REFORM OF CRIMINAL PROCEDURE

Before dealing with the present law of criminal procedure in Malaysia and suggesting in what ways it can be improved it might be useful to look at two other systems, the Islamic system and the French or Continental system.

ISLAMIC PROCEDURE

Islamic Law distinguishes between three types of criminal offences which may be described as (a) the *Hadd* offences[1] (b) the *Qisas*[2] offences and (c) the *Ta'azir*[3] offences. The *Hadd* offences are those where the sentence is fixed by the law and where the mode of proof is extremely strict. The offence of *Zina*[4] for example can only be proved by four reliable witnesses who saw the act being committed; and a false accusation of *zina* is itself a *hadd* offence, that of *kadhf*.[5] The *hadd* is a right or claim of Allah and therefore no pardon or amicable settlement is possible, once the case has been brought before the kathi. On the other hand active repentance (*tawba*) is sometimes taken into account. There is a strong tendency expressed in a tradition attributed to the Prophet to restrict the applicability of *hadd* punishments as much as possible except the *hadd* for *kadhf* but this in turn serves to restrict the applicability of the *hadd* for *zina* itself. The definitions of the offences are very narrow and strict. The doctrine of "*shubha*" or resemblance of the act to another lawful one, is employed to raise a presumption of *bona fides* in the accused. There are generally short periods of limit-

[1] Al-Quran Surah 5 Verse 41–42; Surah 24, Verse 2–4; Surah 36–37; Encyclopaedia of Islam, New Edition Vol. 3 "Hadd"; J. Schacht Introduction to Islamic Law, Oxford 1964, p. 175f.; Herbert J. Liebesny, The Law of the Near and Middle East, New York, 1975 p. 228f.

[2] Al-Quran Surah 2 Verse 178; Herbert J. Liebesny *op. cit.* p. 230.

[3] Herbert J. Liebesny *op. cit.*, p. 229.

[4] Unlawful sexual intercourse. See Schacht *op. cit.* p. 178.

[5] False accusation of unlawful sexual intercourse. See Schacht *op. cit* p. 179.

ation, generally one month. Finally proof is made difficult. A confession of an offence involving *hadd* can be withdrawn and it is even recommended that the kathi should suggest this possibility to the person who has confessed[5a], except in the case of *kadhf*. It is considered more meritorious to cover up offences punishable by *hadd* rather than to give evidence on them; and particularly high demands are made of witnesses as regard their number, their qualifications and the content of their statements. These demands are most severe in regard to evidence on *zina* and a further safeguard lies in the fact that an accusation of *zina* which is dismissed constitutes *kadhf* which is itself punishable by *hadd*.

Qisas is nominally to provide a means of retaliation – an eye for an eye, a tooth for a tooth, – but it is also regarded as a means for saving life as the victim or his family is encouraged to pardon the offender and receive compensation. The remedy of *Qisas* is therefore more tortious than penal.

In the Holy Quran it is stated to the effect –

> "O you who believe. The law of *qisas* (equality) is prescribed to you in cases of murder, the freeman for the freeman, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty. In the law of *qisas* there is saving of life, to you O men of understanding that you may restrain yourselves".[6]

The most relevant form of procedure is that for *ta'azir* that is offences, the punishment for which is left to the discretion of the judge. The basis of Islamic procedure is based on the saying of the Prophet "Proof is upon the plaintiff and oath is upon the defendant".[7]

[5a]For the precedents of the Prophet, See Sahih Al-Bukhari, translated by Dr. M. Muhsin Khan, Vol. 8 p. 528 (Hadith 806), p. 534 (Hadith 813) and p. 535 (Hadith 814).

[6]Al-Quran Surah 2 Verses 178–179.

[7]Mishkatul-Masabih translated by Maulana Fazlul Karim, Book II, p. 619 (Hadith No. 76).

In Malaysia the procedure for criminal trials before the Shariah Courts is set out in the respective enactments for the administration of Islamic Law in each state. In Selangor for example it is provided that when the accused is produced before the court he shall be charged. If he pleads guilty he may be sentenced on such plea. If the accused claims trial, the prosecutor shall outline the facts to be proved, the relevant law and shall then call his witnesses. Evidence shall ordinarily be given on oath in a form binding upon Muslims but the court may on special grounds dispense with an oath and take evidence on affirmation. The practice is that witnesses are asked to take the oath and then affirm "according to the Islamic Law and the law". Each witnesses shall be examined by the party calling him and may then be cross-examined by the opposing party. Cross-examination may be directed to credibility. The party who called the witnesses may then re-examine on matters arising from the cross-examination. The court may put any question to any witness at any time. After hearing the witnesses for the prosecution the court shall either dismiss the case or call on the accused for his defence. In contrast to the procedure in the ordinary criminal courts, the practice in the Shariah Court is to call on the accused for his defence, where there is some evidence against him to give him an opportunity to deny the charge. If called on for his defence the accused may address the court and may then either give evidence or make a statement without being sworn or affirmed in which case he shall not be liable to be cross-examined or may stand silent. If the accused gives evidence, he may be cross-examined, but not as to character or as to other offences not charged. Here again the practice is that the accused if he wishes to give evidence will be asked to make a declaration "according to law" and he is then subject to cross-examination. The accused may then call the witnesses. The accused then sums up his case and the prosecutor replies. The court shall then either convict or acquit the accused[8] . The practice in accordance with the Islamic Law is that if the Kathi finds that the case against the accused is not

[8]Selangor Administration of Muslim Law Enactment, 1952 (No. 3 of 1952, Ss. 53 and 66).

proved, he will ask the accused to take the oath according to Islamic Law. If the accused takes the oath and denies the charge he will be acquitted.[8a]

The Criminal procedure in most Near and Middle Eastern countries is patterned after that of continental Europe, especially France. To take Egypt as an example, there is a hierarchy of public officials who constitute the so-called *niyaba umumiya* or *ministere public*. These officials fulfil the functions of public prosecutors in penal cases. At the head of this hierarchy is the *Procureur General.* Members of the *ministere public* are essentially civil servants. They are all appointed and can be transferred freely. In the exercise of their functions they are under the direction of the *Procureur General.*

If an offence allegedly has been committed, it is up to the public prosecutor (as representative of the *ministere public*) to decide whether there is a case. In cases of misdemeanors the public prosecutor may bring the case directly to the court, provided the police report contains enough information. If the case involves a major misdemeanor, the public prosecutor may at his discretion pass the case for preliminary investigation to an investigating magistrate (French: *juge d'instruction*). In felony cases a preliminary investigation by the *juge d'instruction* is mandatory, provided the public prosecutor believes that there is cause for further investigation of the allegations made. Investigating magistrates are attached to every summary tribunal and to every court of first instance. The investigating magistrate is in full control of and has sole responsibility for the investigation. The investigation is nonpublic, but the parties may demand copies of various documents and are informed of such acts of investigation as took place during their absence. In Egyptian law, as in the law of most Near and Middle Eastern and European countries, a party injured by the alleged offence, whether physically or financially, may join in the penal action as a co-called civil claimant. During the investigation, the accused, the victim, and, if there is such, the civil claimant may be represented by counsel. Counsel for the defendant may, however, speak only with the permission of the judge during the interrogation of the accused.

[8a] See *State v. Amir Zaman Hanafi and Others*, P.L.D. 1979 S.C. (A.J. & K.) 78.

At the end of the preliminary investigation the investigating magistrate transmits the file to the public prosecutor. In a case of a petty offence the accused is brought to trial in the summary court, and the same is the case, with a few exceptions for specific misdemeanors which are tried in the court of assizes, for misdemeanors (*delits*). If the investigating magistrate has come to the conclusion that the offence constitutes a felony, the accused is brought before the so-called *chambre des mises en accusations* This body is part of every court of first instance and consists of three judges. The term may be translated as chamber for indictment, the body is somewhat comparable in function to a grand jury. The chamber makes its determination on the basis of the file which one of its members reports on and statements by the parties. The procedure is not public. The chamber can remand the case to the investigating magistrate, if it feels that further investigation is needed, can undertake such investigation itself, or, if it is satisfied that a felony has been committed, it sends the case for trial to the court of assizes. If the chamber believes that a misdemeanor only has been committed, it sends the case to the summary court. The chamber may also conclude that there is no punishable offence, in which case it can so find and the accused, if he was under arrest, is set free.

At the trial the indictment is read and then the prosecution and the civil party, if there is one, make their statements. The defendant is thereafter asked whether he pleads guilty or not guilty. If he pleads guilty, the court may pronounce judgement without hearing further evidence, if it is satisfied with the confession. In a decision of 25 March, 1957[9] the Court of Cassation stated that the evaluation of a confession is left to the discretion of the court of original jurisdiction.

In Criminal matters the law of Egypt permits both parties to introduce witnesses. The prosecution witnesses are heard first and then the defence witnesses. The court rules whether the facts which the party proposes to prove through his witnesses are pertinent and admissible. The witness is sworn and then questioned. The parties may not question the witness directly

[9] Egyptian Bulletin Officiál des Tribunaux 56 (1958), No. 161.

but should ask their questions through the court. The party who has introduced the witness poses his questions first and then the opposing party poses his questions. The judge or judges also may ask questions independently. This system of interrogation does not allow for cross-examination. In actual practice the presiding judge, if there is a bench of several judges, asks most of the questions.

The decisive oath, which is a feature of Islamic Law, has maintained considerable importance in modern Near Eastern law and survives also in a number of European legal systems. The decisive oath is a measure taken by the judge on his own motion in order to arrive at the truth, and the result of this measure is left to the sole appreciation of the judge. Thus this oath does not constitute incontrovertible proof as far as the judge is concerned: rather it is left to him whether or not to take it into account after it has been sworn. The appellate court is therefore not bound by the conclusion which the court of first instance drew, since the decisive oath does not end the law suit and does not prevent an appeal against the decision which is based upon this oath.[10]

FRENCH PROCEDURE

Under the French system, detention for interrogation is permitted up to 24 hours under detailed safeguards. This period may be extended by another 24 hours by the Public Prosecutor.

The major aspect of French criminal procedure is the important part played by the Investigating Judge. He is a Judge chosen by the President of the Court for renewable periods of 3 years to act as Investigating Judge. One other feature of the French procedure is the provision for the victim of a crime, or a group that considers itself injured to bring a civil claim which is tried in the same Courts at the same time by the same Judges as the trial of the charges against the accused. Counsel for this civil claimant has almost the same rights as the Public Prosecutor, throughout the proceedings.

The Public Prosecutor or the civil claimant may request the Investigating Judge to institute an investigation in respect of an

[10] Herbert J. Liebesny *op. cit* p. 260f.

alleged offence, with or without naming the suspect. When the Public Prosecutor requests such an investigation he sends to the Investigating Judge his file, including all aspects of police investigation todate.

