Arraignment of accused

When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged.

Section 205: Section 197 to apply in dealing with plea of guilty and sentencing

If the accused pleads guilty to the offence with which he is indicted or to a lesser offence for which he could be convicted on that indictment, the provisions of section 197 shall apply.

Section 206: Refusal to plead

If the accused does not plead or if he pleads not guilty or if in the circumstances set out in the proviso to section 205, the Judge refuses to receive the plea jurors shall be chosen to try the case as hereinafter provided.

Section 207: When accused pleads not guilty or is willing to plead guilty to a lesser offence

If the accused pleads not guilty but states that he is willing to plead guilty to lesser offence for which he might have been convicted on that indictment and the prosecuting counsel is willing to accept such plea, the Judge may if he thinks that the interests of justice will be satisfied by so doing order such plea of guilt to be recorded and may pass judgment thereon accordingly, and thereupon the accused shall be discharged of the offence laid in the indictment and such discharge shall amount to an acquittal.

Section 208: Special jury may be summoned

(1) 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; and the Judge before whom such application comes up, shall if he considers such application just and reasonable make an order accordingly.

(2) Such application except when made by the Attorney-General, Solicitor-General, or State Counsel, shall be supported by affidavit.

[9.3.3] Jury Selection and General Procedures Relevant Thereto

These provisions are set out from sections 209 to 216 of the Code of Criminal Procedure:

Section 209: Number of jury and quorum for verdict

(1) The jury shall consist of seven persons.

(2) The verdict returned shall be unanimous or by a majority of not less than five to two.

Section 210: Empanelling of jury

(1) The jury shall be taken from the panel elected by the accused unless the court otherwise directs.

(2) The jury shall be chosen by lot from the panel.

(3) As each juror is chosen his name shall be called and upon his appearance the accused shall be asked by the Registrar if he objects to be tried by such juror.
(4) Objections without grounds stated shall be allowed to the number of two on behalf of the person or ail the persons charged.

(5) On the suggestion of the prosecuting counsel without grounds of objection stated any number of jurors called may be ordered by the Judge to stand by until the names of all the jurors summoned and then available for service on the jury have been gone through.

(6) If such names have been gone through without a jury having been made up the names of each of those so ordered to stand by shall be called again and the prosecuting counsel shall be called upon to state the ground of objection (if any) under section 211.

(7) If there shall not be a sufficient number of jurors present unchallenged the trial shall be adjourned to enable a new panel of jurors to be summoned.

Section 211: Grounds of objection

Any objection taken to a Juror on any of the following grounds if made out to the satisfaction of the court shall be allowed—

(a) some presumed or actual partiality in the juror;
(b) 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;
(c) his executing any duties of police or being entrusted with police duties;
(d) his having been convicted of any offence which in the opinion of the Judge renders him unfit to serve on the jury;
(e) his inability to understand the language of the panel from which the jury is drawn;
(f) any other circumstance which in the opinion of the Judge renders him improper as a juror.

Section 212: Decision of objection

(1) Every objection taken to a juror shall be decided by the Judge and such decision shall be recorded and be final.

(2) If the objection is allowed the place of such juror shall be substituted by any other juror chosen in manner provided in this Chapter.

Section 213: Foreman of jury

(1) When the jurors have been chosen the Registrar shall address them in the following words: "Gentlemen of the jury, choose your foreman," and they shall thereupon proceed to do so.

(2) If a majority of the jury do not within such time as the Judge thinks reasonable agree in the appointment of a foreman he shall be appointed by the Judge.

(3) When the foreman has been appointed the jurors shall be sworn or affirmed.

Section 214: Duties of foreman

The foreman shall preside in the debates of the jury, ask any information from the Judge that is required by the jury, or any of the jurors, and deliver the verdict of the jury.

Section 215: Procedure where juror ceases to attend

If in the course of a trial by jury at any time before the return of the verdict any juror from any sufficient cause is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance or if it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted, the Judge may either order a new juror to be added or discharge the jury and order a new jury to be chosen.

Section 216: Discharge of jury in case or sickness of prisoner

The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the Judge the interests of justice so require.

Edmange Sampath Amarasiri v Officer-in-Charge Police Station (Wariyapola) & The Attorney General **(Supreme Court Case SC (SPL) LA No. 262/15)**

This case was concerned with the prosecution's onus and was an application for Special Leave to Appeal in terms of Section 9(a) of the High Courts of the Provinces (Special Provisions) Act No.19 of 1990 reads with Article 128 of the Constitution. The Appellant had been convicted for an offence under Section 344 of the Penal Code and sentenced to 2 months simple imprisonment (suspended for 5 years) coupled to a fine of Rs 1000. One of the main questions considered by the court was whether the evidence of the Appellant created a reasonable doubt in the prosecution case. The court ruled that if this were the case, the defence case must succeed.

[9.3.4] Trial to Close of Case for the Prosecution and Defence

These provisions are set out from sections 217 to 228 of the Code of Criminal Procedure:

Section 217: Registrar to read indictment to jury

As soon as the jury have been sworn the Registrar shall in the hearing of the accused read the indictment to the jury and the Judge shall 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 any of the charges if more than one, laid against him, in the indictment and 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.

Section 218: Opening of case for prosecution

The prosecuting counsel shall then open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused and shall examine his witnesses who may then be cross-examined by the accused or his pleader.

Section 219: Statements by prisoner to be put in

All statements of the accused recorded in the course of the inquiry if any in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution.

Section 220: Procedure after examination of witnesses for the prosecution.

(1) When the case for the prosecution is closed, 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."

(2) If the Judge considers that there is evidence that the accused committed the offence he shall ask him or his pleader if he means to adduce evidence.

(3) If the accused or his pleader announces his intention not to adduce evidence the prosecuting counsel may address the jury a second time in support of his case for the purpose of summing up the evidence against the accused.

Section 221: Defence

(1) The accused or his pleader may then open his case stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then call his witnesses and after they have given evidence may sum up his case.

(2) The prosecuting counsel will be entitled to cross-examine all the witnesses called by the defence to testify on oath or affirmation.

Section 222: Right of accused as to examination and summoning of witnesses

The accused shall be allowed to examine any witness not previously named by him if such witness is in attendance.

Section 223: Witnesses in rebuttal

The prosecuting counsel may by leave of the Judge call witnesses in rebuttal.

Section 224: View by jury of place where offence committed

(1) Whenever the Judge thinks that the jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred, the Judge shall make an order to that effect; and the jury shall be conducted in a body under the care of an officer of the court to such place which shall be shown to them by a person appointed by the Judge.

(2) Such officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any member of the jury; and unless the court otherwise directs they shall when the view is finished be immediately conducted back into court.

Section 225: When juror may be examined

If a juror is personally acquainted with any relevant fact it is his duty to inform the court that such is the case whereupon he may be sworn and examined in the same manner as any other witness.

Section 226: Jury to attend on adjourned sitting

If a trial is adjourned the jury shall attend at the adjourned sitting and every subsequent sitting until the conclusion of the trial.

Section 227: When jury may be kept together

(1) It shall not be necessary in any case to keep the jury together during any adjournment previous to the close of the Judge's summing up, but it shall be lawful for the Judge if it should appear to him to be advisable in the interests of justice in any trial to require the jury to be kept together during any adjournment.

(2) Where the jury is allowed to separate during the course of any trial the jurors may be first sworn or affirmed not to hold communication with any person other than a fellow juror upon the subject of the trial during such separation.

(3) If any such juror shall hold any such communication with any person other than a fellow juror or if any person other than a fellow juror shall hold any such communication with any such juror, such juror or person as the case may be shall be deemed to be guilty of a contempt of court and shall be punishable accordingly.

Section 228: Judge may allow jurors refreshment

The Judge may if he thinks fit order reasonable refreshment to be procured for the jury by the Registrar at the public expense at any time during which they may be kept together either before or after the Judge has summed up.

[9.3.5] Conclusion of Trial

These provisions are set out from sections 229 to 228 of the Code of Criminal Procedure:

Section 229: Charge to jury

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

Section 230: Duty of Judge

It is the duty of the Judge:

> *(a) to decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of 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, and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties;*
>
> *(b) to decide upon the meaning and construction of all documents given in evidence at the trial;*
>
> *(c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;*
>
> *(d) to decide whether any question which arises is for himself or for the jury.*

Section 231: Judge may comment on question or fact or upon question of mixed law and fact

The Judge may if he thinks proper in the course of his summing up express to the jury his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceedings.

Illustrations:

> *(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible. It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved.*

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed. It is the duty of the Judge to decide whether the original has been lost or destroyed.

Section 232: Duty of jury

It is the duty of the jury:

(a) to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned;

(b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine whether such words occur in documents or not;

(c) to decide all questions which according to law are to be deemed questions of fact;

(d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations:

(a) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide not amounting to murder and to tell them under what view of the facts. A ought to be convicted of murder or of culpable homicide not amounting to murder or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return verdict in accordance with the direction of the Judge, whether that direction is right or wrong and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point whether work was done with reasonable skill or due diligence.

Section 233: Jury may retire to consider verdict

(1) After the summing up the jury may retire to consider their verdict.

(2) If the jury retire they shall be committed to the charge of an officer of the court who shall first take an oath or affirmation in the prescribed form.

(3) Except with the leave of the Judge any person other than a member of the jury shall not speak to or hold any communication with any member of such jury.

Section 234: When jury ready to give verdict

(1) When the jury are ready to give their verdict and are all present the Registrar shall ask the foreman if they are unanimous.

(2) If the jury are not unanimous the Judge may require them to retire for further consideration.

(3) After such further consideration as the Judge considers reasonable or if either in the first instance the foreman says that they are unanimous or the Judge has not required them to retire, the Registrar shall say (the jurors being all present): "Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged?"

(4) On this the foreman shall state what is the verdict of the jury.

Section 235: Verdict to be given on each

(1) Unless otherwise ordered by the Judge the jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) If the Judge does not approve of the verdict returned by the Jury he may direct them to reconsider their verdict, and the verdict given after such reconsideration shall be deemed to be the true verdict.

Section 236: Entry and signing of verdict

(1) The Registrar shall make an entry of the verdict on the indictment and shall then say to the jury the following or words to the like effect: "Gentlemen of the jury: attend whilst your foreman signs your verdict. The finding of you (or of so many of you as the case may be) is that the prisoner AB is guilty" (or "not guilty").

(2) The foreman shall sign the verdict so entered and the verdict when so entered and signed, but not before, shall be final.

(3) When by accident or mistake a wrong verdict is delivered the jury may before it is signed or immediately thereafter amend the verdict.

Section 237: Discharge of jury when they cannot agree

If the jury or the required majority of them cannot agree the Judge shall after lapse of such time as he thinks reasonable discharge them.

Section 238: Judgment in case of conviction

If the accused is convicted the Judge shall forthwith pass judgment on him according to law: Provided always that if it appears to the Judge expedient the Judge instead of pronouncing Judgment may direct that the accused be released on his entering into a bond, with or without

sureties and during such period as the Judge may direct, to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behavior.

[9.4] High Court Flow Chart: See Chapter 15 – Appendices.

[9.5] Courtroom Etiquette and Protocol

The courtroom is a formal setting, and there are some specific etiquette rules to follow that may not be familiar to you. Here are some useful guidelines:

- Always be truthful with the court – remember you are an officer of the court;
- Dress appropriately for court appearance and be fully dressed and robed before entering the courtroom – this shows respect for the forum in which you are appearing;
- Treat all courtroom staff with respect – this includes interpreters, orderlies, the stenographer, police officers, clerks, magistrates and judges;
- When facing the judge, counsel for the accused usually sits at the table to the right and counsel for the prosecution sits at the table to the left;
- When the judge enters, all counsel, and everyone else in the courtroom, must stand-up. Counsel then bow to the judge;
- Sit down when the clerk/registrar instructs everyone to do so;
- When you are getting ready to address the judge, either stand at your table or by the podium (if there is one);
- Wait until the judge looks at you or is ready to proceed. The judge may nod or may say that you can proceed. If you are not sure, ask the judge if you may proceed;
- Usually, the first counsel to address the court should introduce other counsel. For example one might say "[name] appearing for the prosecution and my colleague [name] or "my friends [name] and [name] appear for the accused;"
- Every other counsel should introduce themselves again before starting to address the court;
- If it is not your turn to address the judge sit down and pay attention to what is happening;
- Take notes that you can use during your submissions or closing statements;
- Try not to distract the judge - if you need to talk with your co-counsel, write a note;
- Stand every time you are addressing or being addressed by the judge – do not remain seated;
- Refer to your co-counsel as "my colleague" or "my co-counsel." Opposing counsel should be referred to as "my friend" or "counsel for [position or name of the client]."
- Address the judge formally: In most common law jurisdictions this would be M'lord (for a male judge) or M'lady (for a female judge). Alternatively refer to each judge as "Justice [surname]" or simply as "Justice;"
- Do not interrupt the judge;
- If you made an erroneous submission of fact or law and this is pointer out to you either by the judge or the prosecutor be humble and acknowledge it with the words "I am indebted to the court or/and my learned friend;"
- When you address the court and wish to make a point, indicate it with the words "it is submitted that;"
- If a judge interrupts you mid-argument or submission, stop immediately, and wait until they are finished before replying;

- If you wish to convey to the court of the prosecutor a particular fact or point that is important to your client, indicate it by stating "it is my specific instructions that;"
- Never interrupt or object while an opposing counsel is addressing the judge;
- Wait until you are specifically asked by the judge to respond to a point argued by opposing counsel;
- If the judge asks you a question, take your time to think about it before replying. If you do not hear the question, or are confused by it, ask the judge to repeat or restate the question;
- If you do not know the answer to a question, say so;
- Once a question has been answered, pick up from where you were before the question;
- Never lose your temper in open court.

[9.6] Opening Statements

[9.6.1] General

After pre-trial matters have been completed, the prosecution and defence have the opportunity to give an opening statement. The opening statement allows both sides to give the judge or judge and jury an overview of the case, including what they plan to prove and how they intend to prove it. The Criminal Procedure Code provides for the prosecution and defence respectively to deliver opening statements.

[9.6.2] Relevant Legislation

Magistrates Court

The accused or their pleaders shall be entitled to open their respective cases (Criminal Code, Section 184(3)).

