

Criminal Benchbook

TABLE OF CONTENTS

	PAGE
1. First Information Report1 <i>Wong Teck Meng</i>	1
2. Remand Pending Investigation8 <i>Gunalan Muniandy</i>	8
3. Bail15 <i>Dean Wayne</i>	15
4. Fitness For Trial22 <i>Harmindar Singh Dhaliwal</i>	22
5. Recording of the Plea26 <i>Akhtar Tahir</i>	26
6. Recording Notes of Proceedings29 <i>Harmindar Singh Dhaliwal</i>	29
7. Prima Facie Case34 <i>Rosenani Abdul Rahman</i>	34
8. Charges39 <i>Ravinthran Paramaguru</i>	39
9. Adverse Inference49 <i>Harmindar Singh Dhaliwal</i>	49
10. Identification Evidence55 <i>Harmindar Singh Dhaliwal</i>	55
11. Expert Evidence62 <i>Harmindar Singh Dhaliwal</i>	62
12. Documentary Evidence68 <i>Akhtar Tahir</i>	68
13. Impeachment Proceedings71 <i>Yew Jen Kie</i>	71
14. Hostile Witness83 <i>Ravinthran Paramaguru</i>	83

15. Child Witness	91
<i>Ravinthran Paramaguru</i>	
16. Court for Children	98
<i>Dayang Ellyn Narisa and Melissa Chia</i>	
17. The Law on Alibi	109
<i>Yew Jen Kie</i>	
18. Corroboration	117
<i>Ismail Brahim</i>	
19. Discharge under Criminal Procedure Code	125
<i>Julie Lack</i>	
20. Contempt of Court	130
<i>Harmindar Singh Dhaliwal</i>	
21. Writing of Judgments	137
<i>Harmindar Singh Dhaliwal</i>	
22. Judicial Discretion	144
<i>Rhodzariah Bujang</i>	
23. Sentencing	148
<i>Harmindar Singh Dhaliwal</i>	

First Information Report

- [1] What is First Information Report (F.I.R.)**
- [2] Prerequisites of First Information Report**
- [3] Access of accused to First Information Report**
- [4] The Importance of F.I.R as Evidence**
- [5] Failure to tender F.I.R.**
- [6] Omissions in F.I.R.**
- [7] Right of informant to be informed of the status of the investigation**

[1] What is a First Information Report (F.I.R.)

The term first information report refers to the earliest information relating to a commission of an offence given to the police under section 107 Criminal Procedure Code to enable the police to commence investigation. It is very important simply because it is the first recorded statement of occurrence. Anybody can give the first information report irrespective of whether the person has personal knowledge or being involved in the incident. Moreover, the statement given by an informant need not have to be an eyewitness's account of someone who is at the scene of the crime when it happens. F.I.R. is a vital tool upon which the police will use to initiate and commence their investigation.

F.I.R is not a precondition for police to commence police investigations. This view was observed by the Privy Council in *Emperor v Kuwaja Nazir Ahmad* A.I.R. 1945 P.C. 18 which held that the receipt and recording of information report by the police is not a precondition in a criminal investigation. F.I.R is highly significant because it is a record of the earliest information about an alleged offence, a statement given before the circumstances of the crime can be forgotten or embellished. F.I.R has to be distinguished from an arrest report which is a police report made after the commencement of police investigation and which is not admissible as evidence by virtue of section 113(1) of the Criminal Procedure Code :

Section 113. Admission of statements in evidence.

- (1) *Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence.*

But it may be used by the prosecution or the defence to cross-examine the maker.

In *Nor Hayati bte Saad & Ors v Said bin Ismail* [1991] 3 MLJ 332, it was held that the police report made one day after the accident by the driver of the motor lorry is not a first information report but a report made after police investigation had started although it is set out in the format of an information report under section 107 of the CPC. Finally, to determine whether or not a particular statement would make up the first information is a question of fact and would rely upon the circumstances of the case.

[2] Prerequisites of First Information Report

To begin with, section 107 (1) C.P.C. requires information relating to the commission of an offence. Information here means information of a crime given with the object of setting the police in motion. The information must not be vague but be definite enough to enable the police to start investigations. A vague information cannot constitute a F.I.R. The phrase “relating to” means indicating that an offence has been committed which is sufficient for the police to commence investigation on that basis.

Therefore, there need not be complete or satisfactory proof or evidence given at the time of making a F.I.R. It suffices if it indicates that an offence has been committed. In *PP v Perdeep Singh* [1999] 3 SLR 116, the High Court held that a first information report served mainly to inform the police of a possible offence having been committed and to get them down to the scene for investigations to be conducted. It need not contain the entire case for the prosecution. In *PP v Kesavan a/l Petchayo @ Balakrishnan* [2000] 1 LNS 235, it was held that while a detailed first information report may be valuable evidence, as being less likely to have been embellished, absence of details will not render the evidence of the complainant less reliable but require it to be examined more closely.