Once officially seized of the commission of an offence the Investigating Judge is in complete control – he is the only one to order arrests, issue search and seizure warrants, require attendance of witnesses, grant or refuse bail. He may delegate some of his functions, and is entitled to the assistance of the judicial police in the discharge of his duties.

His first act normally is to visit the scene of the alleged crime. When an accused is first brought before the Investigating Judge, he is told of the charge against him and his right to say nothing; but if he wishes to make a statement it is recorded. If he cannot afford a lawyer, one is appointed for him. He may not be interrogated at this first interview except in unusual circumstances.

At every subsequent appearance of the accused before the Investigating Judge his counsel may be present as well as the Public Prosecutor. Accused is interrogated by the Judge only. Counsel and Public Prosecutor may ask questions with leave of the Judge. Their presence is essentially intended as a safeguard against possible pressures that may be exercised by the Judge in seeking to obtain a confession.

The accused may refuse to answer any questions and he is not on oath. He may be interrogated as often as the Investigating Judge considers necessary. Adverse inferences may be drawn from his silence.

The Investigating Judge may call up and interrogate any person whom he considers may have information that would throw light on the circumstances of the crime. Such witnesses are under oath but they are not punishable for perjury.

The witnesses are interrogated in the absence of the accused, his counsel and the Public Prosecutor. All probative evidence, including hearsay, is received and given appropriate weight.

The Investigating Judge may confront the accused with one or more of the witnesses, or confront a witness with another witness in the absence of the accused, and require them to explain the differences in their testimony. Counsel and Public Prosecutor are allowed to be present only when the accused is a party to the confrontation.

Another very popular device of the Investigating Judge is to hold a reconstruction of the crime at which is attended by all witnesses and the accused.

Everytime the accused is required to be present before the Investigating Judge, his counsel has a right of access to the whole file of the Judge at least 24 hours beforehand. At the conclusion of the investigation, if the Investigating Judge is convinced that there is evidence sufficient to justify prosecuting the accused for a serious offence, he transmits the papers to the Public Prosecutor who must within 10 days send it to the Indicting Court, if he, also, is satisfied that there is a case against the accused, otherwise the accused is discharged.

The indicting Court consists of 3 Judges. One of the 3 Judges is assigned to make a thorough study of the whole investigation file. At the hearing he will inform the Court of the facts in issue, the conflict in testimony and the legal problems involved.

The Indicting Court may call the accused or other witnesses to testify orally. The Public Prosecutor, counsel for the accused and, when present, counsel for the civil claimant may make written and oral submissions.

If the Indicting Court decides that there is a case to go to trial, it then indicts the accused and directs that he be tried by the Assize Court. When this is done, the whole file, from its very inception with the Police right through to its conclusion in the Indicting Court, is transmitted to the Assize Court.

Up to this stage, all proceedings are secret and may not be publicly disclosed. The indictment closes the first place – the secret phase – of the proceedings.

This first secret phase of the proceedings corresponds to the Police Investigation under the English system but there are important differences:

(1) The accused is questioned by a Judge for the record in the presence of his counsel.

(2) The accused is questioned in detail as to his character, his background, his past criminal activities, his family, his finances and his social activities.

(3) The accused and his counsel are at all times kept fully informed of the development of the investigation and the exact nature of all the evidence, oral and documentary.

> There are no surprises either for the accused or the prosecution in the French procedure.[11]

THE CRIMINAL PROCEDURE CODE

The Criminal Procedure Code in force in Malaysia today is basically a re-enactment of the Criminal Procedure Codes of 1902 and 1903, which in turn repealed and re-enacted the provisions of the Criminal Procedure Codes 1900 of Perak, Selangor, Negri Sembilan and Pahang. Prior to 1900 certain Straits Settlements ordinances were applicable in the Malay States.

The Code in the main followed the provisions of the Indian Criminal Procedure Code but it was provided that "as regards matters of criminal procedure for which no special provision may have been made by this code or by any other law for the time being in force, the law relating to Criminal Procedure for the time being in force in the colony (of the Straits Settlements) shall be applied so far as the same shall not conflict or be inconsistent with the code and can be made auxiliary thereto".[12] Thus the law of criminal procedure in the Malay States followed in the main that in India and the Straits Settlements. In 1976 the Criminal Procedure Code of the Federated Malay States was extended to Malacca, Penang, Sabah and Sarawak and at the same time section 5 of the Code was amended to make the law relating to criminal procedure in force in England applicable where there were lacunae in the local law.[13] The code has been amended from time to time but these have been piecemeal amendments and there has not been a general review of the administration of justice. Such a review has been recommended in Singapore where the Law Society in its memorandum stated "It is our earnest hope that this review will cover a study of the inquisitorial system in Western Europe, with a view to adopting its more pragmatic features to achieve a system whereby before trial, the Prosecution and the Defence

[11] See David Marshall, Facets of the Accusatorial and Inquisitorial Systems, [1979] 1 M.L.J. xxx.

[12] Criminal Procedure Code (F.M.S. Cap. 6), s. 5.

[13] *Ibid*, as amended by act A 324 of 1976.

are supplied with statements of each other's potential witnesses, so that a criminal trial ceases to have the elements of a sporting event and is brought to the more sombre field of reality within the framework of real protection for the individual against abuse of investigative and judicial powers".[14] In England although certain aspects of the law of evidence in criminal cases have been considered by the Criminal Law Revision Committee[15] and there has been a Royal Commission on Police Powers and Procedures,[16] it has been suggested that the subject of the criminal process is ripe for a major inquiry.[17] A Royal Commission on Criminal Procedure has now been appointed under the Chairmanship of Sir Cyril Phillips.[18] In Scotland the law of criminal procedure has been considered by the Thomson Committee which reported in 1975,[19] in Australia there is the 1975 Report of the Law Reform Committee of Australia on Criminal Investigation[20] and in the United States there is the American Law Institute's Model Code of Prearraignment Procedure.[21] In India the Law Commission has made a number of reports touching on Criminal Procedure and many of its recommendations have been embodied in the Code of Criminal Procedure, 1973.[22] It is proposed in this paper to highlight some

[14] Memorandum submitted by Law Society of Singapore to the Select Committee on the Criminal Procedure Code (Amendment) Bill, 3rd October 1975.

[15] Criminal Law Revision Committee – Eleventh Report on Evidence (General) Cmnd 4991 (June 1972).

[16] Report of Royal Commission on Police Powers and Procedure Cmnd 3297 (1929).

[17] Michael Zander, The Criminal Process – A Subject Ripe for a Major Inquiry, [1977] Crim. L.R. 249.

[18] See Current Law, February 1978 Item 51.

[19] Report of the Thomson Committee on Criminal Procedure in Scotland, Cmnd. 6218 (October 1975).

[20] Report of the Law Reform Commission of Australia, No. 2. Criminal Investigation (Interim), September 1975.

[21] Model Code of Pre-arraingment Procedure, approved by American Law Institute on May 20, 1975.

[22] Law Commission Forty-first Report, September 1969 which took into consideration the recommendation of earlier reports and which led to the enactment of the Code of Criminal Procedure, 1973.

matters which have been discussed and dealt with in those countries.

DETENTION FOR QUESTIONING

Should a policeman be empowered to stop an individual in the street and require him to give certain personal details? Should the police be empowered to detain a suspect for questioning, even though he has not been arrested and does not consent to the detention? It has been said that to both questions English Law generally answers in the negative, but the position in practice is otherwise.[23]

The Thomson Committee in Scotland consider that the police are unduly hampered by the absence of a power to stop and question suspected persons. They recommend that when a police constable has reasonable cause to suspect a person of having committed an offence for which there is a power to arrest without warrant, he should be able to detain the suspect for a period no longer than is necessary (a) to ask for an explanation of his suspicious behaviour (b) to take the name and address of the detainee and where it can be done rapidly verifying these and (c) to search outer clothing or baggage for stolen goods, tools of crime and weapons.[24]

The Australian recommendation is that where a policeman believes on reasonable grounds that a person whose name and address is unknown may be able to assist him with his inquiries in connection with an offence which has been, may have been or may be committed, he should have a right to ask that person to give his name and address. The power "would extend only so far as questions about name and address. It will not entitle questions to be put or require them to be answered as to where a person has been, where he is going, what he is doing and the like."[25]

In Malaysia the powers of the police are contained in the Police Act, 1967, and in the Criminal Procedure Code. Section

[23] A.J. Ashworth, Some Blueprints for Criminal Investigation, [1976] Crim. L.R. 594; *Rice* v. *Connolly* [1966] 2 All. E.R. 649.; *R.* v. *Lemsatef* [1977] 3 All. E.R. 835.

[24] Thomson Committee Report *op. cit* 3.13 to 3.20.

[25] Australian Law Reform Commission Report *op. cit* 79–81.

20 of the Police Act, 1967,[26] provides that it shall be the duty of a police officer to carry out the purposes mentioned in the Act, that is, the maintenance of law and order, the preservation of the peace and security of the Federation, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence. To carry out such purposes a police officer may take such lawful measures and do such lawful acts as may be necessary, including apprehending all persons whom he is by law authorised to apprehend. In the Singapore case of *Vellasamy* v. *Rex*[27] Mc Elwaine C.J. said—[28]

> "In my opinion the powers of the police to investigate do not depend solely on Chapter XIII of the Criminal Procedure Code. The duties of the police force as set out in section 30 of the Police Force Ordinance (Cap. 177) include detecting crimes, apprehending persons who have committed or who are suspected of having committed crimes and these duties are amplified in section 31 of the Criminal Procedure Code and most of these duties imply a power to investigate whether there has been an information under section 117 or section 118 of the Criminal Procedure Code or not."

The Criminal Procedure Code provides for the arrest of persons without warrant and section 24 provides that when any person commits an offence in the presence of a police officer or penghulu or is accused of committing a non-seizable offence, and refuses on the demand of the police officer or penghulu to give his name or address or gives a name or address which such officer has reason to believe to be false, he may be arrested by such police officer or penghulu in order that his name or address may be ascertained.[29]

[26]Police Act, 1967 (No. 41 of 1967), Ss. 3 and 20. See Wendy Chung Sook Meng, Study of the Discretionary Aspects of Police Investigative Powers, Project Paper, Faculty of Law, University of Malaya, 1977.

[27][1941] M.L.J. 233. (Reprint p. 192).

[28]*Ibid.* at p. 236 (Reprint p. 195).

[29]Criminal Procedure Code, Ss. 23 and 24.