High Court: Trial by judge alone

Following the completion of the prosecutions case, the accused may adduce evidence (Criminal Code, Section 201).

High Court: Trial by jury

Following the completion of the prosecution case, defence counsel may then open his case stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then call his witnesses and after they have given evidence may sum up his case (Criminal Code, Section 221(1)).

[9.6.3] Delivering an Effective Opening Statement

Your opening statement is an opportunity to establish the themes of your case, and to present a persuasive and compelling story introducing your witnesses and evidence. The purpose of an opening statement is to tell the court and/or jurors something about the case they will be hearing.

It is important to confine an opening statement to facts that will be proved by the evidence – an opening statement should never be argumentative.

The trial begins with the opening statement of the party with the burden of proof. In Sri Lanka the prosecution will deliver its opening statement first and thereafter the defence. Most commonly, defence counsel's objective in making an opening statement include the following:

- To provide overview of the defence case;
- To identify weaknesses in the prosecution case;
- Emphasizing the prosecution's burden of proof;
- Summarizing testimony of witnesses, and the role of each in relationship to the entire case;
- Describing exhibits which will be introduced and the role of each in relationship to the entire case;
- Clarifying juror's responsibilities; and
- To state the ultimate inferences counsel seeks the jury to draw.

[9.6.4] Further Practical Tips for Delivering an Effective Opening Statement

- Begin in the prescribed formal way: "May it please the Court;"
- Be as brief as possible;
- Look at the judge and/or each juror: take them into your confidence and do not just speak blankly into courtroom space;
- Begin by telling the jurors something important about the case that they will remember: Highlight an important fact or piece of evidence;
- Establish your case theory and leave the court and/or jurors with a strong, central theme of your defence;
- If you want to introduce co-counsel or explain how the trial is going to work, do it after you're well into your opening;
- Speak in simple language using short, ordinary words;
- Use the words you choose to create images in juror's minds;
- Present your position without quarreling with your opponent;
- Create empathy for your client: Draw the judge and/or jurors into your client's personal life;
- Make a point by repeating it in different ways; and
- Use visual aids and portions of depositions.

[9.7] Direct Examination (Examination in Chief)

Defence counsel may call witnesses to testify for the defence. He may also call the accused to testify in his defence. The purpose of examination-in-chief is to elicit relevant and admissible evidence from the witnesses in a clear and orderly manner. Most witnesses are not familiar with the rules of evidence and it is therefore necessary for counsel to ask appropriate questions to ensure that only relevant and admissible evidence is given.

[9.7.1] Relevant Legislation

[9.7.1.1] Magistrate Court – Trial by Magistrate

The accused shall be allowed to examine any witness not previously named by him if such a witness is in attendance (Criminal Code, Section 222). That prosecuting counsel may by leave of the Judge call witnesses in rebuttal (Criminal Code, Section 223).

The Magistrate shall ask the accused whether or desires to give evidence on his own behalf and whether he desires to call witnesses (Criminal Code, Section 152(1)). If the accused wishes to give evidence but not to call witnesses, the Magistrate shall proceed to take forthwith the evidence of the accused (Criminal Code, Section 152(2)).

The Magistrate shall at the time of committing the accused for trial require the accused to state orally the names of persons whom he wishes to give evidence at trial, distinguishing between those whom he proposes to call to speak to facts and those who are merely to speak to character (Criminal Code, Section 155(1)). The Magistrate will then prepare a list of witnesses named by the accused and shall direct the fiscal to issue a notice on each witness requiring him to appear before the court of trial on a date specified in the notice (Criminal Code, Section 155(2)).

Evidence given by the accused and witnesses shall be taken down in writing (Criminal Code, Section 152(5)).

All statements of the accused recorded in the course of the injury if any in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution (Criminal Code, Section 219).

[9.7.1.2] High Court – Trial by Judge

Accused may make his defence and may examine witnesses (if any) and the accused person or his pleader may then sum up his case (Criminal Code, Section 201).

[9.7.1.3] High Court – Trial by Jury

The accused or his pleader open the case stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then call his witnesses and after they have given evidence may sum up his case (Criminal Code, Section 221(1)).

The defence lawyer should carefully plan the sequence of his questions. The aim must be to extract the evidence in a clear and systematic fashion. The questions should follow a logical sequence so that the evidence can be readily understood. If when asking questions the lawyer does not follow a logical order, the witness may become confused and the judge or jury will have difficulty in following and understanding the evidence of the witness.

The best way of obtaining evidence is to allow the witnesses to give their own description of the events. After they have finished relating the events, questions can be put to clarify points. However, questions can be put to help the witnesses to relate their own version of events but the

witnesses must not be told what to say or questioned in such a way as to suggest the answers to the questions. The questions posed should be kept short and clearly and simply formulated so that they can be readily understood by the witnesses.

It is important to find out from potential witnesses what they actually know about the events in question. It is dangerous to rely upon what the accused or her/his relatives say that certain witnesses know and to subpoena such persons as witnesses based upon what you have been told they will say. Possible defence witnesses should be interviewed to see what they know about salient matters. They can be called if they can give testimony favorable to the defence case.

A problem may arise where the legal practitioner finds from interviewing a witness that the witness could provide valuable evidence for the defence, but the witness has indicated that she/he is unwilling or reluctant to give this testimony in court. If the testimony of the witness is vital to the defence, the defence may have to have the witness subpoenaed. In deciding whether to have a reluctant witness subpoenaed the defence lawyer will have to consider what evidence she/he is likely to be able to extract from the reluctant witness in court and whether her/his testimony will do his client any good.

[9.7.2] Points to Remember When Conducting Direct Examination

- Be sure of the information you want to elicit: remember you are presenting the witness at trial in order to prove particular facts you need to make or defend your case. Knowing *which* facts you want to present through a particular witness is key to a good direct line of questioning;
- Ask questions beginning with words that are intended to elicit information from the witness, such as who, what, when, where, why, how, describe, explain;
- Prepare the witness: prepare your witness – it is imperative that you both know what needs to be said. However, do not commit yourself to particular questions, and don't let the witness develop pre-empted answers;
- Think about the questions you ask and listen carefully to the answers give – try and build (as far as possible) your subsequent questions on previous answers from the witness;
- Keep your questions short, and make sure they'll allow the witness to tell his/her story in a logical, clear way.
- Include headline-type questions that announce to both the witness and the jury in which direction you are steering your questioning;
- Be prepared to handle objections from your opponent, both to the form and substance of your questions;
- Try to anticipate your opponent's cross-examination: if there are bad facts to your case that worry you it is often useful revealing them yourself during your direct examination – this way you can control, and to an extent mitigate, delivery of the bad fact.
- Remember: the witness is the star during direct examination - not the defence lawyer. During direct examination you lead the witness but allow him/her to tell their own story.
- Always be wary whether the witness is having trouble keeping on point: if not, take him/her back to the point with a follow up question;
- Do not ask leading questions (questions suggesting the answer); and

- Always look for signs whether the witness is confused, uncomfortable or tired: if so, back up and begin again or ask to adjourn the proceedings for a short while.

[9.8] Calling the Accused to Give Evidence

Defence counsel needs to decide whether the accused should give testimony in his/her own defence. This is a strategic litigation decision and a discussion must take place between counsel and the accused as to whether it is advisable for the accused to testify.

The most practical way to consider this is by determining, at the end of the prosecution's case, whether there is any *prima facie* incriminating evidence implicating the accused. If there is, it means the accused has a case to answer. In such a case it is safer to advise the accused to testify. The reason for this is that if the accused elects not to give evidence and there is evidence implicating him/her in the charges, the court's reaction may be to believe that he/she has something to hide and (the court) may draw an adverse conclusion based on that refusal.

Conversely, if in a specific matter the prosecution's case is weak (because of a lack of evidence, poor testimony from prosecution witnesses and/or good cross-examination by defence counsel) and there is no *prima facie* evidence against the accused, it is often more advisable for defence counsel to advise the accused not to testify (opting to exercise his/her right to remain silent) especially if the accused will make a poor witness as this may only end up strengthening the State's case.

In any matter it remains a calculated risk whether or not the accused should testify – this calculation will be based on the merits of each case. It is counsel's duty to consider the strengths and weaknesses of both the prosecution and defence case and advise the client accordingly whether it is necessary for him/her to testify.

[9.9] Cross Examination

[9.9.1] General

This is the process and line of questioning of witnesses by the opposing side after the testimony has been adduced during examination-in-chief.

The purpose of cross-examination is to test the accuracy, honesty and voracity of evidence presented during evidence-in-chief. The aims of cross-examination include trying to get the witness to add to, alter, qualify, amend or retract evidence given. Cross-examination is also used to discredit witnesses and their evidence and to elicit evidence more favorable to the cross-examining party. Cross-examination usually encompasses most or all of the above goals but is done principally to elicit testimony favorable to your own case and to expose weaknesses in your opponent's case.

As a general practice defence lawyers should be pleasant and courteous in dealing with a witness. However, it is sometimes necessary to adopt a firm, even somewhat aggressive approach when dealing with a hostile, uncooperative or facetious witness.

[9.9.2] Relevant Legislation

Magistrates Court

In the Magistrates Court, the accused shall be permitted to cross-examine all witnesses called for the prosecution and called or recalled by the Magistrate (Criminal Code, Section 184(2)).

High Court

The accused shall be permitted to cross-examine all witnesses called for the prosecution (Criminal Code, Section 199(5)).

[9.9.3] Practical Points on Cross-Examination:

- A defence lawyer may not cross-examine his own witness;
- A defence lawyer should be able to point to many major discrepancies in a witness's testimony to question his/her credibility;
- Leading questions are allowed in cross-examination and the court should normally allow greater latitude than in examination-in-chief;
- The failure to cross-examine a witness on any matter generally implies an acceptance of his evidence on that point.

[9.9.4] Further to the above and in Preparing for Cross-Examination, Counsel:

- Must consider how cross-examination of individual witnesses is likely to generate helpful information;
- Anticipates those witnesses the prosecutor might call in its case-in-chief or in rebuttal as well as the evidence they are likely to give;
- Creates any necessary cross-examination plan for each anticipated witness;
- Is alert to inconsistencies or possible variations in witness testimony and highlights these to the court;
- Reviews prior statements of witnesses and any prior relevant testimony of the prospective witnesses;
- Where appropriate, reviews relevant statutes and local police regulations for possible use in cross examining police witnesses;
- Is alert to issues relating to witness credibility, including bias and motive for testifying and highlights these issues through cross-examination.

Defence lawyers should NEVER ask *who, what, where, when, why, how, describe* and *explain* during cross-examination. There are words requiring explanation that you do not want to elicit during cross-examination. The goal of cross-examination is to target the prosecutor's case and to advance the accused's theory of the case without giving the witness an opportunity to explain their answers. You want the witness to agree with your version of events, not develop their own.

Therefore, remember these three basic tenets to maximize the impact of your cross-examination:

(a) Ask only leading questions: leading questions simply state a fact with an implied question mark at the end;

(b) Establish exactly one fact per question; and

(c) Ensure each question leads to a specific goal: purposeless questioning is a waste of time and an opportunity for the witness to elaborate with their own version.

[9.10] Re-Examination

After a witness has been cross-examined, the party originally calling him may put further questions to him. There are, however, strict limits to the type of questions which may be put and the judge or magistrate must ensure that their limits are not exceeded by the questioner. Only questions relating to matters raised in cross-examination may be put; leading questions may not be put. New matters may only be introduced if the judge or magistrate grants leave to do so.

[9.11] Closing Arguments (Closing Summation)

[9.11.1] General

A closing argument, is the concluding statement of each party's counsel. It usually reiterates the most important facts and evidence for the trier of fact - either the judge or jury.

A closing argument occurs at the end of a trial after the presentation of all evidence. In criminal cases, the prosecution presents its' closing argument followed by the defence. The prosecution is usually permitted a final rebuttal argument as it carries the burden of proof in criminal cases. If a trial is heard by a jury the judge will usually give the jury its final instructions after hearing the respective parties' closing arguments. Defence counsel should use the closing summation not only to highlight weaknesses in the prosecutions argument but also to describe favorable inferences that can be drawn from the evidence.

During the summation, all of the evidentiary pieces should be brought together and the case should be presented in a strong, fluid, and persuasive manner. All points that help prove the elements establishing the theory of the case must be fully explained. The closing should be performed in a simple, yet precise way.

[9.11.2] Useful Practical Tips:

- It is important to anticipate the arguments that may be made by the other side: prepare to rebut those arguments before they are made;
- Avoid attacking the other side's attorney: neither juries nor judges appreciate this type of argument. Under no circumstances engage in a personality battle with the opposing party or counsel – it is inappropriate and unprofessional;
- Make sure that demonstrative evidence is used when explaining the key points in your case (The use of demonstrative evidence greatly increases the effectiveness of the closing argument); and

- It is important not to cover all the evidence presented during trial: if the entire case is presented during closing, this becomes boring and one runs the risk of losing the judge and/or jury. Instead, point out the highlights of the testimony and key evidence from the trial.

In closing, counsel should finish his/her submissions by asking the jury or judge to acquit the accused.

[9.12] The Test: Guilty Beyond a Reasonable Doubt?

In Sri Lanka the prosecution must prove its' case beyond a reasonable doubt. To find a person guilty the prosecution does not need to eliminate all reasonable doubt that a person did or did not do something or prove its case to an absolute certainty: *beyond a reasonable doubt* requires that, after considering all the evidence, the judge or jury can only come to one conclusion, and that is that the defendant is indeed guilty.

The Sri Lankan Evidence Ordinance states that a fact is proved *"when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man might, under the circumstances of the particular case, to act upon the supposition that it exists"* (Evidence Ordinance, Chapter 1).

Reasonable doubt about a person's guilt is when, after considering and comparing and weighing all the evidence, one is not left with an abiding conviction of the truth of the charge that has been leveled at the accused and that all the elements of the charge(s) have been proved against the accused.