The requirements prescribed under section 107 C.P.C. are considered merely procedural, hence non compliance thereof does not invalidate or nullify the F.I.R. as to its existence and contents. In *Mani Mohan Ghose v Emperor* A.I.R. 1931 Cal.745, it was held that as the information ‘relates to the commission of a cognisable offence’ it is a first information admissible in evidence as such although the police may have neglected to record it in accordance with law.

In *A.W. Khan v State* A.I.R. 1962 Cal 641 it was decided that the absence of signature to the F.I.R by the informant does not necessary to the extent that its absence will vitiate and nullify such report. In *PP v Foong Chee Cheong* [1970] 1 M.L.J 97, the learned Magistrate acquitted the accused without calling for his defence on the ground, inter alia, that as the report of the complainant had not been reduced to writing in the first instance, the police had no power to act and that consequently, the arrest of the accused was void in law. On appeal, the High Court reversed the Magistrate’s order by ruling that a first information report is and can never

be treated as a piece of substantive evidence and the fact that no first information report was made is not in itself a ground for acquitting an accused.

[3] Access of accused to First Information Report

In preparing to defend a criminal charge made against him, an accused would normally apply to the police or the prosecution for a copy of the F.I.R. that implicated him to the offence. The application for F.I.R. usually takes place before trial.

It is trite law that the accused has a right to inspect the F.I.R. and should be supplied a copy of it if applied for. This principle of law was expounded by Suffian LP in *Anthony Gomez v Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24 (FC) where it was held that although section 76 of the Evidence Act is silent as to the right of a person to inspect a first information report, it is clear that under the common law the accused has that right as he is a person interested in it and the inspection is necessary for the protection of his interest. The first information report is admissible in evidence in the criminal trial against him under section 157 of the Evidence Act and therefore the accused or his counsel should be supplied a copy.

An additional reason to allow an accused to access to the F.I.R. can be found in the case of *Husdi v PP* [1979] 2 MLJ 304 which held that the right to an accused person to the first information is nothing more but a consequence of his right to be informed as soon as may be of the ground of his arrest under Article 5(3) of the Constitution which is an off shoot of the common law.

The right to F.I.R. also applies to civil proceedings. In *Loo Fang Siang v Ketua Polis Daerah, Butterworth* [1981] 2 MLJ 272, the court allowed the applicant who was involved in a road accident to apply for a copy of the first information report lodged by the rider of the motorcycle which had collided into the applicant.

As opposed to F.I.R., an accused may be entitled to have access to an arrest report or police report made after police investigation and be supplied with a copy if applied for.

In *PP v Ibrahim bin Arifin* [1993] 2 CLJ 531, the High Court decided that the complete removal of the original provision in S. 113 (1) of the Criminal Procedure Code by virtue of Act A 324 has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports and therefore, there is no justification for the refusal by the learned DPP to supply a copy of the arrest report to the defence on the ground that same is not a first information report or for any other reason; it being also, a public document by virtue of S.35 of the Evidence Act. The above ruling was reiterated by the same learned judge in *PP v Lee Eng Kooi* [1993] 2 CLJ 534.

However, a contrary view was considered in *PP v Roslin bin Harun* (1993) 3 CLJ 505 where the High Court ruled that as the police report was not a first information report but a statement made to the police in course of a police investigation, it was deemed to be a privileged document and therefore the prosecution need not supply a copy of the report to the defence.

[4] The Importance of F.I.R as Evidence

It is well settled that F.I.R is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it. See *Tan Cheng Kooi & Anor v PP* [1972] 2 MLJ 115.

In practice, it is always produced and proved in criminal trials. Its primary purpose being to make known to the court with the case which the prosecution has set out at the earliest stage.

For F.I.R to be used for the purpose of corroborating the oral evidence adduced at the trial, prompt lodging of the report to the police in respect of commission of an offence is necessary as delay in lodging the F.I.R often results in embellishment which is a result of after thought. The value of F.I.R is enhanced if it is recorded soon after the occurrence without lapse of time and opportunity to give a false account of the incident and before the informant's memory falters.

Any undue or unreasonable delay in lodging the F.I.R affects the truthfulness or otherwise of the prosecution's case. In such a situation, the court has to be vigilant to look for an explanation for the delay in order to arrive at the truth of the case.