Under the National Registration Regulations, 1960, a person is required to produce his registration card for inspection on request by any police officer or customs officer and if he fails to do so, he is guilty of an offence.[30]

The Criminal Procedure Code provides that a police officer making a police investigation under Chapter XII of the Code may by order in writing require the attendance before himself of any person 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 he fails to do, he can be arrested on a warrant to secure his attendance.[31]

DETENTION AT POLICE STATION FOR QUESTIONING

Is there a case for giving the police the power to detain a suspect in a police station for questioning? It has been said that "the present law regarding detention for questioning is wholly at variance with practice and requires urgent attention. It is common for suspects to be held incommunicado and without charges for periods stretching sometimes into days. In the newspaper phrase a suspect is "helping the police with their inquiries"; in law he is being held illegally."[32]

The Thomson Committee in Scotland recommend that the present practice of "inviting" suspects to the police station be regularised by conferring a limited statutory authority to detain suspects at a police station. The committee listed four main purposes for which the police need such a power – to question the suspect, to isolate him while they continue their enquiries elsewhere, to take his finger prints and search him without his consent and to obtain evidence of identification. The power should be available where the police has reasonable cause to suspect the detainee of having committed an offence for which there is power to arrest without warrant. The detainee should be told immediately of the grounds of his detention and he should not be detained beyond the time at which the police (in

[30] National Registration Regulations, 1960 (L.N. 151/60) as amended by the National Registration (Amendment) Regulations, 1976 (P.U. (A) 132/76) Reg. 7(1).

[31] Criminal Procedure Code, S. 111.

[32] Michael Zander *op.cit* p. 252.

the light of the information available to them) ought to have charged or released him and in no event longer than six hours.[32]

The Australian Commission proposes that where a police officer believes on reasonable grounds that a person has committed an offence for which there is power to arrest without warrant, he may require that person to come to a police station and to remain there for as short a period as is reasonably practicable to reach a decision whether to charge him and in no event longer than four hours. If the police decide to charge the person, then within the four-hour period either he must be brought before a Magistrate or the police must decide whether to grant police bail to him.[34]

In England the Magistrate's Courts Act, 1952, provides that on a person being taken into custody for an offence without warrant, a police officer not below the rank of Inspector or the police officer in charge of the police station to which the person is brought, may and, if it will not be practicable to bring him before a Magistrate's court within twenty-four hours after his being taken into custody, shall inquire into the case and unless the offence appears to the officer to be a serious one, grant him bail subject to a duty to appear at a Magistrate's court at such time and place as the officer appoints.[35] It is possible in England therefore for a person to be detained at a police station for inquiries. In his evidence to the Royal Commission on Criminal Procedure the Commissioner of Police Metropolis listed six examples where he thought there might be an appreciable delay between arrest and charging. The delays ranged between two and seven days. The reasons given for the delays were the attempted suicide of the accused, the large number of persons involved, checking the truth of the defence and language problems.[36] In *R.* v. *Lemsatef*[37] Lawton L.J. said[38]

[33] Thomzon Committee Report *op. cit.* 3:24.

[34] Australian Law Commission Report *op. cit* pp. 92–94.

[35] Magistrates' Courts Act, 1952, S. 38(1).

[36] See Law Notes, Vol. 98. No. 6 (June 1979), p. 162.

[37] [1977] 2 All. E.R. 835 p. 839.

[38] *Ibid* at p. 839.

"it must be clearly understood that neither customs officers nor police officers have any right to detain somebody for the purposes of getting them to help with their enquiries. Police officers either arrest for an offence or they do not arrest at all. Custom officers either detain for an offence or they do not detain at all. The law is clear. Neither arrest nor detention can properly be carried out without the accused being told the offence for which he is being arrested. There is no such offence as "helping the police with their enquiries". This is a phrase which has crept into use, largely because of the need for the press to be careful about how they report what has happened when somebody has been arrested but not charged. If the idea is getting around amongst either customs and excise officers or police officers that they can arrest or detain people, as the case may be, for this particular purpose, the sooner they disabuse themselves of that idea the better."

In Malaysia under the Criminal Procedure Code a police officer making an investigation may by order in writing require the attendance before himself of any person who from the information given or otherwise appears to be acquainted with the facts of the case and such person shall attend as so required.[39] It has been held by the Privy Council in dealing with the corresponding section 160 of the Indian Criminal Procedure Code that the word "person" here includes someone who is subsequently accused of the offence. (*Narayanaswami* v. *Emperor.*[40]) There is no express power to detain the person but he may be asked to remain in the police station to be examined and to have his statement recorded.

Where a person has been arrested he may not be detained in custody for a longer period than in all the circumstances of the case is reasonable and such period shall not in the absence of a special order of a Magistrate under section 117 of the Code exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.[41] Section 117 provides that whenever any person is

[39] Criminal Procedure Code, S. 111.

[40] AIR 1939 P.C. 47.

[41] Criminal Procedure Code, S. 28.

arrested and detained in custody and it appears that investigations cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well-founded the police officer making the investigation shall forthwith transmit to a Magistrate a copy of the entries in the police diary relating to the case and shall at the same time produce the accused before such Magistrate. The Magistrate may then, authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. The Magistrate authorising detention under the custody of the police shall record his reasons for so doing.[42]

In India there has been what has been described as the "chronic malady of protracted investigation".[43] The period prescribed in the corresponding section 167 of the Indian Criminal Procedure Code was found too short for investigation and the practice grew up of applying under the former section 344 of the Indian Criminal Procedure Code (= S. 259 Malaysian CPC) for the adjournment of the case and the remand of the accused to custody. The Indian Code has now been amended to allow the Magistrate to authorise detention for a total period not exceeding sixty days. At the same time it is provided that where an offence is a summons case, that is an offence punishable with imprisonment of less than two months, the Magistrate may pass an order stopping further investigation if the investigation is not completed within a period of six months from the date the accused was arrested.[44]

In Malaysia it appears that magistrates are sometimex lax and do not ensure that the requirements of section 117 of the Code are complied with before authorising the detention of the accused.[45] It might therefore be better to repeal Section 117 and give the police power to arrest only when investigations have shown that the accused is concerned in an offence.

[42] *Ibid* S. 117.

[43] See A.I.R. Commentary on Code of Criminal Procedure, 1973, Vol. II p. 154.

[44] Indian Criminal Procedure Code, 1973, S. 167.

[45] See Ee Chin Seng "From Arrest to Release etc." – a paper submitted to the Malaysian Judicial Officers' Conference, 1979.

SEARCH AND SEIZURE

In England the powers of the police to apply for a search warrant are limited. There is no power to ask for a search warrant for example in cases of homicide;[46] and the practice of the police in searching the premises of persons arrested have been described as desirable but illegal by the Royal Commission on the Police in 1929.[47] In Malaysia there are fairly wide powers for the issue of search warrants, especially under the new section 56. Section 64 requires a list of all things seized in the cause of a search to be prepared and signed by the police officer conducting the search and section 65 provides that a copy of the list shall be supplied to the occupant at his request.[48]

QUESTIONING BEFORE CHARGE

Under the English Common Law it is established that after a person has been charged with an offence he is not obliged to make any statement and indeed he ought not to be questioned further about the offence by the police.[49] The Criminal Law Revision Committee in England has recommended the abolition of this right to silence in the police station and the conversion of the caution into a warning that failure to speak could be taken as an indication of guilt by the court.[50]

The reasons for abolishing the right were explained by the Committee thus –

(i) it is no help to an innocent person to caution him to the effect that he is not obliged to make a statement. Indeed it might deter him from saying something which might serve to exculpate him. On the other hand the caution often assists the guilty by providing an excuse for keeping back a false story until it becomes difficult to expose its fallacy.

[46] See *Ghani* v. *Jones* [1968] 3 All. E.R. 1700.

[47] Report of Royal Commission on Police Powers and Procedure *op. cit* paras. 33, 12.

[48] Criminal Procedure Code (as amended by Act A 324/76) Ss. 56, 64, 65. There is an error in section 65 where "this section" should read "the preceding section".

[49] See the Judges Rules, III(b).

[50] Criminal Law Revision Committee, Eleventh Report *op. cit* p. 16f.

(ii) it is illogical that when the police have a duty to question persons for the purpose of discovering whether and by whom an offence has been committed, they should be required to tell a person being questioned that he need not answer.[51]

Although the recommendations of the Committee have not been implemented in England some of its suggestions have been adopted in Singapore. In regard to the right of silence of the accused the Committee suggests that where an accused failed during interrogation to mention any fact subsequently relied on in his defence, the court or a jury may draw such adverse inferences as appear proper for the purpose of determining whether to commit for trial, to hold that there is a case to answer and in determining whether he is guilty of the offence charged. The Singapore Criminal Procedure Code now provides that where in any criminal proceedings against a person for an offence evidence is given that the accused, on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so charged or informed, as the case may be, the court in determining whether to commit the accused for trial or whether there is a case to answer, and the court in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper; and the failure may on the basis of such inferences, be treated as or as capable of amounting to corroboration of any evidence given as against the accused in relation to which the failure is material.[52]

Both the Thomson report and the Australian Commission reports have rejected the approach of the English Criminal Law Revision Committee. The Australian Commission conduct their examination of the issues from the standpoint that the onus is

[51] Criminal Law Revision Committee, Eleventh Report (Cmnd 4991) para 43, pp. 24–25. See also S. Chandra Mohan, Admissiblity and use of Statements made to Police Officers, [1976] 2 M.L.J. lxxxiii and [1977] 1 M.L.J. lxxxiv and D.B.W. Good, Quest for Forensic Truth, [1974] J.M.C.L. p. 161.

[52] Singapore Criminal Procedure Code, S. 122 (Amended by Act 10 of 1976)

on those who would change the present position. They pay considerable attention to the empirical evidence for the propositions that the right to silence results in more acquittals and that it is an easy escape – route for professional criminals. However they conclude that "more rights for individuals do not *necessarily* result in more guilty people going free." They go on to hold that even if the right of silence did over-protect a small group of professional criminals, this would not be "a proper ground for disadvantaging the vast bulk of suspects, of whom some are innocent" [53]

The Thomson Committee in Scotland have expressed the view that "a system in which there is a duty to provide answers to the police" would be "too heavily weighted against the suspect". Their objection however is to the requirement that the accused should be required to explain himself to the *police.* They recommend that the prosecution or the accused should be allowed to ask for a judicial examination of the accused as soon as possible after arrest. This would enable the accused to state his position regarding the charges, would enable the prosecution to ask question so as to reduce the danger of subsequent fabrication of defences and would permit inquiry as to whether the accused made statements ascribed to him in the police station.[54]

The development in the United States has also been to strengthen the privilege against self-incrimination. In *Miranda* v. *Arizona*[55] the Supreme Court ruled that before interrogating a suspect the police must inform him of his right to say nothing, to consult counsel and should he be indigent, to be provided with counsel. It must also be made clear that the suspect continues to have these rights throughout the interrogation. Warren C.J. said[56]

> "The current practice of incommunicado interrogation is at odds with one of the nation's must cherished principles

[53] Australian Law Commission Report *op. cit.* 149–150.

[54] Thomson Committee Report *op. cit* 7.05.

[55] (1965) 384 U.S. 436.

[56] *Ibid* at p. 457.

— that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial proceedings, no statement obtained from the defendant can truly be the product of his free choice".