To better understand what *beyond a reasonable doubt* means, it helps to look at two other standards that courts may apply: a *preponderance of the evidence* or/and *clear and convincing evidence*:

- A **preponderance of the evidence**: this means more than 50% of the evidence and that when weighing the evidence, if a judge or jury thinks it is more likely than not that something happened, they can find that fact to be true;

- **Clear and convincing evidence**: this is more than a preponderance and works on a percentage of at least 75% chance that someone did or did not do something;

- **Beyond a reasonable doubt** is the highest standard and is common to most criminal legal systems in the world. In a criminal case, because the stakes are so high, it is not enough to prove that the defendant is probably guilty: rather, the prosecution must prove each element of its case (and the charge) beyond a reasonable doubt.

[9.13] Applying to the Court for Discharge at the End of the Prosecution's Case

Section 220 of the Code of Criminal Procedure determines as follows:

> *Procedure after examination of witnesses for the prosecution*
>
> *(1) When the case for the prosecution is closed, if the Judge considers that there is no evidence that the accused committed the offence he shall direct the jury to return verdict of " not guilty ".*
>
> *(2) If the Judge considers that there is evidence that the accused committed the offence he shall ask him or his pleader if he means to adduce evidence.*
>
> *(3) If the accused or his pleader announces his intention not to adduce evidence the prosecuting counsel may address the jury a second time in support of his case for the purpose of summing up the evidence against the accused.*

Even though the section grants the trial judge the inherent authority to *mero motu* direct the jury to return a verdict of not guilty after the prosecution's case has been presented, section 220(1) is of importance to the defence as it affords counsel the opportunity to apply to the court (if there is in counsel's opinion no evidence that the accused committed the offence) to effectively discharge the case for lack of evidence and to direct the jury to return a verdict of not guilty. This can be done by way of motion before the procedure in either sections 220(2) or 220(3) is initiated.

Section 220(1) can thus be a very useful tool for counsel to not only have the case against the client discharged at an early stage (if successful) but, similarly, argue weaknesses in the prosecution case (if the judge considers that there is evidence and a case which the accused must answer) at an early stage of the proceedings and emphasize it to the judge and jury. Section 220(1) and its effect is similar to section 153(1) of the Criminal Procedure Code - section 153(1) allows for the same procedure of discharge after the prosecution's case in the Magistrate's Court, whereas section 220(1) is applicable in the High Court with a jury.

Gunawardena v The Republic of Sri Lanka H.C Gampaha 28/78 – Sri Lanka Law Reports 316.

Where no *prima facie* case has been made against an accused, he need not offer an explanation – the onus rests solely on the prosecution to prove the accused's guilt. It is open to the accused to rely safely on the presumption of innocence on the infirmity of the evidence for the prosecution and there rests no obligation on an accused to assist the prosecution in discharging its onus.

Practitioners should also note section 186 of the Code of Criminal Procedure which empowers a magistrate to discharge an accused, *mero motu*, at any stage of the proceedings. The section determines as follows:

Anything herein before contained shall not be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so: Provided that, if the Magistrate is satisfied, for reasons to be recorded by him, that further proceedings in the case will not result in the conviction of the accused, he shall acquit the accused.

[10] RULES OF EVIDENCE

[10.1] General

The defence lawyer must be fully conversant with the rules of evidence. Most criminal cases turn on the facts and the inferences to be drawn from those facts, rather than on points of law. The facts are therefore of key importance. The rules of evidence are also of primary importance as they lay down such things as which facts may be admitted, which persons are competent to give testimony, how the facts may be proved, when confessions are admissible and so forth.

In Sri Lanka rules of evidence particularly relevant to criminal proceedings are set out in the Sri Lankan Evidence Ordinance. Practitioners in Sri Lanka should note section 100 of the Ordinance that states as follows:

Whenever in judicial proceedings a question of evidence arises not provided for by this Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence.

What follows in this section is a summary of the main rules of evidence that may be of assistance when a lawyer is defending clients in criminal cases. These rules are first described from the standpoint of how they are applied by the courts. They are then examined from the perspective of how they can be used in favour of persons charged with various crimes.

[10.2] Corroboration

Corroboration is to support or enhance the believability of a fact or assertion by the presentation of additional information that confirms the truthfulness of the item. The testimony of a witness for example is corroborated if subsequent evidence (such as a coroner's report or the testimony of other witnesses) substantiates it.

Corroborating evidence is evidence thus supporting a proposition already made or supported by initial evidence, confirming the original proposition. For example, Z, a witness, testifies that she saw W drive his automobile into a green car. Meanwhile, Y, another witness, testifies that when he examined W's car, later that day, he noticed green paint on its fender.

The evidence of certain classes of witnesses is insufficient, standing alone, as proof of the facts deposed to. Such witnesses – for example, accomplices, young children and complainants in sexual cases – must usually be corroborated.

To be of evidential weight the fact or facts corroborated must be material ones. Corroboration of insignificant facts will not usually help to strengthen the States case.

From the standpoint of the State it is important to have "implicatory corroboration." By this is meant evidence that implicates the accused in the commission of the offence. The corroboration can come from the evidence of another witness or from the evidence of the accused. The confession of an accused can be used as corroborating evidence – even the failure of an accused to testify under certain circumstances can be corroborative of other evidence.

[10.3] Hearsay Evidence

Hearsay evidence is testimony not of what the witness saw, heard or otherwise observed, but what he heard others say about the matter under investigation and is generally not accepted in Sri Lanka.

Section 60 of the Evidence Ordinance clearly expresses all oral evidence to be direct. There are no provisions in the Evidence Ordinance indicating that hearsay evidence should not be allowed in court proceedings but a number of sections provide for exceptions to allow hearsay evidence such as *res gestae* (recognized under section 6) and *common intention* (recognized under section 10) as well as some other exceptions from sections 17 to section 39 of the Evidence Ordinance.

The reason for not allowing hearsay evidence, in general, is that it is not the best evidence of the contested fact (the so called "*best evidence-rule*" i.e., the actual observer is not giving the evidence and therefore the credibility of such evidence can not be tested through cross-examination). There is also the risk that a second hand report of what the actual observer said may be garbled and inaccurate.

In the Privy Council case of *Subramaniam v. Public prosecutor (1956) 1 W.L.R. 965,* the judgment introduced a mechanism to judge whether evidence is hearsay or not. When the object of the evidence is to establish the truth of what is contained in the statement (hearsay and inadmissible). When it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made (not hearsay and is admissible).

[10.4] Documentary Evidence

The contents of documents may be proved either by *primary* or *secondary* evidence (Evidence Ordinance, Section 61). *Primary* evidence means the document itself produced for the inspection of the court (Evidence Ordinance, Section 62).

Secondary evidence means and includes:

- Certified copies given under the provisions hereinafter contained;
- Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- Copies made from or compared with the original;
- Counterparts of documents as against the parties who did not execute them; and
- Oral accounts of the contents of a document given by some person who has himself seen it.

Generally documents must generally be proved by primary evidence (Evidence Ordinance, Section 64). Exceptions to this general application are noted in section 65 of the Evidence Ordinance:

(1) When the original is shown or appears to be in the possession or power:

(a) Of the person against whom the document is sought to be proved, or
(b) Of any person out of reach of, or not subject to, the process of the court, or
(c) Of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it.

(2) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is sought to be proved, or by his representative in interest;

(3) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(4) When the original is of such nature as not to be easily movable;

(5) When the original is a public document within the meaning of section 74;

(6) When the original is a document of which a certified copy is permitted by this Ordinance or by any other law in force in Sri Lanka to be given in evidence;

(7) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

In the case of subsections (1), (3) and (4), any secondary evidence of the contents of the document is admissible. In the case of subsection (2) the written admission is admissible. For subsections (5) and (6) a certified copy of the document but no other kind of secondary evidence is admissible. For purposes of subsection (7) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

Section 66 contains the rules of notice to produce in section 65.

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting (Evidence Ordinance, Section 67).

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence (Evidence Ordinance, Section 68).

If no such attesting witness can be found, or if the document purports to have been executed in Sri Lanka, it must be proved that the attestation or one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person (Evidence Ordinance, Section 69).

The admission of a party to an attested document of its execution shall be sufficient proof of its execution though if it is in law a document required to be attested to (Evidence Ordinance, Section 70). If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence (Evidence Ordinance, Section 71).

[10.5] Circumstantial Evidence

Circumstantial evidence is evidence that relies on an inference to connect it to a conclusion of fact—like a fingerprint at the scene of a crime. By contrast, direct evidence supports the truth of an assertion directly—i.e., without the need for any additional evidence or inference.

Where direct evidence of a particular act or state of affairs is not available one may, and often must, resort to indirect means and evidence to establish certain facts.

> In the matter of *Gunawardena v The Republic of Sri Lanka H.C Gampaha (28/78 Sri Lankan Law Reports p 315*) it was held that "*In a case resting on circumstantial evidence the judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, must give a further direction in express terms that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are consistent with the guilt of the accused and exclude every possible explanation other than the guilt of the accused*"

Since the direct evidence of a witness is open cross-examination, the weakness of observation and recollection, circumstantial evidence is less contestable and more easily relied upon. Where the conviction of an accused is dependent upon circumstantial evidence and the drawing of inferences from all the established facts the inference sought to be drawn must be consistent with all the proved facts and the facts should be such that they exclude every other reasonable inference from them save but the one sought to be drawn.

It was further ruled (in the *Gunawardena* – matter) that in a case of circumstantial evidence the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence although each fact, when taken separately, may be a circumstance of suspicion.

The court (also in the *Gunawardena* – matter) reiterated that with circumstantial evidence it is not the case of each link forms a link in a chain and if one link breaks the chain fails. Rather, in the court's view, circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three stranded together may be quite sufficient.

[10.6] Witness Testimony

[10.6.1] Children

Numerous cases and research in various jurisdictions have established that while children can be reliable witnesses their memories are often less developed than that of adults. Children are more suggestible than adults and they have greater difficulty than adults in communicating what they know.[25]

In many jurisdictions this led to the development and application of a cautionary rule by courts when hearing and considering the testimony of a child witness.

The Sri Lankan Evidence Ordinance determines in section 118 thereof that *"all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."*

Each case will/must be considered on its own merits. Often a child's testimony may be the only testimony in a case and cannot be ignored (or have less evidential weight) simply because the witness is a child – a child witness may be found by the court to be just as credible a witness as an adult.

A more balanced approach may be to approach a child's testimony coupled to other checks and balances pertaining to rules of evidence including corroboration, consistencies/inconsistencies, inherent probabilities, credibility, and strength of available evidence. It is true, as an example, that in the normal course of events a six year old cannot be expected to behave in the same rational way as an adult. However, a child's young age does not automatically mean the child is not a credible or reliable witness.

Once more, each matter will have to be evaluated on its own merits and the child's mental development and maturity must be assessed very carefully before making a determination on the weight to be attached to his/her testimony. In this sense one has to be careful in applying the normal test of credibility having regard to numerous factors such as demeanor, mental ability, consistency, corroboration and probabilities to child witnesses.

The court has the duty of ensuring that there is no unfair questioning aimed at overbearing, overpowering or confusing the child or trying to prompt the child unduly. The child should be allowed to respond naturally and spontaneously. Judges have an obligation to ensure that all witnesses -including children- are asked questions in court that they can understand and meaningfully answer. The Supreme Court of Canada provided useful guidance in this regard in the matter of *R. v. L. (DO.)* and reiterated:

> *In cases involving fragile witnesses such as children, the trial judge has a responsibility to ensure that the child understands the question being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent*

[25] "Judicial Assessment of the Credibility of Child Witnesses." *US National Library of Medicine*, National Institute of Health, April 2005, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4640896/.

questions to the child to clarify the child's responses. In order to ensure the appropriate conduct of the trial, the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm.[26]

When the prosecution's case hinges on the evidence of a child witness, counsel must carefully cross-examine that witness in order to try to discredit his or her testimony (also where for example the child is the only or single witness for the prosecution).

However, as indicated above, counsel will not be permitted to engage in badgering and aggressive questioning of a witness of tender age.

[10.6.2] Accomplices

An accomplice is a person who has participated or assisted in the commission of a crime, other than the perpetrator(s) and other than an accessory after the fact.

Under English common law an accomplice is a person who actively participates in the commission of a crime, even if they take no part in the actual criminal offense. For example, in a bank robbery, the person who points the gun at the teller and asks for the money is guilty of armed robbery. Anyone else directly involved in the commission of the crime, such as the lookout or the getaway car driver, is an accomplice, even if in the absence of an underlying offense keeping a lookout or driving a car would not be an offense.

An accomplice differs from an accessory in that an accomplice is present at the actual crime, and could be prosecuted even if the main criminal (the *principal*) is not charged or convicted. An accessory is generally not present at the actual crime, and may be subject to lesser penalties than an accomplice or principal.

In most jurisdictions courts approach the evidence of an accomplice with caution. The reasons for this include the following:

- An accomplice is a person who is himself guilty and/or implicated in the commission of criminal conduct who might be a person of reprehensible character and not having a high regard for the truth;
- There is the inherent danger that an accomplice is willing to tell lies to the court, incriminating another, in the hope that he/she (the accomplice) will secure indemnity from prosecution, will receive a lesser sentence or that he/she will receive clemency if he/she testifies against the other accused;
- An accomplice may also wish to falsely implicate one person to possibly shield another person or his/her own role in the commission of the crime.

Section 133 of the Evidence Ordinance determines that *"an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."*

[26] *R. v. L. (DO.)* [1993] 4 S.C.R. 419 at 471.

Section 114 of the Evidence Ordinance sets out instances in which a court may presume the existence of certain facts (these instances are generally described as rebuttable presumptions). In terms of section 114 the court *"may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars."*

Similar to other jurisdictions the contents of the confession of one accused (accomplice) cannot be used in evidence against another accused. Section 30 of the Evidence Ordinance provides that *"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court shall not take into consideration such confession as against such other person."*

[10.6.3] Expert Evidence

The law of evidence contains a general rule excluding testimony as to opinion, subject to a series of exceptions. The exclusionary principle states that a witness may not give his opinion on matters which the court considers call for the special skill or knowledge of an expert unless he is an expert to such matters.

Section 45 of Evidence Ordinance provides that:

> *When the court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impression, are relevant facts. Such persons are called experts.*

The Evidence Ordinance offers the following illustrations in section 45 regarding the appropriateness of expert evidence:

Example #1: *The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.*

Example #2: *The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinion of experts on the question whether the two documents were written by the same person or by different persons, are relevant.*

Whether the person called to testify is "specially skilled" is a question of fact to be decided by the court (see *Charles Perera v. Motha* (1961) 65 NLR 294 at p. 295, *per* Basnayake, C.J). It is the duty of the side calling the witness to demonstrate to the satisfaction of the court that the witness' qualifications and experience render them "specially skilled" on the subject they have been called on to give expert testimony (see *R. v. Pinhamy* (1955) 57 NLR 169 at p. 171 *per* Basnayake, C.J). The defence should ensure that its' expert witnesses come to court armed with documentary proof (e.g. resume, CV, articles, publications) of his or her qualifications and expertise.

Among other generally accepted forms in which a witness may refresh his or her memory, "[a]n expert may refresh his memory by reference to professional treatises" (Evidence Ordinance, Section 159).

Usually, courts do not allow for any witness other than the witness under cross-examination to remain inside the courtroom. But if the court so rules, an expert witness may be granted permission to remain in the courtroom for the purpose of observing the testimony of other witnesses (see *Colombo Electric Tramway Co. v Colombo Gas & Water Co.* (1915) 18 NLR 385).

The use of expert witnesses on behalf of a criminal defendant is quite rare within the Sri Lankan court system. However, it must be noted that a number of exonerations have occurred due to such expert testimony. "Unscientific evidence and stubborn opinions provided in the past have incarcerated innocent people. If a defence expert is available, then there is arguably a balance of scientific power that could minimize bias, prejudice, adamancy, and dishonesty … which in turn will illuminate justice."[27]

[10.6.4] Witness Credibility

One of the duties defence counsel may have in the course of defending an accused, especially if a matter proceeds to trial where witnesses testify, will be to argue the credibility, or otherwise, of witnesses (prosecution and defence).

The assessment of the credibility of a witness and their testimony usually involves the consideration of several different aspects of the testimony of a witness, and may include:

- *Honesty:* Is the witness making a good faith effort to fully and accurately give evidence, or conversely, is the witness deliberately lying or at least not disclosing certain information?
- *Memory:* How accurate and complete is the memory of the witness?
- *Suggestibility:* Has the memory of the witness been distorted as a result of conversations or questions with others?
- *Communication Ability:* How well does the witness understand the questions and how well is the witness able to communicate about the matters at issue?

A judge or jury may rely on a number of factors when assessing the credibility of a witness, including:

- The compatibility or not of the witness's testimony with other evidence in the case;
- The demeanor of the witness while giving testimony, including such matters as the manner of speech, pauses, physical demeanor and apparent confidence of the witness;
- Whether the witness tells a consistent story, or conversely, becomes self-contradictory;

[27] Goonerathne, I., 2011. Delivering a Forensic Expert Testimony for the Defence: Relevance, Hesitations and Reservations amongst Professionals in Sri Lanka. *Sri Lanka Journal of Forensic Medicine, Science & Law*, 1(2), pp.1–4. DOI: http://doi.org/10.4038/sljfmsl.v1i2.2719.

- Whether the testimony "makes sense" — that is, how consistent is the testimony with the understandings of the trier of fact about what happens in the world and how people act in different situations; and
- Whether or not the witness has a general reputation for honesty or dishonesty

[10.7] DNA, Finger, Palm, Footprint and Handwriting Samples

DNA profiling (also called DNA fingerprinting, DNA testing, or DNA typing) is the process of determining an individual's DNA characteristics, which are as unique as fingerprints.

DNA analysis intended to identify a species, rather than an individual, is called DNA barcoding. DNA profiling is commonly used as a forensic technique in criminal investigations - for example comparing one or more individuals' profiles to DNA found at a crime scene so as to assess the likelihood of their involvement in the crime. The importance of DNA is that DNA is unique to each person. DNA can be identified from analysis of cells, including from tiny samples of blood, saliva, semen, skin or even sweat.

The Code of Criminal Procedure deals with DNA evidence in section 123 (Additionally, section 45 of the Evidence Ordinance provides the legal acceptance for DNA evidence in Sri Lankan courts).

Section 123: Taking of finger impressions and specimens of hair of suspect persons

> *(1) Where any officer in charge of a police station is of opinion that it is necessary to do so for the purpose of an investigation, he may cause any finger, palm or foot impression or impression of any part of the body of any person suspected of the offence under investigation or any specimen of blood, saliva, urine, hair or finger nail or any scraping from a finger nail of such person to be taken with his consent.*
>
> *(2) Where the person referred to in subsection (1) does not consent to such impression, specimen or scraping being taken, such police officer may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order authorizing a police officer to take such impression, specimen or scraping and such person shall comply with such order.*
>
> *(3) Any officer in charge of a police station may, where it is necessary for the purpose of the investigation to compare any handwriting, cause a specimen of the handwriting of any person to be taken with his consent.*
>
> *(4) Where such person refuses to give a specimen of his handwriting the officer in charge of the police station may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order requiring such person to give a specimen of his handwriting, and such person shall comply with such order.*

It is important for counsel to note in terms of sections 124(2) and 124(4)) two important aspects:

> (1) An accused can refuse to provide any specimens as listed in sections 124(1) and 124(3) if the police asks to collect same; and

(2) If an accused refuses to provide any specimens, the police officer wishing to collect such specimens must first apply to the relevant magistrate court having jurisdiction over the matter for an order to collect such specimens.

The effect of this section is that if the relevant officer does apply to the relevant magistrate court for such an order, collection of the specimens is illegal and an infringement of the accused's rights.

[10.8] Identity Parades

This is permitted in Sri Lanka and regulated by section 124 of the Code of Criminal Procedure:

Section 124: Magistrate to assist investigation

> *Every Magistrate to whom application is made in that behalf shall assist the conduct of an investigation by making and issuing appropriate orders and processes of court and may, in particular hold, or authorize the holding of, an identification parade for the purpose of ascertaining the identity of the offender, and may for such purpose require a suspect or any other person to participate in such parade, allow a witness to make his identification from a concealed position and make or cause to be made a record of the proceedings of such parade.*

Practitioners should note that the importance of this section is that an application must have been made to a magistrate for an identification parade to be held: if such application has not been made and an order made by the magistrate to that effect, evidence pertaining to the identity parade may not be tendered by the prosecution during the trial.

[10.9] Computer Evidence

Section 12 of The Evidence (Special Provisions) Act defines a computer as *"any device the functions of which includes the storing and processing of information."*

Computer Evidence is specified in section 5(1) of the same Act as

In any proceedings where direct oral evidence of a fact would be admissible any information contained in any statement produced by a computer and tending to establish the same fact shall be admissible as evidence of that fact subject to the conditions expressed in the same section such as:

- *The statement produced or reproduced, is capable of being perceived by the senses;*
- *At all material times the computer producing the statement was operating properly or, if it was not, any respect in which it was not operating properly or out of operation, was not of such a nature as to affect the production of the statement of the accuracy of the information contained therein;*
- *The information supplied to the computer was accurate and the information contained in the statement reproduces or is derived from, the information so supplied to the computer.*

Section 7 of the Act provides provisions regarding Notices to have access to inspect evidence sought to be produced, machine, device, or computer, any records relating to the production of the evidence or the system used in such production, and the steps to be taken by the other party. The court may presume the accuracy of any recording, reproduction or statement produced by, or by use of a machine, device or computer which is in common use where the court draws such presumption with respect to any recording, reproduction or statement, and in the absence of any evidence to the contrary.

[10.10] Affidavits

Section 415 of the Code of Criminal Procedure determines that affidavits may only be used in criminal proceedings in court if properly sworn and/or affirmed to. The section specifically determines as follows:

An affidavit may be used in a criminal court if it is sworn or affirmed to—

> *(a) in Sri Lanka before any Justice of the Peace, or Judge;*
> *(b) in any other place before a Judge or Magistrate, or Justice of the Peace or other person qualified or authorised to administer oaths in that place or in any other way deemed sufficient by the court; or*
> *(c) before any person authorised by the Supreme Court to receive Oaths out of Sri Lanka.*

It is therefore of crucial importance, where the prosecution tenders any affidavit as part of its case, that counsel determines whether the affidavit and the manner in which it was sworn to or affirmed, complies with section 415 of the Criminal Procedure Code.

[10.11] Admissions

An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons under the circumstances hereinafter mentioned (Evidence Ordinance, Section 17(1)). Admissions are not conclusive proof of the matters admitted (Evidence Ordinance, Section 31).

Before any admissions are made by the defence in a criminal case, they should be fully discussed with and explained to the client. The lawyer should find out the exact extent of any admission and his client wishes to make and he should explain to his client the implications of making such admissions. All admissions should be carefully and precisely drafted. The client should be asked to confirm, preferably in writing, exactly what it is that he is being asked to admit.

Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions (Evidence Ordinance Section 18(1)).

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases:

- When the statement is made by a person as to the cause of the death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into questions (Evidence Ordinance, Section 32(1));
- When the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or would have exposed him to criminal prosecution or to a suit for damages (Evidence Ordinance, Section 32(3));
- When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, the existence of which, if it existed, he would have likely been aware of (Evidence Ordinance, Section 32(4));
- When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in questions (Evidence Ordinance, Section 32(8)).

Section 33 of the Evidence Ordinance states that evidence during a former judicial proceeding may be relevant provided that the proceedings were between the same parties or their representatives in interest; the adverse party in the first proceeding had the right and opportunity to cross-examine; and the questions in issue were substantially the same in the first as in the second proceeding

Statements made in record such as any occupation or employment is relevant provided that a statement shall not be capable of corroborating oral evidence of the person who originally supplied the information (Evidence Ordinance, Section 35A).

[10.12] Confessions

A confession, in essence, amounts to a complete admission of guilt on the charges. In that sense a confession is wider than a mere admission: An accused may admit a particular element of an offence, and then that element need not be proved by the prosecution – it does not however prove the accused's guilt beyond a reasonable doubt. Where, on the other hand, an accused admits all the elements of a particular offence, it amounts to a confession of the alleged crime.

In Sri Lanka a confession is defined in section 17(2) of the Evidence Ordinance as:

> *An admission made at any time by a person accused of an offence stating or suggesting the inference that he committed the offence.*

In terms of section 24(2) of the Evidence Ordinance a confession made by an accused person is irrelevant, and may not be admitted, as evidence against an accused in criminal proceedings if:

> *The making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat, or promise is sufficient in the opinion of the court to give the accused persons grounds, which would appear to him reasonable, for supposing that by making it he would gain*

any advantage or avoid any evil of a temporal nature in reference to proceedings against him

If a confession is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the court, been fully removed it becomes relevant (Evidence Ordinance, Section 28).

If a confession is relevant, it does not become irrelevant according to section 29 of the Evidence Ordinance:

> *Merely because it was made under a promise of secrecy or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.*

No confession made to a police officer shall be proved as against a person accused of any offence (Evidence Ordinance, Section 25(1)) and no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved against such person (Evidence Ordinance, Section 26(1)).

Practitioners in Sri Lanka must also be wary of the contents of section 30 of the Evidence Ordinance in that where more than one person is tried together and makes a confession, the contents of that confession may not be used in evidence against the other accused:

> *When more persons than one are being tried jointly for the same offence and a confession made by one person affecting himself and other persons are proved, the court shall not take into consideration such confession against such other person.*

[10.13] Ballistics

Ballistics is the examination of evidence relating to firearms at a crime scene, including the effects and behaviour of bullets, cartridges, projectiles and explosive devices. A forensic ballistics expert matches bullets, fragments, and other evidence with the weapons of alleged suspects or others involved in a case. Methods to gather ballistics evidence include:

- Fingerprint recovery
- Serial number recovery
- Magnetic particle inspection
- Chemical restoration
- Examination of the class or individual characteristics of a recovered bullet
- Striation (marking) databasing
- *The practice of comparative bullet-lead analysis has now been discredited*

The need for technically sound, professionally gathered ballistics evidence is apparent due to the nature of firearm ownership in Sri Lanka. The 2017 Small Arms Survey, a project of the Geneva-based Graduate Institute of International and Development Studies, estimated that 93% of the 494,000 firearms in the hands of Sri Lankan civilians are illicitly owned. The Institute also

estimated that police officers maintain a stockpile 134,000 firearms, and defence forces, 509,700 guns.

In effort to improve firearms tracking and comply with UN guidelines, section 18 of the Sri Lankan Firearms Ordinance states that *"[e]very gun made by a manufacturer of guns licensed in Sri Lanka…shall bear the name of the manufacturer, together with a consecutive number, legibly engraved on the barrel [a serial number]."*

As Sri Lanka is not a weapons manufacturing country, the marking requirement falls on foreign manufacturers. Section 28 of the Firearms Ordinance continues:

> *The licensing authority shall before granting a license require the applicant to produce before him any such gun and thereupon cause the same to be marked on the barrel with some permanent mark…Any person obliterating, defacing, altering or counterfeiting any such mark shall be guilty of an offence.*

This requirement provides one way in which to facilitate the gathering of ballistics evidence. However, the effect of such laws on the trade and use of illicit firearms is unknown.
For many decades, ballistics has been held as an indisputable science in courtrooms across the world. However, defence attorneys have been challenging the reliability of ballistics evidence with greater success in recent years. Several cases from the United States are worth noting:

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) – court held that the federal rules of evidence govern the admission of scientific evidence. They require judge to act as gatekeeper before admitting evidence, determining that evidence is scientifically valid and relevant to case at hand.
- *United States v. Green*, 405 F. Supp. 2d 104, 107 (D. Mass. 2005) – court ruled that expert could only describe the ways in which the bullet casings were similar but not that the casings came from a specific weapon "to the exclusion of every other firearm in the world."
- *United States v. Monteiro*, 407 F. Supp 2d 351, 374 (D. Mass. 2006) – court concluded that examiner had not followed established standards in his field and was precluded from testifying until he reexamined the evidence and properly documented his findings.

When a ballistics expert is expected to testify in your case, take the time to learn about the type of firearm and bullets involved. Know the relevant laws and terms of art. Investigate the expert's credentials, methods, and conclusions. The investment of time will make you more comfortable with the evidence and help you represent your client more effectively.

[11] Post-Trial

[11.1] Sentencing

[11.1.1] General

Should an accused be found guilty the court will normally proceed to sentence the accused. Sentencing proceedings are usually conducted directly after the proceedings on the merits have been concluded or can be done at a later date in the court's discretion (usually one of the parties may also apply for the proceedings to be conducted at a later date).