In *Harris* v *State of New York*[57] the Supreme Court retreated somewhat from this view and held by a majority that although the statements were inadmissible to establish the prosecution's case in chief such statements could properly be used to impeach his credibility, since the shield provided by the *Miranda* case could not be perverted into a licence to use perjury by way of defence, free from the risk of confrontation with prior inconsistent utterances.

In Malaysia the Criminal Procedure Code states that the police may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement by the person so examined. This includes the suspect who is subsequently accused of the offence. Such person shall be bound to answer all questions relating to such case put to him by such police officer but he may refuse to answer any question the answer to which may have a tendency to expose him to a criminal charge or penalty or forfeiture. The person making the statement shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions. The statement made by the person shall whenever possible be taken down in writing and signed by the person making it or affixed with his thumb-print, as the case may be, after it has been read to him in the language in which it was made and after he has been given an opportunity to make any corrections he may wish.[58]

Section 113 then provides—

"(1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or

[57](1973) 401 U.S. 222.

[58]Criminal Procedure Code, S. 112, as amended by Act A 365/76.

partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
Provided that—

(a) no such statement shall be admissible or used as aforesaid—
  (i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged 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 the proceeding against him; or
  (ii) in the case of a statement made by a person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:
  "It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence"; and
(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applied shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him".[59]

[59] *Ibid*, S. 113 as substituted by Act A329/76.

The new section 113 has raised a number of problems some of which have had to be resolved by the court. While the old section 113 dealt with all statements made in the course of a police investigation, the new section 113 deals only with statements made by accused persons. The new section 113 has also removed the reference to statements made in the course of an identification or falling within sections 27 and 32(a) of the Evidence Act, 1960. It has however been held that the new section 113 does not affect the admissibility of statements under section 27 of the Evidence Act, 1960.[60] In *Public Prosecutor* v. *Ng Goh Weng and another*,[61] it has been held that despite the reference to "trial" in the section, statements by the accused may also be admissible in inquiries. At present there is no provision in the Code for the admission or use of statements by persons other than the accused to the police in the course of investigation. It seems that recourse will have to be had to the English Law under Section 5 of the Code. At present statements to the police are admissible not only under the Criminal Procedure Code but also under other laws, like the Internal Security Act and the Prevention of Corruption Ordinance. It has been suggested that the best thing to do is to repeal all the other laws and let only section 113 of the Criminal Procedure Code remain with such amendments as may be necessary.[62] It might also be better to amend section 113 to re-enact some portion of the old Code, as was done for example in Singapore.[63] In Singapore the requirement for the giving of a caution has been deleted. Instead the accused must be served with a notice in writing, which is to be explained to him, to the following effect – "Do you wish to say anything in answer to the charge? If there is any fact on which you intend to rely in your defence in court you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your

[60] *Public Prosecutor* v. *Sandra Margaret Birch* [1977] 1 M.L.J. 129; *Public Prosecutor* v. *Toh Ah Keat* [1977] 2 M.L.J. 86.

[61] [1979] 1 M.L.J. 127.

[62] *Public Prosecutory* v. *Zakaria bin Isa* [1978] 2 M.L.J. 35.

63 Singapore Criminal Procedure Code, S. 121.

case in general. If you wish to mention any fact now, and you would like it written down, this will be done".[64]

On this point of statements to the police and their admissibility, it might be pertinent to refer to what was stated by Mr. Edgar Joseph Jr. in 1975[65]

> "It appears, therefore, that contrary to many post-arrest and pre-courts rights of an accused, there is, in theory, a deterrent to ensure that the police do comply with the statutory requirements regarding the admission of statements by an accused person, since their failure to comply would render the statements inadmissible. However, in practice, since interrogation usually takes place privately in a vacant room, soon after arrest, with no lawyer or friend of the accused present, there is nothing to prevent the recording officer from saying-untruthfully-that he did not offer any inducement or threat, or, that he did administer the prescribed caution when in fact he may have done nothing of the kind. The issue, if it then arises in court, will give rise to a contest of the word of the accused alone (since invariably there are no defence witnesses on such occasions) and the word of one or more police office or officers of the investigating department concerned; an unequal context in which the accused is nearly always, if not always, worsted. When one bears in mind that statements to the police or other law enforcement officers, whether by an accused or by potential witnesses, are unsigned and, are not made in a book and no copy thereof is provided to the accused this is certainly a problem which deserves close scrutiny and remedies should be devised to overcome it. The writer knows of no reason why the accused should not be required to sign such statement, and, if he refuses, why a contemporaneous note to that effect should be made on the statement, and, why again the accused should not be furnished with a copy thereof forthwith and his signed acknowledgement therefor obtained, if possible. Such procedure would, in fact, be in the interests of the prosecution itself if,

[64] *Ibid*, as amended by Act 10 of 1976.

[65] Edgar Joseph Jr. "Right of the Accused – Law and Practice" [1976] 2 M.L.J. ii at p. vi. See also project paper by Sulaiman bin Aris "Hak-hak Siditudoh pra Perbicaraan di Malaysia," 1978.

and when, the accused claims that there was inducement, threat or promise or that no caution or no sufficient caution was administered, particularly where the accused is an educated person. The statement should be recorded, not on a loose sheet but in a book properly bound and fastened so as to render successful tampering difficult".

It will be noticed that at least one of the suggestions made by him has been incorporated into the Code.[66]

RECORDING THE INTERVIEW

Both the Thomson Committee in Scotland and the Australian Commission recommended that interview between the police and the accused should be taped. The Thomson Committee recommended that when a suspect is questioned at a police station, evidence of his statements should be inadmissible unless recorded on tape.[67] The Australian Commission on the other hand recommend that any interview should be recorded on tape if practicable and that the onus of establishing impracticability would be cast on the prosecution.[68] Both the Thomson Committee and the Law Commission recognise the practical problems that would arise but they suggest that the practical difficulties be dealt with as they emerge rather than to prolong preliminary inquiries into feasibility. A feasibility study was begun by the Home Office in England in February 1974 but the results have not yet been announced.[69]

ACCESS TO A LAWYER

The Australian Commission has recommended that a person who is detained should be informed of his right to a lawyer and should be allowed to consult his lawyer before questioning and to have him present during custodial investigation. The police officer should not begin the interview until these facilities have been provided and should allow up to two hours for the lawyer to arrive. Enforcement of these rules would be through the

[66] Criminal Procedure Code, S. 112(v) added by Act A 365/76.

[67] Thomson Committee Report *op. cit*, 7.23.

[68] Australian Law Commission Report *op. cit* 154–164.

[69] See A.J. Ashworth *op. cit* p. 603, Note.

police disciplinary code and through the judicial discretion to exclude evidence.[70]

The Thomson Committee in Scotland however do not go so far. They recommend that a detainee should have the right to have his solicitor informed of the detention but there should neither be a right to receive legal advice before interrogation nor a right to have a lawyer present during the interview. He may be permitted to seek his lawyer's advice either by telephone or by direct consultation but this will remain at the discretion of the police. Only if the police propose to hold an identification parade should the suspect have the right to consult a solicitor. "The purpose of interrogation" they said "is to obtain from the suspect such information as he may possess regarding the offence and this purpose might be defeated by the participation of his solicitor".[71]

In England the Judges Rules provides that "every person at any stage of an investigation [shall] be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so".[72] A more substantial right appears to be contained in the Criminal Law Act, 1977. Section 62 of this Act provides that where any person has been arrested and is being held in custody in a police station or other premises he shall be entitled to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him without delay or where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders with no more delay than is necessary.[74] Home Office Circular No. 74/1978 lists four examples when it may be considered necessary to delay an intimation of arrest for the purposes of the Act (i) the police

[70] *Australian Law Committee Report op. cit.* Draft Bill Clauses 23, 24, 25.

[71] Thomson Committee Report *op. cit.* 5.08.

[72] Judge's Rules, Introductory Principles (c).

[73] A.J. Ashworth *op. cit.* p. 603.

[74] Criminal Law Act, 1977, S. 62.

have arrested one member of a terrorist gang and consider that other members will escape; (ii) they have arrested a man carrying stolen goods to a receiver and wish to search the area for the receiver; immediate notification may lead to his escape (iii) a person suspected of being a persistent shoplifter is arrested and there is reason to believe that the family, if notified, will move or destroy the proceeds of previous thefts; (iv) the police have arrested a member of a bank robbery gang and immediate intimation may lead to the destruction of evidence or threats to witnesses.[75]

In Malaysia the Constitution provides that "when a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice".[76] It has been held in *Ooi Ah Phua* v. *O.C. Criminal Investigation, Kedah/Perlis*[77] that the right of an arrested person to consult his lawyer begins from the moment of arrest but that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyers on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The right should not be exercised to the detriment of any investigation by the police. In *Hashim bin Saud* v. *Yahaya bin Hashim and others*[78] the Federal Court rejected the view that the right to counsel could only be exercised after the completion of police investigation and the detention of the accused allowed under S. 117 of the Code. The right is not lost by the order of the Magistrate under S. 117 of the Code. The right starts from the day of arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice. The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police.

[75] See Law Notes Vol. 98 No. 6 (June 1979) p. 161–162.

[76] Federal Constitution, Article 5(3).

[77] [1975] 2 M.L.J. 198.

[78] [1977] 2 M.L.J. 116.

INFORMING INDIVIDUALS OF THEIR RIGHTS

The Australian Law Commission state "No criminal justice system deserves respect if its wheels are turned by ignorance" They recommend that persons who are detained should be fully informed of their rights before any questioning or other investigation begins. "They should be informed of the fact that they are in custody why they are in custody and what their rights are, in the first place in respect of the answering of questions, access to friends and relatives, access to a lawyer and subsequently, if the occasions arise, in relation to identification parade, bail and the like".[79]

In Malaysia the right of an accused to know, as soon as possible that is, upon arrest what offences he is alleged to have committed is enshrined in the Constitution[80] and the English House of Lords case of *Christie* v. *Leachinsky*[81] which lays down the proposition that an accused person is entitled to know, immediately upon arrest, what offence he is alleged to have been committed, has been followed in Malaysia.[82] But as Edgar Joseph Jr. says[83]

> "In practice, however, it is difficult, if not impossible, for an accused to prove a denial of this right. In the majority of cases, he is unrepresented at this stage of the proceedings and it will be his uncorroborated word against that of a police officer, possibly supported by other officers. If he does succeed in so proving, it could give rise to an award of damages for wrongful imprisonment but will not, of course, afford any answer to the criminal charge he faces. Furthermore, if the police, assuming they have informed the accused of the intended charge against him, decide later to amend the

[79] Australian Law Commission Report, *op. cit.* 99–100.

[80] Federal Constitution, Article 5(3).

[81] [1947] A.C. 573.

[82] *Abdul Rahman* v. *Tan Jo Koh* [1968] 1 M.L.J. 205. But see *Aminah* v. *Superintendent of Prison, Pengkalan Chepa* [1968] M.L.J. 92, where Wan Suleiman J. following *Tarapade* v. *State of West Bengal* [1951] S.C.R. 212 held that the words "as soon as possible" in Article 5(3) means as nearly as possible in the circumstances of the particular case.