Generally, the court will impose a sentence that is within a range set by statute for the crime committed. The schedule of sentences of the sentencing range is codified in the Code of Criminal Procedure.

[11.1.2] Sentencing Framework in Sri Lanka

A High Court may impose any sentence or other penalty prescribed by written law (Criminal Code, Section 13).

Sentences which a Magistrate's Court may impose are set out in section 14 of the Code of Criminal Procedure. This includes:

> *(a) imprisonment of either description for a term not exceeding two years;*
> *(b) fine not exceeding one thousand five hundred rupees;*
> *(c) ... [S 14(c) replaced by s 2 of Act 21 of 2005.]*
> *(d) any lawful sentence combining any of the sentences aforesaid [S 14(d) amended by s 2 of Act 21 of 2005.]*

Section 15(1) of the Code of Criminal Procedure stipulates that no sentence of imprisonment for a term of less than seven day may be imposed:

> *Notwithstanding anything in this Code, the Penal Code, or any other written law to the contrary, any court shall not sentence any person to imprisonment, whether in default of payment of a fine or not, for a term which is less than seven days.*

The Code envisages a sentence of detention in the precincts of court *in lieu* of imprisonment:

> *Any court may, in any circumstances in which it is empowered by any written or other law to sentence an offender to imprisonment, whether in default of payment of a fine or not, in lieu of imposing a sentence of imprisonment, order that the offender be detained in the precincts of the court until such hour on the day on which the order is made, not being later than 8 pm, as the court may specify in the order* (Criminal Code, Section 15(2)).

The courts also have the power to sentence an accused to imprisonment where such person is in default of payment of a fine:

> *Any court may impose such term of imprisonment in default of payment of a fine as is authorised by law in case of such default, provided that the term imposed is not in excess of the court's powers under this Code* (Criminal Code, Section 15(3)).

Where an accused is sentenced upon being convicted for several offences at one trial, section 16(1) of the Code of Criminal Procedure determines as follows:

> *When a person is convicted at one trial of any two or more distinct offences the court may, subject to section 301, sentence him for such offences to the several punishments prescribed therefore which such court is competent to inflict; such punishments when consisting of imprisonment to commence, unless the court orders them or any of them to run concurrently, the one after the expiration of the other in such order as the court may direct, even where the aggregate punishment for the several offences is in excess of the punishment which the court is competent to inflict on conviction of one single offence.*

The above is subject to an inherent provision (in section 16(1)) determining that *if the case is tried by a Magistrate's Court the aggregate punishment shall not exceed twice the amount of punishment which such court in the exercise of its ordinary jurisdiction is competent to inflict.*

Upon a verdict of not-guilty, counsel explains to the accused that he is free to go.

[11.1.3] Sentencing: Mitigating and Aggravating Factors

[11.1.3.1] General

In a sentencing an offender for a crime and in order to determine an appropriate sentence, the sentencing judge may consider information from a number of sources, and taking into consideration a number of factors. Defence counsel should be aware of the kind of factors that the court will consider.

[11.1.3.2] Aggravating and Mitigating Circumstances

In general, before a court imposes sentence, both the prosecution and defence are given an opportunity to address the court on sentence. The prosecution usually argues in aggravation of sentence while the defence will argue in mitigation. Numerous factors are placed in front of the court and this can include the following:

- The accused's criminal history (previous convictions);
- The charge and nature of the crime;
- The prevalence of a particular crime in a particular area or community;
- The interests of the victim;
- The interests of the offender;
- The interests of the community;
- The accused's personal circumstances (educational level, children, marital and employment status),

- Did the accused express of remorse;
- Whether the crime was premeditated and if it was, the level thereof;
- The seriousness of the crime;
- Circumstances surrounding the crime (for example was the accused provoked or not, if there are more than one accused a particular accused's level of involvement);
- Case authority related to similar offences;
- Evidence submitted by way of pre-sentencing reports (if applicable).

The judge will also consider input from the prosecution and defence in determining the sentence. It is up to the accused if he wishes to make a statement or if his counsel wishes to make a statement on his behalf (the latter is usually referred to as 'addressing the court *ex parte* from the Bar on behalf of the accused').

[11.1.3.3] It is advisable, where applicable, to make the following further points during a closing argument in a sentencing hearing:

- A detailed personal history of the accused which may include, among other things, positive personal success, volunteer work and/or community service (this process if often referred to as "*humanizing the accused*");
- Possible alternatives to incarceration such as community-based probation, house arrest and/or placement in a half-way house (referred to as 'non-custodial' sentence options);
- Specific community service;
- Psychiatric/Psychological counseling;
- Victim restitution with a statement of remorse for the offence committed;
- The possibility of rehabilitating the accused;
- Specific employment options/coupled with a detailed work history;
- Any other mitigating circumstances to counter the prosecution's evidence in aggravation of sentence.

The goal of the defence lawyer should be to provide the court with any and all positive information about the accused that would assist the court in its sentencing determination.

Counsel should note that in the case of juveniles and/or younger accused, the case against imprisonment (especially long term imprisonment) is stronger than it would be for an accused of normal adult age. It is therefore imperative that where counsel represents a juvenile or young accused counsel engages with the prosecution and court during sentencing proceedings to explore sentencing options *other* than direct imprisonment.

A person charged with one offence and appears after evidence that he committed a different offence for which he might have been charged, he may be convicted of the offence which he is shown to have committed although he was not charged with it (Criminal Code, Section 177).

All persons concerned in committing an offence may be charged together (Criminal Code, Section 180). For example, A and B are accused of the same murder. A and B may be indicted and tried together for the murder.

[11.1.4] Sentencing Outcomes

[11.1.4.1] Monetary Compensation

When a person is convicted of an offence, the court may order the person to pay within such time or in such installments as the court may direct, such sum by way of compensation to any person affected by the offence as to the court shall seem fit (Criminal Code, Section 17(4)).

If the offender referred to in 17(4) is under the age of sixteen years the court may, if it deems fit, order the payment to be made by his parent or guardian (Criminal Code, Section 17(5)).

Any sum awarded whether by way of costs or compensation shall be recoverable as if it were a fine imposed by the court (Criminal Code, Section 17(6)). Compensation is not to exceed one hundred thousand rupees (Criminal Code, Section 17(7)).

Provisions as to sentences of fines are set out in section 291 of the Criminal Procedure Code.

[11.1.4.2] Community Service Orders

Section 18(1) of the Code of Criminal Procedure, states the following

> *The court may, in lieu of imposing a sentence of imprisonment on conviction of an accused person, or in lieu of a fine, enter an order for the convicted person to perform such services as may be specified in such order, at a named place –*
>
> *(a) In a State or State-sponsored project;*
>
> *(b) In a Government department, public corporation, statutory board or any local authority; or*
>
> *(c) In a charitable institution, social service organization or a place of religious worship, with the consent of the person in charge of such institution, organization or place, under the direction and supervision of an authorized officer.*

The duration of the Community Service Order shall be for such number of hours being in the aggregate not less than forty hours and not more than two hundred and forty hours, as may be specified in such order, to be served within a period of one year commencing from the date on which the order is entered (Criminal Code, Section 18(2)).

When a person convicted fails to perform the number of hours specified or not to the satisfaction of the authorized officer it shall be lawful for the Court to

(a) Vary the Community Service Order;
(b) Enter a fresh Community Service Order; or
(c) Revoke the Community Service Order (Criminal Code, Section 18(3)).

[11.1.4.3] Imprisonment

No one shall be sentenced to an imprisonment less than seven days (Criminal Code, Section 15(1)).

[11.1.4.4] Suspended Sentence

Section 303 of the Code of Criminal Procedure provides as follows:

(1) A court may make an order suspending the whole or part of the sentence, for reasons to be stated in writing, having regard to:

(a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed;
(b) the nature and gravity of the offence;
(c) the offender's culpability and degree of responsibility for the offence;
(d) the offender's previous character;
(e) any injury, loss or damage resulting directly from the commission of the offence;
(f) the presence of any aggravating or mitigating factor concerning the offender;
(g) the need to punish the offender to an extent, and in a manner, which is just in all of the circumstances;
(h) the need to deter the offender or other persons from committing offences of the same or of a similar character;
(i) the need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in;
(j) the need to protect the victim or the community from the offender;
(k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or
(l) a combination of two or more of the above.

(2) A court shall not make an order suspending a sentence of imprisonment if—

(a) a mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed; or
(b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or
(c) the offence was committed when the offender was subject to a probation order or a conditional release or discharge; or
(d) the term of imprisonment the aggregate terms where the offender is imposed, or of imprisonment where the offender is convicted for more than one offence in the same proceedings exceeds two years

(3)The period for which the whole or a part of a sentence may be suspended (hereinafter referred to as the "operational period") shall be—

(a) determined; and
(b) specified,

by the court, when making the order suspending the whole or part of the sentence: Provided that such period shall not be less than five years from the date of the order suspending the whole or Part of the sentence.

[11.1.4.5] Conditional Discharge

Section 306 of the Code of Criminal Procedure provides as follows:

(1) Where any person is charged before a Magistrate's Court with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to discharge the offender conditionally as hereinafter provided, the court may, without proceeding to conviction, either—

(a) order such offender to be discharged after such admonition as to the court shall seem fit; or

(b) discharge the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour, and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order of the court.

(2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to discharge the offender conditionally as hereinafter provided, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour, and to appear for sentence when called on at any time during such period, not exceeding three years as may be specified in the order.

(3) The court may, in addition to any order it may make under subsection (1) or subsection (2), order the offender to pay:

(i) compensation under section 17(4); and

(ii) State costs in an amount not exceeding one thousand five hundred rupees as the court thinks fit.

(4) Where an order under this section is made by a Magistrate's Court, the order shall, for the purpose of re-vesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with such restitution or delivery, have the like effect as a conviction.

[11.1.4.6] Death Penalty

The court may sentence any person convicted of an offence punishable with death, who appears to the court be under the age of eighteen years, that person *in lieu* of the sentence of death a sentence provided by section 53 of the Penal Code. This is set out in section 281 of the Criminal Code.

When a person is sentenced to death the sentence shall direct that he be hanged by the neck till he is dead on a day and at a place, decided upon by the President (Criminal Code, Section 285).

[11.1.4.7] Women

Section 282 of the Code of Criminal Procedure provides as follows:

(1) When a woman is convicted of a capital offence and alleges that she is pregnant, or where the court before whom a woman is so convicted thinks it expedient that the question whether or not the woman is pregnant should be determined, such question shall, before sentence is passed on her, be determined –

(a) if the woman is convicted after trial at Bar by three Judges of the High Court without a jury, by those Judges; or

(b) if the woman is convicted after trial by jury, by the jury who returned the verdict of guilty, and the members of such jury need not be re-sworn.

(2) In cases falling under paragraph (b) of subsection (1)—

(a) If after the conviction of the woman and before the jury return a verdict on the question whether the woman is or is not pregnant, any juror is from any sufficient cause prevented from attending throughout the inquiry, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted, the court may either order a new juror to be added or discharge the jury and order a new jury to be chosen.

(b) If the jury are not able, either unanimously, or by a majority of not less than five to two, to agree upon the question to be determined or if in the opinion of the court the interests of justice so require, the court may discharge the jury and order a new jury to be chosen.

(c) Where the court orders a new jury to be chosen under paragraph (a) or paragraph (b) of this subsection, such jury shall be constituted in like manner as the jury chosen for a trial and every such jury, and every new juror added under paragraph (a) of this subsection, shall be sworn in such manner as the court may direct.

(3) The question whether the woman is pregnant or not shall be determined by the Judges or by the jury, as the case may be, on such evidence as may be laid before them either on the part of the woman or on the part of the prosecution, and the Judges or the jury, as the case may be, shall find that the woman is not pregnant unless it is proved affirmatively to their satisfaction that she is pregnant.

(4) Punishment of imprisonment death for pregnant woman: if the finding is that the woman is pregnant, the court shall pronounce on her in lieu of the sentence of death a sentence of imprisonment as provided by Section 54 of the Penal Code.

[11.1.4.8] Relevant Legislation

[11.1.4.8.1] Magistrate Court – Trial by Magistrate

In the Magistrates court, the Magistrate after taking the evidence for the prosecution and defence and any further evidence, finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence (Section 185 Criminal Procedure Code).

The Magistrate's Court may impose the following sentences:

(1) Imprisonment of either description for a term not exceeding two years (Criminal Code, Section 14(a));
(2) Fine not exceeding one thousand five hundred rupees (Criminal Code, Section 14(b));
(3) Any lawful sentence combining any of the sentences aforesaid (Criminal Code, Section 14(d)).

[11.1.4.8.2] High Court – Trial by Jury

The High Court may impose any sentence or other penalty prescribed by written law (Criminal Code, Section 13).

Unless otherwise ordered by the Judge the jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is (Criminal Code, Section 235(1)). If the Judge does not approve the verdict returned by the Jury he may direct them to reconsider their verdict, and the verdict after such reconsideration shall be deemed to be the true verdict (Criminal Code, Section 235(2)).

If the accused is convicted the Judge shall forthwith pass judgment on him according to the law (Criminal Code, Section 238).

[11.1.4.8.3] High Court – Trial by Judge

When the case for the prosecution and defence are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons and if the verdict is one of conviction pass sentence on the accused according to the law (Criminal Code, Section 203).

[11.2] Appeals

[11.2.1] General

Any person who is dissatisfied with any judgment or final order pronounced by a court in a criminal case may lodge an appeal to the Court of Appeal against such judgment for any error in law or fact.

[11.2.2] Magistrates Court to Court of Appeal

The procedure and rules to lodge an appeal against an order of a magistrate's court are set out in section 320(1) of the Code of Criminal Procedure:

Any person who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court in a criminal case may prefer an appeal to the Court of Appeal against such judgment for any error in law, or in fact—

> *(a) by lodging within **fourteen days** from the time of such judgment or order being passed or made, with such Magistrate's Court a petition of appeal addressed to the Court of Appeal, or*
>
> *(b) by stating within the time aforesaid to the Registrar of such court or to the jailer of the prison in which he is for the time being confined his desire to appeal and the grounds therefore, providing at the same time a stamp of the value of five rupees, and it shall thereupon be the duty of such Registrar or jailer as the case may be, to prepare a petition of appeal and lodge it with the court by which such judgment or order was pronounced.*

In computing the time within which an appeal must be preferred, the day on which the judgment or order complained of was pronounced shall be included, but all public holidays shall be excluded (Criminal Code, Section 321(1)).