[83] Edgar Joseph Jr. *op. cit* p. ii.

charge or make substitutions or additions thereto, they are at liberty to do so. In any case the investigation papers (in the more serious cases) are sent to the Deputy Public Prosecutor who would advise on the bringing of appropriate charges. It will be seen therefore, that this right of an accused enunciated in the case of *Christie* v. *Leachinsky* is somewhat illusory since the accused has little or no means of enforcing it. It is difficult to suggest reforms to this aspect of the accused's right. To require that in each and every case where an accused is arrested, he be informed in writing of the offence he has committed would impose a tremendous work load necessitating the employment of additional staff with consequent expense, thus making it impractical. On the other hand, merely verbally informing an accused person is bound to give rise to endless disputes especially so since Malaya has a cosmopolitan population."

In Malaysia before a statement is taken, the police officer must first inform the person of the provisions of subsections (ii) and (iii) of section 112 of the Code – that he is bound to answer all questions other than a question the answer to which will have a tendency to expose him to a criminal charge or penalty or forfeiture and that he is legally bound to state the truth, whether or not the statement is made in answer to questions. A statement, made by the accused after his arrest will only be admissible if the prescribed caution has been administered to him.[84]

It is unfortunate that some police officers advice the arrested persons to plead guilty or to confess to the crime. Such a practice should be discouraged. Both under the common law and under the Evidence Act it would appear that the prosecution must prove that the statement from the accused was not obtained in consequence of a threat or promise (*D.P.P.* v. *Ping Lim*).[85] It might be noted that in *Brindley and Long*[86]

[84]Criminal Procedure Code, Ss.112 and 113, as amended by Acts A 324/76 and A 365/76.

[85][1975] 3 All. E.R. 175. See Evidence Act, 1950 (Act 56), S. 24.

[86][1971] 2 All. E.R. 698. See however the Singapore case of *Lim Kim Tjok* v. *Public Prosecutor* [1978] 2 M.L.J. 94 where Wee Chong Jin C.J. said "It is settled law that words "you had better tell the truth" or equivalent expressions have always been held to import a threat or inducement".

the Court of Appeal accepted a ruling by the trial judge that the question was not whether the statement by the police that the defendant had better tell the truth was capable of being a threat or inducement but whether it actually operated on the mind of the suspect so as to make his resulting statement involuntary.

It is also unfortunate that some policemen abuse their powers and tend to use undesirable means to secure an admission of a confession from the accused. It is a pity therefore that section 114(i) of the Criminal Procedure Code which provided that "No police officer or person in authority shall 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 having reference to the charge against such person" has been repealed.[87]

In regard to confessions generally Dato David Marshall with his considerable experience as a defence counsel has said[88] "The principles governing the admissibility of confessions and statements are laudable, but impractical. Their application involves wanton waste of time, encourages perjury on the part of investigative personnel, causes frustrated irritation on the part of the defence and erosion of public confidence in the Police and the Administration of Justice. Radical surgery is called for to deal with this ulcer in our system".

He then says that he would urge that "all confessions during the investigative process be made inadmissible. Instead the Accused should be taken before a Magistrate in Chambers within 24 hours of arrest and in the presence of a Court stenographer and his counsel (if any) the Prosecution (and only the Prosecution) be permitted to question him for the record for a continuous period not exceeding 2 hours. Before the questioning commences he should be told that he can refuse to answer any or all questions, and after the questioning he should be asked if he wishes to add anything".

[87] Repealed by Act A 324 of 1976. See the case of *Public Prosecutor* v. *Lai Kim Hon and others* (Federal Territory Criminal Trial No. 1 of 1978) where a Chief Inspector, and three constables were found guilty of voluntarily causing hurt to extort a confession. See also *Sandra Margaret Birch* v. *Public Prosecutor* [1978] 1 M.L.J. 72.

[88] David Marshall op. cit pp. xxxi-xxxii.

It has been suggested in England that in respect of interrogation, the police shall be entitled to question a suspect for an adequate length of time for the purposes of obtaining information but no confession or incriminating statement obtained from him should be admissible, unless it is authenticated by a magistrate or a solicitor or by a tape recording. The safeguard that is recommended is interrogation before a magistrate or other qualified person who should record and certify any replies which are given. This can be at the request of the police or the suspect.[89]

The Criminal Procedure Code provides that a Magistrate may record any statement or confession made to him at any time before the commencement of the inquiry or the trial.[90] It would appear that because of the extensive powers given to police officers to record statements and confessions, which are admissible at the trial, not many confessions are in fact recorded by Magistrates under section 115. Perhaps more use can be made of this section.

In this connection it might be useful to have statutory provision on the lines of section 54 of the Indian Criminal Procedure Code which enacts that "When a person who is arrested whether on a charge or otherwise, alleges at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the

[89]Proposals of *Justice*. See Commonwealth Law Bulletin, July 1979 and Robert S. Gerstein, The Self-Incrimination Debate in Great Britain, American Journal of Comparative Law, Vol. 7 No. 1 (Winter 1979), p. 81.

[90]Criminal Procedure Code, S. 115. In India it has been held that confessions recorded by a Magistrate are to be admited in evidence without the Magistrate being examined as a witness. It is improper and undesirable for the prosecution to call the Magistrate for proving such statements. *Nazir Ahmad v. King Emperor* A.I.R. 1939 P.C. 253; *Kashmira Singh v. State of Madya Pradesh* A.I.R. 1952 S.C. 159.

ends of justice".[91] In *Public Prosecutor* v. *Mah Chuen Lim and others*[92] the accused had alledged that they had been manhandled and beaten by the police and counsel applied for them to be sent for medical examination. The learned Magistrate made an order accordingly but on revision the High Court held that the order was not made according to law. Syed Othman J. (as he then was) held that the order could only have been validly made under the Code if the magistrate was enquiring into an offence upon a complaint on oath. He referred to section 133 of the Code and said that as there was no such complaint in that case, the order could not be validly made.

PREPARATION FOR TRIAL

Dato David Marshall, who has been quoted already has said[93] that one of the unhappy features of the present system of criminal procedure is "the unhappy traditions of non-cooperation by the prosecution which go to the extent of:

- refusing the Defence sight of exhibits seized from the accused,
- refusing to communicate to the Defence a list of names of potential prosecution witnesses although defence seeks it only to avoid communicating with the persons named,
- refusing even to give the defence a copy of the Statement of Facts in anticipation of a plea of guilty until minutes before the plea.

In this atmosphere of non-cooperation can one believe the Prosecution would draw the Court's attention to discrepancies between the evidence on oath of their witnesses and the statements these witnesses gave the police? Can one expect the prosecution to inform the Defence of the existence of facts and witnesses that may be helpful to the Defence?

[91] Indian Code of Criminal Procedure, 1973, S. 54. See Sulaiman bin Aris, Hak-hak Siditudoh pra Perbicaraan di Malaysia, Project Paper. University of Malaya, 1978, at p. 73f.

[92] [1975] 1 M.L.J. 95.

[93] David Marshall *op. cit* p. xxxi.

Full disclosure is an essential prerequisite in civil proceedings, and, to a limited extent, in criminal proceedings in the High Court – what is the logic of refusing full disclosure in all criminal proceedings, including those in the Subordinate Courts?

Criminal trials are not poker games, any more than they are sporting events. Their purpose is not to enrich the egos of prosecutors or defence counsel.

I recommend that all statements obtained in the course of investigation and all exhibits collected should be made available to the Defence, whether or not the makers of the statements are called to the witness box or the exhibits admitted in evidence.

At present the prosecution has access to the Accused and his witnesses and extensive powers of search and seizure. I suggest that these should be supplemented by the early compulsory appearance of the Accused before a magistrate for questioning, and communication by the Defence to the prosecution, when the Defence is called on, of statements of the Accused and his witnesses, and access to all exhibits the Defence proposes to introduce".

If the prosecution should place their cards on the table so should the accused. It has been suggested that the accused should at some point prior to trial be required to provide the prosecution with copies of statements by proposed witnesses.[94]

In Malaysia the judges have had to step in to ensure that the defence are supplied with copies of relevant documents. In *Anthony Gomez* v. *Ketua Polis Daerah, Kuantan*[95] the Federal Court held that the accused has a right to be given a certified copy of the first information report lodged against him. In *Khoo Siew Bee and Another* v. *Public Prosecutor,*[96] Suffian L.P. held that the accused has a right to a copy of the cautioned statement made by him but not to copies of the statements made by the witnesses in the case.

[94] Michael Zander *op. cit* p. 255. See S. 402A of the Criminal Procedure Code on notice of the defence of alibi.

[95] [1977] 2 M.L.J. 24. In this case after the report was supplied, the Public Prosecutor withdrew the charge against the accused.

[96] [1979] 2 M.L.J. 49.

In India the position has been placed on a statutory basis by the Indian Criminal Procedure Code which provides "In any case where the proceeding has been instituted on a police report the Magistrate shall without delay furnish to the accused, free of charge, a copy of each of the following:–

(i) the police report
(ii) the first information report recorded under Section 154;
(iii) the statements recorded under subsection (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under subsection (6) of section 173.
(iv) the confessions and statements, if any, recorded under section 164.
(v) any other documents or relevant extract thereof forwarded to the police magistrate under subsection (5) of section 173.

Provided that the Magistrate may after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (iv) is voluminous, he shall instead of furnishing the accused with a copy thereof direct that he will only be allowed to inspect it either personally or through pleader in court".[97]

In England the James Committee in their report on "The Distribution of Criminal Business between the Crown Court and the Magistrates Courts" 1975, recommended that a person charged with an offence triable on indictment should have a statutory right to receive copies of the statements of prosecution witnesses before agreeing to summary trial.[98] In Malaysia today where all offences, other than those punishable with death, can

[97] Indian Code of Criminal Procedure, 1973, S. 207.

[98] The Distribution of Criminal Business between the Crown Court and the Magistrates Court, Cmnd 6323 (1975) para 230.

be tried summarily[99] it seems fair that copies of the statements of prosecution witnesses should be supplied to the defence.

There is a suggestion which appears to be gaining support in Malaysia, that preliminary inquiries should be abolished.[1] If so, it would be necessary to have legislation on the lines of the Criminal Justice Act, 1967, in England under which the prosecution may serve on the defence copies of the statements the police have taken from the witnesses.[2] We have already provision in Chapter XVIIA of the Criminal Procedure Code for a similar procedure in lieu of holding a preliminary inquiry but not much use appears to be made of this. In those cases where preliminary inquiries have already been abolished, as for example in emergency cases, in cases under the Dangerous Drugs Ordinance, 1952 and the Firearms (Increased Penalties) Act, 1971, and in cases transferred from the subordinate courts to the High Court,[3] there should be provision for the supply of the statements recorded by the police to the defence. In fact it might be argued that while the new section 41A of the Dangerous Drugs Ordinance, 1952, for example, provides that there is no necessity for a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, the Magistrate may still act under Chapter XVIIA of the Code.