If the time for preferring a petition of appeal expires on a day on which the office of the court is closed the appeal shall be deemed in time if such petition be preferred on the first day next thereafter on which such office is open (Criminal Code, Section 321(2)).

Every petition of appeal shall state shortly the grounds of appeal and shall be signed by the appellant or his Attorney-at-Law (Criminal Code, Section 321(1)). Where the appeal is on a matter of law the petition shall contain a statement of the matter of law to be argued and shall bear a certificate by an Attorney-at-Law that such matter of law is a fit question for adjudication by the Court of Appeal (Criminal Code, Section 321(2)).

Every such petition shall bear a stamp of five rupees (Criminal Code, Section 321(3)). If the appeal be decided in whole or in part in favour of the appellant the amount of stamp fee when such fee has been paid shall be returned to him (Criminal Code, Section 321(4)).

Section 323 of the Code of Criminal Procedure states that when an appeal has been preferred by the court, an appellant may be released on giving security:

> *(1) When an appeal has been preferred the court from which the appeal is preferred shall order the appellant if in custody to be released on his entering into a recognizance in such sum and with or without a surety or sureties as such court may direct conditioned to abide the judgment of the Court of Appeal and to pay such costs as may be awarded - Provided always that the appellant may if the court from which the appeal is preferred*

thinks fit instead of entering into a recognizance give such other security by deposit of money with such court or otherwise as that court may deem sufficient.

(2) Upon the appellant's entering into such recognizance or giving such other security as aforesaid he shall be released from custody.

(3) Such recognizance may if the appellant is in prison be entered into before the superintendent or jailer of the prison and if so entered into shall be as valid in all respects as if it had been entered into before the court from which the appeal is preferred; and for this purpose the court shall endorse on the warrant of committal the amount and nature of the security which is to be given in case an appeal is preferred.

(4) When a person sentenced to a term of rigorous imprisonment has preferred an appeal, but is unable to give the required recognizance or other security he shall be detained in custody without hard labour until the judgment of the Court of Appeal is made known to the superintendent of the prison.

(5) The Court of Appeal may order that the time so spent by such appellant in custody or any part thereof shall be reckoned as part of the term of his sentence.

(6) Proceedings to be forwarded to Court of Appeal and notice to be given to party in whose favour the judgment or order appealed against was pronounced.

On a petition of appeal being lodged the Magistrate shall transmit the record of the case to the Court of Appeal together with the petition of appeal and shall forthwith issue notice thereof to the party, whether complainant or accused, in whose favour the judgment or order appealed against was pronounced or made or adversely to whom the appeal is preferred.

When the record and petition of appeal have been transmitted to the Court of Appeal the Registrar shall number the appeal and enter it on the list of appeals and such list shall be kept suspended in the Registry of the Court of Appeal (Criminal Code, Section 324 (1)).

The appeal shall come on for hearing in its order without further notice to the parties concerned: Provided that the court may of its own motion or on the application of a party concerned accelerate or postpone the hearing of an appeal upon any such terms as to the prosecution or the costs of the appeal or otherwise as it may think fit (Criminal Code, Section 324(2)).

When the appeal comes on for hearing the appellant if present shall be first heard in support of the appeal and then the respondent if present shall be heard against it (Criminal Code, Section 325(1)).

Section 328 of the Code of Criminal Procedure outlines the power of the court of appeal on appeals:

At the hearing of the appeal the court may if it considers that there is no sufficient ground for interfering dismiss the appeal or may—

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made or that the accused be re-tried or committed for trial as the case may be or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction—

(i) reverse the verdict and sentence and acquit or discharge the accused or order him to be re tried by a court of competent jurisdiction or committed for trial, or
(ii) alter the verdict maintaining the sentence, or with or without altering the verdict increase or reduce the amount of the sentence or the nature thereof;

(c) in an appeal from any other order, alter or reverse such order: provided always that the sentence awarded on an appeal shall not exceed the sentence that might have been awarded by the court of first instance.

In dealing with an appeal under this Chapter the Court of Appeal if it thinks additional evidence to be necessary, may either take such evidence itself or direct it to be taken by any Magistrate (Criminal Code, Section 329(1)). The taking of such evidence shall be deemed an inquiry under Chapter XV (Criminal Code, Section 329(4)).

On the termination of the hearing of the appeal the Court of Appeal shall either at once or on some future day, which shall then be appointed for the purpose, deliver judgment giving reasons for its decision in open court (Criminal Code, Section 330(1)). On the day so fixed, if the court is not prepared to give its judgment, a yet future day may be appointed and announced for the purpose (Criminal Code, Section 330(2)).

Any party aggrieved by any conviction, sentence or order entered or imposed by the Magistrate's Court may subject to provisions of any law of appeal, has the right to appeal (Judicature Act, Section 31).

[11.2.3] High Court to Court of Appeal

Any person who stands convicted of any offence by the High Court may appeal to the Court of Appeal (Judicature Act, Section 14).

[11.2.3.1] In a Case Tried *With a Jury*:

Section 14(a) of the Judicature Act provides as follows:

(i) against his conviction on any ground which involves a question of law alone; or
(ii) against his conviction on any ground which involves a question of fact alone, or a question of mixed law and fact; or
(iii) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.

[11.2.3.2] In a Case Tried *Without a Jury*:

Section 14(b) of the Judicature Act provides as follows:

> *From any conviction or sentence except in a case where*
> *(b) in a case tried without a jury, as of right, from any conviction or sentence except in the case where-*
> > *(i) the accused has pleaded guilty; or*
> > *(ii) the sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees: Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded guilty on the question of sentence only.*

Section 331 of the Code of Criminal Procedure outlines the procedure for filing of petition of appeal or application for leave to appeal:

> *(1) An appeal under this Chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced: Provided that a person in prison may lodge an appeal by stating within the time aforesaid to the jailer of the prison in which he is for the time being confined his desire to appeal and the grounds therefore and it shall thereupon be the duty of such jailer to prepare a petition of appeal and lodge it with the High Court where the conviction, sentence or order sought to be appealed against was pronounced*
> *(2) In computing the time within which an appeal may be preferred, the day on which the judgment or final order appealed against was pronounced shall be included, but all public holidays shall be excluded.*
>
> *(3) If the time for preferring a petition of appeal expires on a day on which the office of the court is closed the appeal shall be deemed to be in time if such petition be preferred on the first day next thereafter on which such office is open.*
>
> *(4) The petition of appeal shall be distinctly written on good and suitable paper, signed by the appellant or his Attorney-at-Law and dated and shall contain the following particulars—*
> > *(a) the sessions of the High Court where the conviction, sentence or order appealed against was pronounced,*
> > *(b) the number of the case,*
> > *(c) the names and addresses of the appellant and the respondent,*
> > *(d) the address to the Court of Appeal,*
> > *(e) the date of pronouncement of the judgment or order as the case may be sought to be appealed against and the nature of such pronouncement,*
> > *(f) a plain and concise statement of the grounds of appeal,*
> > *(g) the relief claimed.*

(5) Stamps to the value of five rupees shall be affixed by such appellant but where the appeal is by the Attorney-General or from a sentence of death a stamp fee is not required.

[11.2.3.3] Appeal with Jury Verdict

Section 334 of the Code of Criminal Procedure outlines a determination of an appeal in cases where trial was by jury:

(1) The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Code the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and direct a judgment of acquittal to be entered: Provided that the Court of Appeal may order a new trial if it is of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed.

(3) Anything in this section shall not affect the power of the Court of Appeal to order a new trial when the trial at which the conviction was had was a nullity by reason of any defect in the constitution of the court or otherwise.

(4) If it appears to the Court of Appeal that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the verdict on the charge or part of the indictment on which the court considers that the appellant has been properly convicted.

(5) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the verdict of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

(6) Where on the conviction of the appellant the jury have found a special verdict, and the Court of Appeal considers that a wrong conclusion has been arrived at by the court

before which the appellant has been convicted on the effect of that verdict, the Court of Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

[11.2.3.4] Appeal with Judge Alone Verdict

Section 335 of the Code of Criminal Procedure outlines the determination of appeals in cases where trial was without a jury and by judge alone:

(1) In an appeal from a verdict of a Judge of the High Court at a trial without a jury the Court of Appeal may if it considers that there is no sufficient ground for interfering dismiss the appeal.

(2) In an appeal from a conviction by a Judge of the High Court at a trial without a jury the Court of Appeal may—

(a) reverse the verdict and sentence-and acquit or discharge the accused or order him to be re-tried; or

(b) alter the verdict maintaining the sentence or without altering the verdict increase or reduce the amount of the sentence or the nature thereof or substitute a conviction for a different offence of which the accused person could have been found guilty on the indictment and pass such sentence as may be warranted by law in substitution for the sentence passed.

[11.2.4] Outcome of Appeal

On an appeal against the sentence whether passed after trial by jury or without a jury, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefore as it thinks ought to have been passed and in any other case shall dismiss the appeal (Criminal Code, Section 336).

[11.2.5] When Leave to Appeal is Required

Any person aggrieved by a judgment, order or sentence of the High Court in a criminal case may appeal to the Court of Appeal with leave of the court of first instance (the trial court). (Judicature Act, Section 16).

An application for leave to appeal may be lodged by presenting it to the Registrar of the Court of Appeal within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced and the provisions of the proviso to subsection (1) of section 331 and subsections (2), (3) and (4) of that section shall *mutatis mutandis* apply to such application (Criminal Code, Section 340).

Section 341 of the Criminal Procedure Code states, that on an application for leave to appeal the Court of Appeal may: *(a) grant such leave; or (b) reject the application.*

Upon leave to appeal being granted on an application for leave to appeal the Registrar of the Court of Appeal shall so inform the High Court and the provisions of section 333 shall thereafter become applicable *mutatis mutandis* to such application (Criminal Code, Section 342).

[11.2.6] Appeal to Supreme Court

There shall be a right of appeal to the Supreme Court in accordance with the provisions of the Constitution and of any other law from any judgment or order of the Court of Appeal in any appeal from the High Courts or the Magistrates Courts (Judicature Act, Section 37).

Batagala Manike v The Attorney General **(Supreme Court Case SC (SPL) LA 57/2015)**

This was an application for Special leave to appeal in terms of Article 128 of the Constitution of Sri Lanka. The Appellant had been convicted of murder and sentenced to death. On appeal his conviction and sentence were set aside and replaced with culpable homicide and 15 years imprisonment. The court held that the time during which an Appellant, pending the determination of the appeal, is admitted to bail and the time during which the Appellant if in custody shall not count as part of any term of imprisonment under his/her sentence.

The Attorney General v Singappuli Dasanayake alias Gaminige Kolla & Others **(Supreme Court Case SC (SPL) LA125/2014)**

This was an application for Special Leave to Appeal in terms of Article 128 of the Constitution of Sri Lanka concerning non-compliance with Rule 3 of the Supreme Court Rules of 1990. Rule 3 required the petition to contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted. In the event where an applicant fails to strictly, but manages to substantially comply with a Rule (and in so doing causes no prejudice to the respondent) the Court should examine the circumstances surrounding such default and adopt a reasonable view of the matter in order to prevent an automatic dismissal of the application.

[11.3] Judicial Review

Judicial Review is a legal process by which a ruling or decision made by a public body can be reviewed by a court of law. In essence, Judicial Review is concerned with public accountability. It seeks to ensure that the public power is exercised according to certain well-established norms and principles.

In Sri Lanka it is possible by virtue of Article 126 of the Sri Lankan Constitution to apply for Judicial Review in a number of situations, including:

(a) Human rights standards;
(b) General principles of administrative justice; and/or
(c) The Doctrine of Public Trust.

In reviewing courts must balance 'administrative or executive action' against the human rights standards laid down in Chapter III of the Constitution. Citizens have the right to petition the Supreme Court in cases where the rights in Chapter III are violated.

The Doctrine of Public Trust derives strength and legal validity from provisions of the Constitution and other constitutional principles such as the Rule of Law highlights that executive and administrative act must have a public benefit and public purpose. Public officers are to be held at a high standard in the execution of their powers for the purpose for which it was conferred. Abuse of power is a violation of the trust as it goes against Articles 3 and 4 of the Constitution.

Under the general principles of administrative justice, there are standards of review the courts have developed over a considerable period of time. These include grounds such as the lack of jurisdiction, the violation of the rules of natural justice, an abuse of discretionary power and error of law on the face of the record. Judicial Review of legislative or administrative action can have political consequences. A decision that goes against a State Agency, government department or Minister, is often portrayed poorly on the current government.

[12] Other Relevant Domestic Law

[12.1] Capital Punishment

Capital punishment, also known as the death penalty, is a government-sanctioned practice whereby a person is killed by the state as a punishment for a crime. The sentence that someone be punished in such a manner is referred to as a death sentence, whereas the act of carrying out the sentence is known as an execution. Crimes that are punishable by death are known as capital crimes or capital offences.

Although capital punishment is still legal in Sri Lanka (*de jure*) the practice is in fact abolitionist *de facto*: Sri Lanka's last execution occurred in 1976 and the country stopped hangings since 1976. Death row prisoners spend life terms in jail.

[12.1.1] Crimes and Offenders Punishable by Death in Sri Lanka

Practitioners must lastly note that in terms of the Criminal Procedure Code, before sentencing a convict to death the court must allow the convict to submit reasons he should not be executed. The judge must then submit to the President a report of the case as well as an evaluation of whether the sentence of death is appropriate.