In Singapore the procedure for preliminary inquiries has been simplified.[4] An examining Magistrate making an inquiry preliminary to committal for trial may, where he is satisfied (a) that all the evidence before the court, whether for the prosecution or the defence, consists of written statements tendered to the

[99] See Subodinate Courts Act, 1948 (Act 92), as amended by Act A 424/78, Ss. 63 and 85.

[1] A Resolution to this effect was passed at Conference of Judicial Officers of Malaysian. It was later supported by the Solicitor-General.

[2] Criminal Justice Act, 1967, S. 1.

[3] See Essential (Security Cases) Regulations, 1975 (P.U.(A) 320/75), as amended by P.U.(A) 362/75, Schedule, regulation 6; Dangerous Drugs Ordinance, 1952, as amended by Act A 426, S. 41A; Firearms (Increased Penalties) Act 1971 as amended by A 427, S. 11; Criminal Procedure Code (as amended by Act 324/76), S. 418A).

[4] Singapore Criminal Procedure Code, Ss. 137–139 added by Act 12 of 1972.

court, with or without exhibits and (b) that the statements disclose sufficient evidence to put an accused upon his trial, commit the accused for trial for the offence. Generally a written statement by a person will be admissible as evidence to the like extent as oral evidence to the like effect by that person subject to the following conditions—

(a) the statement purports to be signed by the person who made it;
(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true;
(c) before the statement is tendered in evidence, a copy of the statement is given, by or on behalf of the party proposing to tender it, to each of the other parties to the proceedings not less than seven days before the date of hearing;
(d) none of the other parties before the statement is tendered in evidence at the preliminary inquiry objects to the statement being so tendered.

The court may either of its own motion or on the application of any party to the proceedings require that person to attend before the court and give evidence. So much of any statement as is so admitted in evidence shall, unless the court otherwise directs, be read aloud at the hearing and when the court so directs an account shall be given orally of so much of any statement that is not read aloud. Any document or object referred to as an exhibit and identified in a written statement tendered in evidence shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.

Further where an accused who is bought before an examining Magistrate states that he wishes to plead guilty to the charge preferred against him, such Magistrate shall record the facts of the case presented by the prosecution and if the facts disclose sufficient ground for committing the accused, he shall satisfy himself that the accused understands the nature of the charge and intends to admit without qualification the offence alleged against him, and on being so satisfied, shall commit the accused

for trial for the offence. There are also provisions restricting reports of preliminary inquiries.

INTERVIEW OF WITNESSES

It apears that there is a practice of the prosecution calling up witnesses to be interviewed by the DPP and having them read their police statements immediately before they give evidence in court. The practice has been criticised as one that "must necessarily prevent them from correcting over-zealous falsehoods or admitting that they can no longer remember precise details".[5] This question was raised in the Singapore case of *Lim Hong Yap* v. *Public Prosecutor*[6] where reference was made to the English case of *R.* v. *Richardson*[7] where the Court of Appeal said:

> "Leaving such points aside it is however necessary to consider what should be the general approach of the court to there being shown in this way to witnesses their statements – which were not "contemporaneous" within the meaning of that word as normally applied to documents used to refresh memory. First, it is to be observed that it is the practice of the courts not to allow a witness to refresh his memory in the witness box by reference to written statements unless made contemporaneously. Secondly, it has been recognised in a circular issued in April 1969 with the approval of Lord Parker CJ and the judges of the Queen's Bench Division (the repositories of the common law) that witnesses for the prosecution in criminal cases are normally (though not in all circumstances) entitled, if they so request, to copies of their statements taken from them by police officers. Thirdly, it is to be noted that witnesses for the defence are normally, as is known to be the practice, allowed to have copies of their statements and refresh their memories from them at any time up to the moment they go into the witness box – indeed counsel for the appellant was careful not to submit that there was

[5] David Marshall *op. cit* p. xxxi.

[6] [1978] 1 M.L.J. 154.

[7] [1971] 2 All E.R. 773.

anything wrong about that. Fourthly, no one has ever suggested that in civil proceedings witnesses may not see their statements up to the time they go into the witness box. One has only to think for a moment of witnesses going into the box to deal with accidents which took place five or six years previously to conclude that it would be highly unreasonable if they were not allowed to see them. Is there then anything wrong in the witnesses in this case being offered an opportunity to see that which they were entitled to ask for and to be shown on request? In a case such as the present is justice more likely to be done if a witness may not see a statement made by him at a time very much closer to that of the incident?

Curiously enough, these questions are very bare of authority. Indeed the only case which has a direct bearing on this issue is one which was decided not in this country but on appeal in the Supreme Court of Hongkong in 1966: *Lau Pak Ngam* v. *Reginam*,[8] which is compactly reported. In the view of each member of this court it contains some sage observations, two of which are apt to be quoted. One of them is:

> "Testimony in the witness box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question.'

The other:

> 'Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses.'

With those views this court agrees. It is true that by the practice of the courts of this country a line is drawn at the moment when a witness enters the witness box and when giving evidence there in chief he cannot refresh his memory except by a document which, to quote the words of Phipson on Evidence, 'must have been written either at the time of the transaction or so shortly afterwards that

[8] [1966] Cr. L.R. 443.

the facts were fresh in his memory.' (Incidentally, that definition does provide a measure of elasticity and should not be taken to confine witness to an over-short period). It is moreover a practice which the courts can enforce; when a witness is in the box the court can see that he complies with that practice. The courts, however, must take care not to deprive themselves by new, artificial rules of practice of the best chances of learning the truth. The courts are under no compulsion unnecessarily to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice. Obviously it would be wrong if several witnesses were handed statements in circumstances which enable one to compare with another what each had said. But there can be no general rule (which incidentally would be unenforceable, unlike the rule as to what can be done in the witness box) that witnesses may not before trial see the statements they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed one can imagine many cases, particularly those of a complex nature, where such a rule would militate very greatly against the interests of justice."

Wee Chong Jin C.J. then said[9]

"We agree that there can be no general rule that witnesses may not before trial see the statements they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed one can imagine many cases, particularly those where the material witnesses are persons such as police officers or narcotics officers whose daily duties consist of investigating activities of a criminal nature, where such a rule would militate very greatly against the interests of justice.

In England, in *R.* v. *Westwell*[10] the Court of Appeal, Criminal Division, has also held that the fact that the prosecution has failed to inform the defence that witnesses had seen their statements before giving evidence can be no

[9] [1978] 1 M.L.J. 154 at p. 158.

[10] [1976] 2 All. E.R. 812.

bar to conviction. In our opinion the law is the same in Singapore."

THE TRIAL

The Criminal Procedure Code provides that "if the accused pleads guilty to a charge -- the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequence of his plea and intends to admit without qualification the offence alleged against him."[11] A number of cases have laid down that before recording a plea of guilty by the accused the court should satisfy itself by questioning the accused that he does really understand the charge and admit each ingredient that goes to make it up. In the Singapore case of *Kho Mie Keow* v. *Reg.*[12] Brown J. said "In a case such as this where the charge contains one or more ingredients or questions and where the accused is not represented by counsel it is desirable that each ingredient and each question involved should be explained by the Magistrate himself through the interpreter to the accused and that the accused's reply should be recorded. If, after recording them, the Magistrate is in any doubt whether the plea is an unequivocal plea of guilty, a plea of not guilty should be entered and the evidence should be called. This is particularly important in a case which is sufficiently serious to warrant a sentence of imprisonment".

Mr. Edgar Joseph Jr. has said[13] "In the writer's experience where the accused is unrepresented, there is usually compliance with the letter but not the spirit of the requirements of the Code in this respect. The wretched accused is asked, sometimes by an impatient interpreter (after the charge is read over to him) if he understands the nature and consequences of his plea. The accused answers "Yes". No attempt whatsoever is made to find out if he appreciates that an accused person, who pleads guilty has a considerably curtailed right to appeal; he may not

[11] Criminal Procedure Code, S. 173(b).

[12] [1952] M.L.J. 214. See also *Cheng Ah Sang* v. *P.P.* [1948] M.L.J. 82, *Yeo Sim Huat* v. *P.P.* [1961] M.L.J. 328.

[13] Edgar Joseph Jr. *op. cit.* p. vii.

appeal against conviction except as to its legality. Frequently he is furthermore unaware what the relevant maximum sentence is. Sometimes the accused is persuaded to plead guilty by the police who tells him that he will be let off with a small fine. He pleads guilty and is then sentenced to imprisonment. In such circumstances he has no remedy, even if he in fact is innocent of the charge."

It is suggested that in a case which is serious enough to warrant a sentence of imprisonment the Magistrate should not accept the plea on the mention date of the case but should adjourn the case to enable the accused to consult his friends, relatives and counsel. If he still maintains his plea of guilty on the date after the adjournment, only then should the Magistrate accept his plea, record the facts and circumstances and sentence the accused.

As Hashim Yeop Sani J. said in *P.P.* v. *Tasaso*[14] "I would rather live with arrears and backlog of cases which is I think a lesser evil, then have cases disposed of in such a speed and in such a hurried fashion as would leave in the minds of the ordinary persons a lingering suspicion that something is not right".

RIGHTS OF UNREPRESENTED ACCUSED

The Criminal Procedure Code provides that at every trial before the Court of a Magistrate if and when the court calls up the accused for his defence it shall, if he is not represented by an advocate inform him of his right to give evidence on his own behalf and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have the opportunity of explaining them".[15] This requirement is unfortunately seldom complied with in the subordinate courts. In *Shaari* v. *Public Prosecutor*[16] where the record did not show

[14] [1975] 2 M.L.J. 44. See also *Sau Soo Kim* v. *Public Prosecutor* [1975] 2 M.L.J. 134; *Public Prosecutor* v. *Abdul Aziz* [1978] 2 M.L.J. 155; *Loo Kim Peng and others* v. *Public Prosecutor* [1979] 1 M.L.J. 249; *Manokaran and another* v. *Public Prosecutor* [1979] 1 M.L.J. 263.

[15] Criminal Procedure Code, S. 257(1).

[16] [1963] M.L.J. 22.

that the Magistrate had complied with the provisions of section 257 of the Code, the High Court held that the omission was curable under section 422 of the Code as in the particular case the accused was able, as shown by his evidence, to explain the evidence against him and give an intelligent reply and therefore there was no failure of justice, even though the accused was convicted. It is a pity that Magistrates were not reminded that they must comply with the mandatory provisions of the section.