Additionally, the Constitution provides that the President must forward the report to the Attorney-General's Department, who forwards it to the Minister of Justice with his advice, who forwards it to the President with his recommendation.[28]

The following crimes are punishable by death:

- Murder: "*Whoever commits murder shall be punished with death*;"[29]
- Other Offenses Resulting in Death: "*If an innocent person be convicted and executed in consequence of … false evidence, the person who gives such false evidence shall be punished with death*;" [30]
- "*If any person commits suicide whoever abets the commission of such suicide shall be punished with death*;"[31]
- Culpable homicide committed with the use of a gun is punishable by death or life imprisonment;[32]
- Rape Not Resulting in Death;[33]
- Robbery Not Resulting in Death: Robbery committed with the use of a gun is punishable by death or life imprisonment;[34]
- Kidnapping Not Resulting in Death: Kidnapping or abduction committed with the use of a gun is punishable by death or life imprisonment. This has bearing on the offences of abduction, kidnapping, and human trafficking;[35]
- Drug Trafficking Not Resulting in Death: Under Section 54(A-B) of the Poisons, Opium and Dangerous Drugs Ordinance anyone who manufactures heroin, cocaine, morphine or opium is liable to a sentence of death or life imprisonment. Under Schedule 3, Parts II and III, trafficking, importing or exporting more than 500 grams of a number of substances is punishable by death or life imprisonment;[36]
- Any drug offense under that Ordinance, when committed with the use of a gun, is punishable by death or life imprisonment;[37]
- Drug Possession: Under Schedule 3, Parts II and III of the Poisons, Opium and Dangerous Drugs Ordinance anyone who possesses more than 500 grams of a number of substances is punishable by death or life imprisonment;[38]

[28] Sri Lanka Code of Criminal Procedure of 1979, arts. 280, 286, amended by Act No. 7 of 2006.
[29] Sri Lanka Penal Code of 1885, arts. 294-296, amended by Act No. 16 of 2006.
[30] Sri Lanka Penal Code of 1885, arts. 294-296, amended by Act No. 16 of 2006.
[31] Sri Lanka Penal Code of 1885, arts. 294-296, amended by Act No. 16 of 2006.
[32] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[33] Sri Lanka Penal Code of 1885, arts. 294-296, amended by Act No. 16 of 2006.
[34] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[35] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[36] Sri Lanka Poisons, Opium and Dangerous Drugs (Amendment) Act, secs. 5, 14, No. 13 of 1984.
[37] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[38] Sri Lanka Poisons, Opium and Dangerous Drugs (Amendment) Act, secs. 5, 14, No. 13 of 1984.

- Any drug offense under that Ordinance, when committed with the use of a gun, is punishable by death or life imprisonment;[39]

- Treason: *"Whoever wages war against the Republic, or attempts to wage such war, or abets the waging of such war, shall be punished with death…or imprisonment*;"[40]

- Offenses against the state committed with a gun are punishable by death or life imprisonment;[41]

- Military Offenses Not Resulting in Death: Offenses (of civilians) relating to the armed forces committed with the use of a gun are punishable by death or life imprisonment;[42]

- As applicable to civilians: "*Whoever abets the committing of mutiny by an officer, soldier, sailor, or airman in the Army, Navy, or Air Force of the Republic shall if mutiny be committed in consequence of that abetment, be punished with death or imprisonment…;"*[43]

- Offenses of military personnel in the Army or Air Force in breach of military discipline or duty are punishable by death. Such offenses include cowardice, disregarding warlike orders, mutiny, destruction of military assets, acts calculated to undermine operational success, giving false signals, treachery, giving a parole, watchword or countersign to the enemy, espionage, assisting the enemy, voluntarily serving or aiding the enemy if taken prisoner;[44]

- Individuals subject to Sri Lankan military laws are *"liable to suffer death*" for treason (or murder);[45]

- Officers in the Navy "*shall be punished with death*" for traitorous failure to engage the "*enemy, pirate or rebel*" or face death or other punishments for failures out of cowardice; they are also punishable with death for failing to defend mariner convoys or demanding compensation for protection;[46]

- Spies (whether members of the Navy or not) are punishable with death or lesser penalties;[47]

- Offenses of personnel in the Navy in breach of military discipline or duty are punishable by death, including abandoning one's post (traitorously or in cowardice), mutiny or

[39] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[40] Sri Lanka Penal Code of 1885, arts. 294-296, amended by Act No. 16 of 2006.
[41] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[42] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[43] Sri Lanka Penal Code of 1885, art. 129, amended by Act No. 16 of 2006.
[44] Sri Lanka Air Force Act of 1949, arts. 95, 97, 98, 131(1-2), amended by Act No. 9 of 1993; Sri Lanka Army Act of 1949, arts. 95, 97, 98, 131(1-2) amended by Act No. 10 of 1993.
[45] Sri Lanka Air Force Act of 1949, arts. 95, 97, 98, 131(1-2), amended by Act No. 9 of 1993; Sri Lanka Army Act of 1949, arts. 95, 97, 98, 131(1-2),amended by Act No. 10 of 1993.
[46] Sri Lanka Navy Act of 1950, arts. 54, 55, 92, amended by Act No. 53 of 1993.
[47] Sri Lanka Navy Act of 1950, arts. 54, 55, 92, amended by Act No. 53 of 1993.

incitement thereof, failure to suppress mutiny (traitorously or in cowardice), desertion to the enemy or unlawful arson of noncombatant property. In such cases, traitorous activity "*shall be punished with death*;"[48]

- Treasonable offenses (and murder) "*shall be punished with death*;"[49]
- Extortion committed with the use of a gun is punishable by death or life imprisonment;[50]
- Causing harm with the use of a gun is punishable by death or life imprisonment;[51]
- Assault or criminal force on a public servant, or of a sexual nature or in committing theft, with the use of a gun, is punishable by death or life imprisonment;[52]
- Attempting murder or attempting an act that would amount to culpable homicide, with the use of a gun, is punishable by death or life imprisonment;[53] and
- Human trafficking offenses committed with the use of a gun are punishable by death or life imprisonment.[54]

[12.1.2] Categories of Offenders Excluded from the Death Penalty

[12.1.2.1] Individuals Below Age 18 at the Time of the Commission of the Crime

The Penal Code provides: "*Sentence of death shall not be pronounced on or recorded against any person who, in the opinion of the court, is under the age of eighteen years; but, in lieu of that punishment, the court shall sentence such person to be detained*."[55]

Sri Lanka is a party to the ICCPR and Convention on the Rights of the Child (CRC) which prohibit such executions.

[12.1.2.2] Pregnant Women

The Penal Code provides that "*Sentence of death shall not be pronounced on or recorded against any woman who is found in accordance with the provisions of section 282 of the Code of Criminal Procedure Act, to be pregnant at the time of her conviction; but, in lieu of that punishment, the court shall sentence her to imprisonment of either description for life or for any other term*."[56]

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[48] Sri Lanka Navy Act of 1950, arts. 54, 55, 92, amended by Act No. 53 of 1993.
[49] Sri Lanka Air Force Act of 1949, arts. 95, 97, 98, 131(1-2), amended by Act No. 9 of 1993; Sri Lanka Army Act of 1949, arts. 95, 97, 98, 131(1-2),amended by Act No. 10 of 1993.
[50] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[51] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[52] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[53] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996.
[54] Sri Lanka Firearms Ordinance, art. 44(A) & Schedule C, amended by Act No. 22 of 1996; Sri Lanka Penal Code of 1885, arts. 350-360(A), amended by Act No. 16 of 2006.
[55] Sri Lanka Penal Code of 1885, arts. 294-296, amended by Act No. 16 of 2006.
[56] Sri Lanka Penal Code of 1885, arts. 294-296, amended by Act No. 16 of 2006.

As indicated earlier in this Manual, Sri Lanka is a party to the ICCPR, which prohibits such executions.

[12.1.2.3] Intellectually Disabled

The Code of Criminal Procedure, to an extent, protects intellectually disabled persons who are less able to avail themselves of the safeguard of a fair trial:

> *"If the accused though not insane cannot be made to understand the proceedings the Magistrate's Court or the High Court as the case may be, may proceed with the inquiry or trial, and if such inquiry results in a commitment or if such trial results in a conviction the proceedings shall be forwarded to the Court of Appeal with a report of the circumstances of the case and the Court of Appeal shall pass thereon such order as it thinks fit."*[57]

[12.1.2.4] Mentally Ill

The Penal Code determines that "*Nothing is an offense which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong of contrary to law*."[58]

[12.2] Prevention of Terrorism Act

[12.2.1] General

The Prevention of Terrorism Act (PTA) provides police with broad powers to search, arrest, and detain suspects. The underlying purpose of the Act is to suppress dissidents.

[12.2.2] Core Human Rights Issues with the Act and its Implementation

The PTA allows courts to admit as evidence any statements made by the accused at any time and provides no exception for confessions extracted by torture.[59] It is reported that an estimated 70 to 130 individuals remained in detention from prior PTA arrests.[60]

Interviews by human rights organizations found that torture remained endemic throughout the country, including for those charged with offenses under the PTA. Suspects arrested under the PTA, including since the war ended in 2009, gave accounts of torture and mistreatment, forced confessions, and denial of basic rights such as access to lawyers or family members.[61]

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[57] Sri Lanka Code of Criminal Procedure of 1979, art. 262, amended by Act No. 7 of 2006.
[58] Sri Lanka Code of Criminal Procedure of 1979, art. 338, amended by Act No. 7 of 2006.
[59] "Country Reports on Human Rights Practices for 2017." *United States Department of State*, Bureau of Democracy, Human Rights and Labor, https://www.state.gov/documents/organization/277537.pdf.
[60] "Country Reports on Human Rights Practices for 2017." *United States Department of State*, Bureau of Democracy, Human Rights and Labor, https://www.state.gov/documents/organization/277537.pdf.
[61] "Country Reports on Human Rights Practices for 2017." *United States Department of State*, Bureau of Democracy, Human Rights and Labor, https://www.state.gov/documents/organization/277537.pdf.

Under the PTA, the ability to challenge detentions is particularly limited.[62] Detainees may be held for up to 18 months without charge, but in practice authorities often held PTA detainees for longer periods. Judges require approval from the Attorney-General's Department to authorize bail for persons detained under the PTA, which the office normally does not grant.[63]

In 2017 the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism reported that of 81 prisoners in pretrial detention awaiting the police investigation to be completed and the Attorney-General's Department filing of charges for offences under the PTA 70 had been in detention without trial for more than five years, and 12 had been in detention without trial for more than 10 years.[64]

In Sri Lanka, the law in general requires authorities to inform an arrested person of the reason for the arrest and arraignment of that person (before a magistrate within 24 hours for minor crimes and 48 hours for grave crimes). For purposes of the PTA, it is 72 hours and it has been reported in some instances that more time reportedly elapsed before some detainees appeared before a magistrate - particularly in PTA cases.[65]

[12.3] Office on Missing Persons Act (No. 14 of 2016)

The Office on Missing Persons (OMP) is a national mechanism which will assist the country to put an end to disappearances and address the grief of families. The OMP is empowered to investigate and trace tens of thousands of cases of persons forcibly disappeared during two insurgencies and a 26 year civil war. The OMP is an indepedent body reporting to Sri Lanka's Parliament and to families of the disappeared.

[12.3.1] OMP Mandate

The OMP is mandated to search and trace missing persons, clarify the circumstances in which persons have gone missing and their fate, make recommendations towards addressing incidents of missing persons, protect the rights and interests of missing persons, indentify avenues of redress for missing persons and relatives of missing persons, collect data related to missing persons being carried our or previously carried out by other institutions, organizations, Government departments and commissions of inquiry.

[12.3.2] Power of OMP

The OMP has investigative powers to receive information from a relative of a missing person or any other person or organization, and to initiate an inquiry and/or investigation into the whereabouts and/or circumstances of disappearance pursuant to a complaint made to the OMP or on the basis of information received previously by Commissions of Inquiry.

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[62] Country Reports on Human Rights Practices for 2017." *United States Department of State*, Bureau of Democracy, Human Rights and Labor, https://www.state.gov/documents/organization/277537.pdf.
[63] "Country Reports on Human Rights Practices for 2017." *United States Department of State*, Bureau of Democracy, Human Rights and Labor, https://www.state.gov/documents/organization/277537.pdf.
[64] "Country Reports on Human Rights Practices for 2017." *United States Department of State*, Bureau of Democracy, Human Rights and Labor, https://www.state.gov/documents/organization/277537.pdf.
[65] Country Reports on Human Rights Practices for 2017." *United States Department of State*, Bureau of Democracy, Human Rights and Labor, https://www.state.gov/documents/organization/277537.pdf.

The OMP will take all necessary steps to investigate cases of missing person by procuring and receiving statements (written or oral), examine witnesses, summon person residing in Sri Lanka, admit any statement or material which may be inadmissible in civil or criminal proceedings, establish process to accept confidential information to ensure personal security for victims and witnesses, apply to appropriate Magistrate's Court for an order to carry out exhumations/excavations of suspected grave site, authorize specified officer of OMP to enter without warrant and investigate any place of detention, police station or prison in which a person is suspected to be detained or has previously been suspected to be detained, make an application for search warrant to search premises suspected to contact evidence.

When it appears to the OMP that an offence within the Penal Code or any other law has been committed, a report will be completed and tendered to the relevant law enforcement or prosecuting authority.

[12.3.3] Functions and Duties of the OMP

When the OMP has sufficient material to conclude that the person to whom the complaint relates is a missing person, it shall issue an interim report to the relative of such missing person and enable the Registrar General to issue a Certificate of Absence or a Certificate of Death.

The OMP will provide or facilitate administrative assistance and welfare services including where required psycho-social support, to the relatives of the missing person, to recommend to the relevant authority grant raparations to missing persons and/or relatives, to develop and enforce a system for victim and witness protection, create and maintain a database for including particulars of missing persons, create public awarness of causes, incidence and effects of missing persons and facilitating their access to economic, psycho-social, legal and administrative support.

[12.3.4] Tracing Unit and Victim and Witness Protection

There will be a Tracing Unit of the OMP, which will be responsible for tracing and searching missing persons and will be compromised by competent, experienced and qualified investigators, including relevant technical and forensic expertise.

There will also be a Victim and Witness Protection Division that will protect the rights and address the needs and concerns of victims, witnesses and relatives of missing persons.

[12.4] Registration of Deaths (Temporary Provisions Amendment) Act (No. 16 of 2016)

In June 2016, an amendment to the Registration of Deaths (Temporary Provisions) Act enabled the Government to issue Certificates of Absence (COA). The COA is valid for two years or if information surfaces about the missing person. If after two years, no information has been found relatives may extend the COA, apply for a Certification of Death or cancel the COA.

In 2016, President Maithripala Sirisena agreed to issue Certificates of Absence to relatives of over 65,000 that went missing during the civil war allowing them to temporarily manage the property and assets of missing people, to obtain provisional guardianship of their children and apply for government welfare schemes.

[12.5] Right to Information Act (No. 12 of 2016)

The Right to Information Act (RTI) was established in 2016 on the premise that as the State and public institutions are maintained by tax monies of the people, the people have the right to know information of which the functions of the state are accomplished using public funds.

The RTI can be used to facilitate the discovery of the fate of the disappeared, however information relating to the war may be denied on the basis of national security.

[12.6] International Convention for the Protection of All Persons from Enforced Disappearance Act (No. 5 of 2018)

The Interntational Convention for Protection of All Persons from Enforced Disappearances is to ensure the right to justice and reparation to victims of enforced disappearance. The Act provides that every Sri Lankan citizen has the freedom to live without fear of being a victim of enforced disappearance or abduction. The Act does not have retrospective operation, and will only apply to allegations of enforced disappearances committed from 2018 onwards.

[13] Other Criminal Justice Actors

[13.1] General

Defence lawyers must vigorously defend individual clients. An integral component of this duty is to work collaboratively with other key criminal justice system actors. This adds to building and strengthening a criminal justice system that is transparent and implements rule of law principles like legal certainty, non-impunity and judicial independence.

Other criminal justice actors that a defence lawyer will encounter on a regular basis in Sri Lanka, similar to other jurisdictions, include the following:

[13.2] Judges

The basic role and responsibility of judges is to uphold national law - including international law when this has been incorporated into domestic legislation. Judges must preside independently and impartially over the administration of justice.

In determining guilt or innocence (or in weighing the merits of claims between individuals and the state) judges must have reference not only to the facts and merits of each party's position but also relevant and applicable law.

In most common law jurisdictions judges preside over civil and criminal trials (including appeals) in the higher courts. This means that judges usually sit in the High Court, courts of appeal, the Supreme and/or Constitutional court of a particular country.

It is the responsibility of judges to ensure that defendants, witnesses and victims are treated fairly and that those accused of having committed a criminal offence receive a fair trial. The right to a fair trial involves ensuring that an accused's rights are respected at all times, and that only

evidence which has been properly obtained should be admissible in court. In ensuring a fair trial judges may often take a more assertive role to not only ensure that all testimony and evidence has been given freely but also that it has not been obtained using coercive means.

Judges should at all times be alert to the possibility that defendants and witnesses may have been subject to torture or other ill-treatment. If, for example, a detainee alleges that he or she has been ill-treated when brought before a judge it is incumbent upon the judge to record such allegations and as presiding officer take the necessary steps to ensure the allegation is fully investigated. A prudent judge will also do this even in the absence of an express complaint or allegation if the person concerned bears visible signs of physical or mental ill-treatment.

While legal systems vary in many respects throughout various parts of the world, the legal prohibition of torture is universal and one of the primary roles of a judge is to ensure that the law is upheld at all times and this includes the prevention of torture.

The Chief Justice and Justices of the Supreme Court and Court of Appeal are appointed by the President of Sri Lanka with the nomination of the Constitutional Council. The Constitutional Council is a ten member constitutional authority tasked with maintaining independent commissions and monitoring affairs. Judges of the High Court are appointed by the President on the advice of the Judicial Service Commission. Traditionally judges are Attorneys-at-law while retired judges of the Supreme Court and the Court of Appeal do not practice law after retirement.[6667]

In Sri Lanka, Supreme Court judges wear scarlet gowns when attending court. On special ceremonial occasions (such as ceremonial sittings of the Supreme Court) they wear scarlet gown, barrister's bands and mantle and a long wig. Appeal Court judges wear dark purple gowns when attending court. On special ceremonial occasions (such as ceremonial sittings of the Appeal Court) they would wear dark purple gown, barrister's bands and mantle and a long wig.

[13.3] Magistrates

In Sri Lanka, a magistrate is a judicial officer appointed to preside over a magistrates court to a particular jurisdiction under the Judicature Act. Magistrates in Sri Lanka were formally known as Police Magistrates when the magistrate courts were known as police magistrate courts.

Magistrates have jurisdiction over the criminal cases filed under the Penal Code. Their duties also include issuing search warrants, arrest warrants and hearing bail applications. In many cases magistrates preside over primary courts. There are four types of magistrates:

- Chief Magistrate (only in the metropolitan area of Colombo);
- Magistrate;
- Additional Magistrate (found when there are more than one Magistrate in one station); and
- Unofficial Magistrates.

[66] *Judicial Services Commission Secretariat Sri Lanka,* http://www.jsc.gov.lk/web/index.php?option=com_content&view=frontpage&Itemid=1&lang=en.
[67] *Supreme Court of Sri Lanka,* http://www.supremecourt.lk/.

The Judicial Service Commission is responsible for the appointments of magistrates to the lower courts such as District Courts and First Instance Courts.[68]

[13.4] Justices of the Peace and Unofficial Magistrates

In Sri Lanka, a Justice of the Peace and Unofficial Magistrate (also known as Acting magistrate) is a judicial appointment made by the Minister of Justice to a particular jurisdiction under the Judicature Act. An Unofficial magistrate is a senior Attorney-at-law (with 15 years or more practice), who is a Justice of the Peace and has the powers and authority vested in a Magistrate except the power to hear, try, or determine civil or criminal cases.

Persons appointed as unofficial magistrates may use the post-nominal Justice of the Peace and/or Unofficial Magistrate.

[13.5] Prosecutors

Prosecutors in general perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

A State Counsel is the public prosecutor in the legal system of Sri Lanka and represent the State in criminal proceedings. They are not elected and are instead public servants as Law Officers of the Attorney-General's Department. [69]

To become a State Counsel, one must be a qualified Attorney-at-law. Senior State Counsel are members with several years of experience in public prosecution. The Attorney General and his/her deputy the Solicitor General are former State Counsels. Prior to 1972, the post was known as Crown Counsel and was changed when Ceylon/Sri Lanka became a republic.

There are similarities between the role of the State Counsel and the Procurator Fiscal in Scotland, Crown Prosecutor in England and Wales, Crown Attorneys in Canada and District Attorneys in the United States.

[13.6] Police

[13.6.1] General

The Sri Lanka Police is the civilian national police force. The professional head of the police is the Inspector General of Police who reports to the Minister of Law and Order as well as the National Police Commission of Sri Lanka.

The police service is organized into five primary geographic commands, known as ranges (I, II, II, III, IV, V) covering the northern, western, eastern and southern sectors of the country.

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[68] *Judicial Services Commission Secretariat Sri Lanka,* http://www.jsc.gov.lk/web/index.php?option=com_content&view=frontpage&Itemid=1&lang=en.
[69] *Attorney General's Department Sri Lanka,* http://www.attorneygeneral.gov.lk/.

The police service has a number of specialized units responsible for investigative, protective, counter-terrorism and paramilitary functions. Investigation of organized criminal activity and detective work are handled by the Criminal Investigation Department under the command of Deputy Inspector General of Police.

The Police Human Rights Division was established on 29th April 2002 with the preliminary objective of preventing human rights violations committed by Police officers when performing their routine duties and to preserve the human rights privileged by the general Public.

[13.6.2] Human Rights Abuse by Police

The Sri Lankan legal system has several mechanisms available for victims of police abuse. *As a first step*, victims can file a First Information Report (FIR) with the police. Unfortunately, these are almost always unsuccessful, as police either refuse to record the complaint or try to pressure victims not to file the FIR. *Secondly*, victims may file complaints against police abuse with the local courts however, court fees, attendances at court and attorney fees for each appearance, generally takes years before cases are heard properly, if at all. *Thirdly*, Sri Lankan law allows for a direct appeal to the Supreme Court in Colombo if a fundamental right enshrined in the constitution has been violated. These applications must be made within 30 days of the alleged abuse.

[13.7] Judicial Medical Officers

[13.7.1] General

A Judicial Medical Officer (JMO) is a full-time specialist consultant in forensic pathology. Forensic medicine is the field that links medicine with law and the legal process. The JMO is a servant of the State – employed by, and accountable to, the Ministry of Justice. The duties of a JMO include but not limited to conducting autopsies, post-mortem investigations and exhumations, examining patients who have undergone suspicious physical trauma and submitting evidence in court.

The role of a JMO is crucial in cases of alleged torture. When an accused person alleges torture at the hands of the police, they must be first examined by a JMO. The JMO will then provide a thorough oral and physical examination to determine the history of the injuries, according to the victim, and record their opinion as to their cause, the establishing whether the injuries are consistent with the accused persons account of events. These findings are then documented in a Medico-Legal Examination Form (MLEF). The JMO will provide an opinion between the injury pattern and the accused persons account of events. It is then left to the courts to link this evidence with a perpetrator, generally law enforcement officers.

If the case is referred to the Magistrate's Court the JMO complies a Medico-Legal Report, which is a detailed expansion of the MLEF. If the case is referred to the High Court, the JMO must give evidence as a witness for the prosecution.

Proper medico-legal documentation is vital for successful torture prosecutions. Unfortunately, there are only 42 JMOs in Sri Lanka, which has a population of over 20 million people.

Therefore, gaining access to a JMO is difficult especially in rural areas resulting in many victims of torture examined by junior doctors or under-skilled doctors.

[13.7.2] Legitimacy of JMO

In advocating for the accused, a criminal defence lawyer has a duty to the client to question the legitimacy of the MLEF and MLR completed by the JMO. Moreover, a JMO is not immune from questioning or persecution. In one case, the court found a JMO guilty of professional misconduct by the Supreme Court for failing to properly examine a victim of torture allegedly at the hands of the police and subsequently died in police custody. The JMO's license was suspended for three years.

[13.8] The Inquirer for Sudden Deaths

The Inquirer for Sudden Deaths (ISD) is a coroner appointed by the Minister of Justice. The ISD is generally non-medical, non-legal appointees who are heavily dependent on the police and forensic pathologists for death investigations.

If a person dies under suspicious or unexplained circumstance, the death is reported to the police and the medico-legal system is activated. The police then inform the ISD who undertakes a fact-finding inquiry to determine the case of death.

If the ISD is unable to determine the case of death, he will refer the case to the JMO to do an autopsy. The JMO will conduct a second inquiry to determine the circumstances of death.

[13.9] Correctional Services and Prison Officials

In Sri Lanka, correctional facility and/or prison officials work for the Department of Prisons. The Department is tasked with ensuring that custodial sentences (imprisonment) and non-custodial sentences and orders (home detention, supervision, community work and release on conditions) imposed by Sri Lankan Courts are administered in a safe, secure, humane and effective way.

The Department aims to contribute to the maintenance of a safe and just society by reducing the level of re-offending through the delivery of targeted and appropriate programs to help offender's rehabilitation and reintegration to society. The Department and its administration is regulated principally by the *Prisons Ordinance (No. 16 of 1877).*

The Department is also responsible for the transportation of prisoners within the country with the assistance of the Sri Lanka Police.

[13.10] Court Interpreters

A Court Interpreter is someone who works with the court system to provide language interpretation for those who do not speak the official language of the court where he/she is being tried. Court Interpreters work with witnesses or/and defendants to provide valuable real time translation of evidence and testimony into a language the accused understands. It is a court interpreter's job to orally translate everything that is said and often such interpreters may also assist counsel during consultations with their clients.

[13.11] Jury Members

A jury is a sworn body of people convened to render an impartial verdict (a finding of fact on a question) officially submitted to them by a court or to set a penalty or judgment. Modern juries tend to be found in courts to ascertain the guilt, or lack thereof, in a crime. In Anglophone jurisdictions, the verdict may be *guilty* or *not guilty* (*not proven*; a verdict of acquittal, based on the state's failure to prove guilt rather than any proof of innocence, is also available in Scotland).

In Sri Lankan High Courts trial by a jury shall be on indictment in the High Court by a jury (Criminal Code, Section 161). The Supreme Court decides the manner in which panels of jurors may be prepared and the mode of summoning, empanelling and challenging of jurors (Sri Lankan Constitution, Section 136(1)(g)).

[13.12] The Legal Aid Commission

The Legal Aid Commission (LAC) of Sri Lanka was established in 1978 and at present has 76 Centres Island wide. The role of the LAC is to provide legal advice and free assistance of lawyers to low income groups and to create awareness in the entire society on legal procedures. To obtain assistance from LAC, clients must show a monthly income of Rs. 15,000 or less.

The litigation services provided by LAC include the following: land, divorce, money recovery, accident compensation, domestic violence, spousal and child maintenance, labour debt reconciliation board matters, rent board matters, bail, appeals, and fundamental rights violation cases. The LAC rarely accepts criminal law cases and as a result indigent accused persons are forced to navigate the legal system on their own.

[13.13] The Sri Lankan Judicial Services Commission

The Judicial Service Commission establishes the process in which judges to the lower judiciary are appointed, transferred, removed and disciplined. The Commission is made up of the Chief Justice who is the Chairman, and two Judges from the Supreme Court of Sri Lanka appointed by the President. According to the Sri Lankan Constitution (1978), to enter the judiciary, candidates must have been practicing law for a minimum of three years, pass a written examination and then be successful in an interview. Once appointed, judges undergo mandatory training at the Judges Institute.

[13.14] The Sri Lankan Human Rights Commission

The Sri Lankan Human Rights Commission (SLHRC) was established to give force to the commitment of Sri Lanka as a member of the United Nations in protecting human rights, to perform the duties and obligations imposed on Sri Lanka by various international treaties at international level as well as to maintain the standards set out under the Paris Principles in 1996. The SLHRC is an independent Commission, which was set up to promote and protect human rights in the country by virtue of Act No. 21 of 1996 to establish the Human Rights Commission of Sri Lanka.

Its mission is to "*develop a better Human Rights Culture in Sri Lanka through Protecting and Promoting Human Rights for all in Law, Policy and in Practice, adhering to Universally*

Recognized Human Rights Norms and Principles with a Special Emphasis on the Fundamental Rights Guaranteed under the Sri Lanka Constitution for the Citizens of Sri Lanka."[70]

[70] *Human Rights Commission of Sri Lanka*, http://hrcsl.lk/english/about-us/establishment/.