RIGHT TO COUNSEL

The Criminal Procedure Code provides that every person accused before any criminal court may of right be defended by an advocate.[17] It has been held in the Singapore case of *Sim Kee Tang* v. *Rex*[18] that any trial where the accused was deprived of a reasonable opportunity to obtain the services of counsel must of necessity be regarded as a mistrial. The accused must be given a reasonable opportunity of getting bail to enable him to brief counsel. In *Chung Fah Hin* v. *Public Prosecutor*[19] the accused was arrested and charged on February 8, 1949 and when he claimed trial the case was fixed for trial on the 12th February 1949, bail being granted in the sum of $10,000. On the 12th February 1949 when the case was called the accused stated that he had been unable to find the sum of $10,000 necessary for bail and therefore had been unable to instruct counsel. He asked for a brief adjournment to enable him to brief counsel. This was refused, the trial proceeded and he was convicted. On appeal it was held that the conviction must be quashed and a retrial ordered.

On the subject of counsel Dato David Marshall referred to the occasional ineptitude of defence counsel "which leads one to wonder how many are convicted and even hanged, because counsel are unequal to their responsibilities".[20] He recommends that counsel assigned in capital cases should have

[17] Criminal Procedure Code, s. 255.

[18] (1948–49) M.L.J. Supp. 151.

[19] [1948–49) M.L.J. Supp. 139.

[20] David Marshall *op. cit.* p. xxxi.

experience of defending criminal cases in the High Court; and that two counsel should be assigned in such cases one senior and one junior for experience.

Often the accused cannot afford counsel and because of poverty they occasionally plead guilty unnecessarily just to get it over quickly. Although the Legal Aid Act, 1971 has provisions for legal aid in criminal cases, these provisions have not been implemented, except in regard to criminal proceedings where the accused not being represented by counsel pleads guilty to the charge or charges and wishes to make a plea in mitigation".[21] If a legal aid scheme is to be effective in criminal cases, the burden of running it must be borne by the Bar.

RIGHT TO MAKE UNSWORN STATEMENT

The Criminal Law Revision Committee in England has recommended that the right of the accused to make an unsworn statement be abolished.[22] This suggestion has been adopted in Singapore where the amended section 173 of the Code provides that if the accused does not plead guilty to the charge as amended or if no amendment is made, the accused shall then be called to enter upon his defence. Before any evidence is called for the defence the court shall tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect will be, if when so called upon he refuses to be sworn or affirmed. The Court shall then call upon the accused to give evidence.[23]

A new section in Singapore also provides that in any criminal proceedings except an inquiry preliminary to committal for trial, the accused shall not be entitled to make a statement without being sworn or affirmed, and accordingly if he gives evidence he shall do so on oath or an affirmation and be liable to cross-examination. If the accused (a) after being called by the

[21] Legal Aid Act, 1971 (Act 26), Part III and Second Schedule; P.U. (a) 104/73. See Lim Heng Seng, Unrepresented Accused Persons in the Lower Courts, Project Paper, Faculty of Law, University of Malaya, 1975 and Gurdial Singh Nijar, The Position of the Unrepresented Accused in the Subordinate Courts in Malaysia, LL.M. dissertation, University of Malaya, 1978.

[22] Criminal Law Revision Committee, Eleventh Report, para. 102–113, pages 65f.

[23] Singapore Criminal Procedure Code, S. 173, as amended by Act 10 of 1976.

Court to give evidence or after he has informed the Court that he will given evidence refuses to be sworn or affirmed or (b) having been sworn or affirmed without good cause refuses to answer any question, the court in determining whether the accused is guilty of the offence charged may draw such inferences from the refusal as appear proper.[24]

TRIAL BEFORE HIGH COURT

In Singapore trial by jury has been abolished even in criminal cases and instead capital offences are tried before two judges.[25] There has also been a move to abolish trial by jury in Malaysia and in fact trial by jury is not required in emergency cases, in offences under the Dangerous Drugs Ordinance and under the Firearms (Increased Penalties) Act.[26] It may be better to have all trials for capital offences before a single judge, with an automatic provision for review by the Federal Court, where there is no appeal.

ADMISSIONS

In England the Criminal Justice Act, 1967, provides that any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant, and the admission by any party of such fact shall as against that party be conclusive evidence in those proceedings of the fact admitted. Such an admission may be made at the trial by counsel for either side or may be made before the proceedings, in which case if it is made by the accused, it must be in writing and approved by his counsel or solicitor. An admission cannot, it seems, be made, by an unrepresented accused. An admission may be withdrawn by leave of the court, for example, where subsequent investigation showed the accused that the facts

[24] *Ibid*, S. 186A.

[25] *Ibid*, S. 185 as amended by Act 17 of 1969.

[26] Dangerous Drugs Ordinance, 1952, S. 41A (added by Act A 426) and the Firearms (Increased Penalties) Act, 1971, S. 11 (Substituted by Act A 427).

should not be admitted.[27] Similar provisions have been made in Singapore.[28]

PROOF BY WRITTEN STATEMENT

In Singapore it has been provided that written statements may be received in evidence to the like extent as oral evidence in any criminal proceedings subject to the following conditions–

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(d) none of the other parties or their advocates and solicitors, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section; and

(e) an advocate and solicitor has been acting for the accused at any time prior to the hearing of the preliminary inquiry or the court is satisfied that the accused is aware of the provisions of this section:

Provided that the conditions mentioned in paragraphs (c) and (d) of this subsection shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

The Court may either of its own motion or on the application of any party to the proceedings, require the person making the statement to attend before the court and give evidence.

[27] Criminal Justice Act, 1967, S. 10.

[28] Singapore Criminal Procedure Code, S. 371A added by Act 12 of 1972 (renumbered by Act 10 of 1976).

So much of any statement as is admitted in evidence shall unless the court otherwise directs be read aloud at the hearing and where the court so directs an account shall be given orally of so much of any statement as is not read aloud. Any document or object referred to as an exhibit and identified in a written statement so tendered in evidence shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.[29]

HEARSAY RULE

The Criminal Law Revision Committee in England has recommended that large inroads be made into the rule against hearsay. The scheme which they propose is as follows:—

(i) to make admissible any out-of-court statement if (a) the maker is called as a witness or (b) he cannot be called because he is dead or for one of the reasons mentioned below;
(ii) to make admissible statements contained in certain kinds of records if the information in the statement was supplied by a person having personal knowledge of the matter in question and the supplier (a) is called as a witness, (b) cannot be called for one of the reasons referred to or (c) cannot be expected to remember the matters dealt with in the information;
(iii) to make special provision for the admissibility of information derived from computers;
(iv) to restate the rule as to admissibility of statements forming part of the *res gestae;*
(v) to provide that, subject to certain safeguards, out-of-court statements shall be admissible if the parties so agree;
(vi) to clarify the law by providing that hearsay evidence shall be admissible only under the provisions mentioned, under any other statutory provision or under the common law rules specifically preserved by the Bill.

The cases where an out-of-court statement is to be admissible on account of the impossibility of calling the maker as a witness are (a) where he is unavailable because he is dead, unfit to

[29] *Ibid*, S. 367A added by Act 12 of 1972 (renumbered by Act 10 of 1976).

attend as a witness, abroad, impossible to identify or impossible to find and (b) where he is available but is either not compellable as a witness and refuses to give evidence or is compellable but refuses (in court) to be sworn. On the same principle, the prosecution will be able to give in evidence against one accused a statement made by another accused jointly tried with him, as the maker cannot be called for the prosecution.

Under the scheme admissibility of hearsay statements will be subject to a number of restrictions, of which the following are the most important:

(i) in the case of oral statements only first-hand evidence of the making of the statement will be admissible (unless the statement was made in giving evidence in court);

(ii) a statement contained in a proof of evidence (including a proof incorporated in a record) given by a person who is called as a witness in the proceedings in question will not be admissible unless the court gives leave for this on the ground that in the circumstances it is in the interests of justice that the witness's evidence should be supplemented by the proof;

(iii) at a trial on indictment a statement will not be admissible by reason of the impossibility of calling the maker unless the party seeking to give it in evidence has given notice of his intention to do so with particulars of the statement and of the reason why he cannot call the maker;

(iv) a statement said to have been made, after the accused has been charged, by a person who is compellable as a witness but refuses to be sworn or by a person said to be abroad, impossible to identify or find, or to have refused to give evidence, will not be admissible at all (and there will be a similar restriction in the case of the supplier of information contained in a record);

(v) a statement made by the wife or husband of the accused (not being tried jointly with the accused) will not be admissible on behalf of the prosecution unless the maker gives evidence for the prosecution or would have been a compellable witness for the prosecution.

The purposes which it is hoped to be achieved by this scheme are the following:

(i) to admit all hearsay evidence likely to be valuable to the

greatest extent possible without undue complication or delay to the proceedings;

(ii) to ensure that evidence should continue to be given for the most part orally by allowing hearsay evidence only if the maker of the statement cannot be called or it is desirable to supplement his oral evidence;

(iii) to include necessary safeguards against the danger of manufactured hearsay evidence;

(iv) to follow the scheme of the Civil Evidence Act 1968 as far as the differences between civil and criminal proceedings allow.[30]

Some of the recommendations of the Committee have been adopted in Singapore in amendments to the Criminal Procedure Code,[31] and it is for consideration whether similar amendments should be made in Malaysia.

RIGHT TO BE RELEASED ON BAIL

The grant or refusal of bail is a matter of primary importance to both the accused and the police. An accused who is denied bail is clearly at a disadvantage when preparing his defence or in raising funds to engage counsel. As against that is the interest of the public to ensure that the accused released on bail attends his trial and will not tamper with witnesses. Obviously there must be a balancing of the interest of the public and of the accused.

An accused is presumed to be innocent until he is proved guilty. He should be entitled to be at liberty to prepare his defence. Bail should therefore be granted on adequate security, unless there are good grounds for refusing it. Bail, should, except in cases punishable with death or life imprisonment, be the rule and its refusal the exception.

It is unfortunate that the Criminal Procedure Code has used the short forms "bailable" and "non-bailable" offence,[32] as it is often overlooked that "non-bailable" only means "non-bailable

[30] Criminal Law Revision Committee, Eleventh Report, para 224–238, pages 132f.

[31] Singapore Criminal Procedure Code, Ss. 371B-371J. Added by Act 10 of 1976.

[32] Criminal Procedure Code, S. 2 and Ss. 387–388. See Teh Boon Eng Custody Pending trial or Sentence and the Bail System in the Lower Courts, Project Paper, Faculty of Law, University of Malaya, 1976.

as of right". The Court has a discretion to release on bail and should exercise its discretion in favour of the accused, unless there are good reasons for refusing bail. Unfortunately the practice of the courts in Malaysia is otherwise. Two recent cases may be referred to. In *Che Su binte Daud* v. *Public Prosecutor*[33] the accused was charged together with her husband and her brother for trafficking in dangerous drugs. She was a mother of six children, aged 11, 9, 6, 4, 3 years and 4 months respectively. Her youngest child was still breastfeeding. The offence was punishable with death or life imprisonment and her application for bail was referred in the Sessions Court. In the High Court bail was opposed on the ground that there were no exceptional and special reasons to grant bail. Luckily for the accused, Gunn Chit Tuan J. held that he was justified in exercising his discretion to release her on bail. Subsequently the case against the accused was withdrawn by the Public Prosecutor.[34]

In *Yanasengam and others* v. *Public Prosecutor*[35] the High Court held that despite the fact that the offence of gang robbery under section 395 of the Penal Code is no more punishable with life imprisonment, "the nature and seriousness of these offences speak for themselves the necessity for the old rules before the amendment in the application for bail for offences punishable with life imprisonment must continue to apply if the administration of justice is to have any real effect." The onus was placed on the accused to show special reasons for bail to be granted.

It is unfortunate that the discretion of the court to grant bail has been further restricted in cases under the Dangerous Drugs Ordinance and the Firearms (Increased Penalties) Act.[36] At present the Sessions Court has no discretion to grant bail in cases punishable with life imprisonment and it is suggested that the Code be amended to give such a discretion.

[33] [1978] 2 M.L.J. 162.

[34] New Straits Times, 5th January, 1979.

[35] [1978] 1 M.L.J. 269½.

[36] Dangerous Drugs Ordinance, 1952, as amended by Act A 426/79, S. 41B; Firearms (Increased Penalties) Act, 1971, as amended by Act A 427/79, S. 12.

EMERGENCY CASES

In emergency cases the safegurads for the accused have been further whittled down, especially in regard to the detention of the accused, the admission of statements made in custody and the trial. In this respect the interests of national security may justify the measures taken but it should be ensured that the procedure is only applicable to cases where the security of the state is involved.[37]

RIGHT OF APPEAL

At present there is only one right of appeal from the decision of a Sessions Court or a Magistrates Court and that is to the High Court. In 1976 the Courts of Judicature Act, 1964, was amended to allow an appeal to the Federal Court from the High Court in the exercise of its appellate jurisdiction in respect of an appeal from a decision of a President of a Sessions Court who is conferred with special jurisdiction.[38] The provision for the conferment of special jurisdiction on Presidents of Sessions Courts has been repealed but as Sessions Courts can now try all criminal cases, other than those punishable with death, there is a case for a further appeal from the decision of the High Court in respect of an appeal from the subordinate courts.[39]

At present it is possible for an accused person to be acquitted in the Sessions Court or the Magistrate's Court and for the Public Prosecutor to appeal to the High Court, which may then reverse the order of acquittal find him guilty and sentence him. In such a case the accused has in fact no right of appeal at all. It is suggested that in such a case the High Court should not exercise its powers to find him guilty but should order a re-trial.[40] Similarly when an accused has been acquitted in the High Court in the exercise of its original jurisdiction, the Public

[37] See the Essential (Security Cases) Regulations, 1975 P.U.(A) 320/75 as amended by P.U.(A) 362/75.

[38] Courts of Judicature Act, 1964 (Act 91), S. 50.

[39] Subordinate Courts Act, 1948 (Act 92) S. 63.

[40] See *Tan Boon Hock* v. *Public Prosecutor* [1979] 1 M.L.J. 236.

Prosecutor can appeal to the Federal Court,[41] and the Federal Court can reverse the order of acquittal and find the accused guilty. In such a case too it is suggested that the Federal Court should only order a retrial.

The power to seek a reference to the Federal Court in an appeal from a subordinate court on a point of law of public interest is discretionery in the case of an application by the defence but appears to be mandatory on the application of the Public Prosecutor. As has been said it is difficult to support this discrimination on principle since justice would seem to be done only where there is equality of treatment.[42]

Appeals to the Yang di Pertuan Agong have been abolished in criminal cases, so that the Federal Court is at present the final court of appeal. An accused person has therefore only one right of appeal from the decision of the High Court. It may be that, as has been suggested by Tun Mohamed Suffian,[43] there is need for the restructuring of the system of courts in Malaysia so that we have a court of appeal and a Supreme Court. There can then be provision for appeals to the Court of Appeal and then to the Supreme Court.

Delay in writing grounds of judgment often prejudices the accused. A particularly bad example was the case of *T.N. Nathan* v. *Public Prosecutor.*[44] In that case the accused was originally charged for an offence under the Prevention of Corruption Act 1961 alleged to have been committed in 1966. He was acquitted and discharged on January 10, 1972 without his defence being called at the close of the case for the prosecution. Unfortunately the learned President made a remark to the effect that the acquittal was on "purely technical grounds". The accused was dissatisfied with these and other related remarks of the President and he appealed to have the offending remarks expunged. The appeal was treated as an application for revision

[41] See Courts of Judicature Act, 1964 (Act 91) S. 50 and *Public Prosecutor* v. *Ooi Khai Chin and another* [1979] 1 M.L.J. 113.

[42] Edgar Joseph Jr. op. cit. p. xiii. See *Kulasingam* v. *Public Prosecutor* [1978] 2 M.L.J. 243.

[43] [1976] 2 M.L.J. cxv.

[44] [1978] 1 M.L.J. 134, See also *Voon Chin Fatt* v. *P.P.* [1948–49] MLJ Supp. 131.

and the High Court ordered a retrial before another sessions court President. See [1972] 2 MLJ 47. The retrial started on June 13, 1972 and was carried on for seventy-seven days over a period of fourteen months. It was concluded on August 20, 1973 and the accused was convicted. He appealed against his conviction but the grounds of decision dated July 20, 1974 were not supplied to counsel until July 2, 1976.

Gunn Chit Tuan J. in allowing the appeal said[54] "Trials before Presidents and Magistrates are meant to be summary trials under the Criminal Procedure Code and to my mind the interests of justice would not be served if trials in the subordinate courts are allowed to continue for many days spread over a long period of time, As it was in this case, a mass of evidence, both admissible and inadmissible, was allowed to creep in so much so that one could hardly see the wood for the trees. It is appreciated that the courts do not have the conduct of the prosecution case or that of the defence, but it would, in my opinion, help to keep out irrelevant evidence and to speed up the hearing of cases in the lower courts if Presidents and Magistrates would at appropriate times during a summary trial ask the prosecuting officer or defence counsel to indicate the relevancy of any evidence which it is proposed to adduce.

After recording over six hundred pages of evidence spread over a period of more than a year, one can understand why some time was required to write the grounds of decision. But after a period of eleven months from the date of conclusion of the trial, it was doubtful if the learned President could have remembered the impression which witnesses made upon him. It was held by Terrell Ag. C.J. in *Chia Han Kiat* v. *Rex*[46] that where judgement was not given until nearly six months later, an appellate court would in such circumstances be in an equally good position to weigh the evidence as the learned District Judge himself. In that case the learned District Judge had expressly stated that it was difficult, after many months, to remember the impression which the witness had made upon him.

[45] Ibid, at p. 135.

[46] [1937] M.L.J. 261.

In the case of *Voon Chin Fatt* v. *Public Prosecutor,*[47] the appellate court had no means of discovering whether the delay was in writing the grounds of decision or in despatching them, but Spenser Wilkinson J. had this to say about it:

> "The interval between notice of appeal and delivery of grounds of decision should, in such a case, be a matter of days, not weeks, much less months. Indeed there is a very good reason from the Magistrate's point of view why grounds of decision should always be written as promptly as possible. The sooner, after hearing the witnesses the grounds of decision are written the clearer in the mind of the Magistrate who writes them will be all the details of the evidence, the demeanour of the witnesses and the general atmosphere of the case. Where delay occurs, not only have important details faded from the mind of the Magistrate who tried the case, but also additional work is involved as the whole case has to be studied afresh in order to bring the matter back to mind. In my opinion, the fact that no time limit is laid down by law for giving grounds of decision increases the responsibility of Judges and Magistrates to see that no undue delay occurs and that the spirit of the law rather than its letter is complied with."

In the above-quoted case, the learned District Judge did not acknowledge the difficulty of remembering the impression which witnesses had made upon him, but the appellate court nevertheless held that the the long delay of two years in delivering the grounds of judgment was unsatisfactory and had prejudiced the appellant in the appeal because in writing grounds of judgement so long after the hearing it is possible that the learned District Judge may have omitted to state something in those grounds which might have been favourable to the appellant. In the present case, I regret to note that a summary trial under the provisions of the Criminal Procedure Code had to take so long to complete and that the judgement was not signed until eleven months after conclusion of the trial. Moreover, the further delay of another two years before

[47] [1948–49] M.L.J. 131.

receiving the grounds of decision was most unsatisfactory and has prejudiced the appellant."

INTEREST OF STATE

In considering the reform of criminal procedure while it is right that we should consider the safeguards for the accused, we would also have regard for the interests of the State. As Raja Azlan Shah F.J. (as he then was) said in *Hashim bin Saad* v. *Yahya bin Hashim & Anor.*[48]

> "We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the State, and not enough attention is paid to the interests of the State. We have a shocking prevalence of crime, and of crimes of violence, infractions of the plainest requirements of civilised society about which there is no debate. Our capacity to protect life and property itself is in question. There is a manifest failure to secure, through an adequate administration of our criminal laws and appropriate punishment of crimes, the deterrent effects which are in large part the object of these laws. This failure is due in part to the defects in a procedure which favours delay and obstructions to the cause of justice. The chief cause is probably a laxity of public sentiment, the most difficult thing to correct."

Ahmad Ibrahim*

[48] [1977] 2 M.L.J. 116 at p. 118.

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CONVERSION AND THE *KITABIA* IN MALAYSIA

I

One of the perennial problems of private international law resides in the effect of a conversion to Islam. Students of local family law are, at an early age, invited to consider the mysteries of *P.P.* v. *White*[1] and *A.G.* v. *Reid*,[2] and to brood upon the meaning of those cryptic words in Nawawi's *Minhaj et Talibin*,[3] an authoritative text on Shafi'i's teachings:

> An infidel of whatever religion who is converted to Islam while married to a woman whose religion is founded upon some holy scripture keeps her as his wife; but if she is an idolatress or a fire-worshipper, and is not converted with him, separation takes place immediately *ipso facto*, when the marriage has not yet been followed by cohabitation. Otherwise the continuation of the marriage depends upon whether the woman embraces the faith before the end of her period of legal retirement. If, before the expiry of this period the wife's conversion has not yet taken place, the marriage is considered to have been dissolved from the husband's conversion; and the same rule is observed if it is the wife who is converted, while the husband remains in a state of religious blindness. When, on the other hand, both parties embrace the faith at the same time, the marriage remains valid.

The same author defines "infidels whose religion is founded upon a holy scripture"[4] as "those people who follow one of the actually existing divine revelations though abrogated by the Koran, *i.e.*, Jews and Christians; but not adherents of religious sects founded only on the psalms of David, and so on. Jewesses may become wives of Moslems, even when not strictly speaking of the race of Israel, provided their nation was converted to Judaism before that revelation was abrogated by the Koran, and

[1] (1940) M.L.J. 214.

[2] [1965] A.C. 720 (P.C.)

[3] English text, from the French, London, 1914, p. 295.

[4] *Ibid.*, p. 294.