Any delay in lodging the F.I.R may be satisfactorily explained by the informant and if accepted by court may not affect the veracity of the prosecution's case. In *PP v Mohammad Terang bin Amit* [1999] 1MLJ 154, the High Court held that the Magistrate should not have rejected the police reports lodged by the complainants just because it was not lodged at the first reasonable opportunity. The reasons given by the learned judge were the complainants were all school children who resided in the hostel of the school and as such the Magistrate should have considered whether they would have had the opportunity or access to lodge the police report or whether they possessed the idea and know how to lodge a police report, before rejecting the admissibility of the police report.

Section 157 of the Evidence Act 1950 allows the admission of F.I.R to corroborate the testimony of a witness by any former statement made by him. However, this form of corroboration constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In *Mohamed Ali v Public Prosecutor* [1962] MLJ 230 it was held that true corroboration by independent evidence from an extraneous source should be distinguished from "corroboration" as it appears in section 157, which rests on the principle that consistency

between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. See *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (FC). It has been held in *Morgan a/l Perumal v Ketua Inspektor Hussein bin Abdul Majid* [1996] 3 MLJ 281 that a previous statement gives rise to a strong assumption of consistency. Hence, the corroboration set out in Section 157 is only for the purpose of showing that the witness is consistent.

F.I.R may be used to contradict, discredit or impeach the evidence given by the maker in criminal trial. The relevant law where a witness may be cross-examined as to previous statements made by him in writing or reduced into writing for the purpose of contradicting is found in section 145 Evidence Act 1950. If it is intended to use the F.I.R. to contradict the maker, his attention before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

However, it must be noted that a witness can be contradicted only by a former statement made by him and not by a third party. See *Abdul Khoder bin Shafie v Low Yam Chai* [1989] 2 MLJ 483. For impeaching the credit of the maker of F.I.R., the relevant provision is section 155 (c) Evidence Act 1950. This section allows the credit of a witness be impeached by proof of former statements inconsistent with any part of which evidence which is liable to be contradicted. See *Muthusamy v PP* [1948] MLJ 57 on the procedure of impeachment.

In *Herchun Singh & Ors v PP* [1969] 2 MLJ 209 it was held that irrelevant errors in details and mere omissions in the F.I.R. should not be over emphasized to form the basis for impeaching the credit of the maker.

[5] Failure to tender F.I.R.

Failure to tender F.I.R. by the prosecution was considered in the case of *Chin Khing Siong v Rex* (1952) 18 MLJ 74 where it was held that where the evidence of the complainant is the only evidence against the accused, the failure to produce at the trial the complainant's report to the police raises a presumption that it would, if produced, have been unfavourable to the prosecution's case. Such an omission is not an irregularity that can be cured under section 448 of the Criminal Procedure Code. See *Teo Thin Chan & Ors v PP* (1957) 23 MLJ 184, *Tan Cheng Kooi & Anor v PP* [1972] 2 MLJ 115 and *PP v Abdul Razak bin Johari* [1991] 1 MLJ 105 for similar ruling on this point.

On the contrary, it was held in *Ooi Hock Leong v Regina* (1955) 21 MLJ 229, where the principal witness in the case was not the complainant but the police constable who was at the scene and chased after the accused, failure to produce the complainant's police report by the prosecution was not fatal to the prosecution's case as there was ample evidence from the police constable to prove the case against the accused.

[6] Omissions in F.I.R.

When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the informant on that fact because of such omission (*Sohoni's Code of Criminal Procedure* 7th Reprint Vol. 2, page 1497). This statement of the law was considered in the Federal Court's judgment in *Lee Ah Seng & Anor v PP* (Rayuan Jenayah No. 05-67-2005 (J) and 05-68-2005 (J)) delivered on 26.7.2007. The facts of the case showed that the complainant who was the only eyewitness to the commission of a murder of his friend did not at all mention the names or identity of the assailants who were known to him and the role they played in the commission of the crime in the F.I.R. that he made shortly after the incident. The Federal Court ruled that since the complainant was the only eyewitness to the commission of a murder of his friend did not mention the name or identity of the assailants and the role they played in the F.I.R. that he made shortly after the incident and that the explanation given for the omission was not reasonable, the omission was so serious that it proved fatal to the credibility of the complainant as a truthful witness.

On whether omissions in a police report or a statement recorded under CPC section 112 amount to a contradiction the following two cases provide useful guidance :

- (i) *Muthusamy v Public Prosecutor* [1984] MLJ 57 where Taylor J said :

"A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence."

- (ii) *Dasu v State* (1985) Cri.L.J. 1933, 1938 where the court held as follows:

"In order to see whether there is a contradiction by omission it is necessary to find out whether the two statements cannot stand together. It is also necessary to see whether the statement which the witness has made in the witness-box should have been made by him while reporting the matter soon after the incident. If the two statements made by the witness cannot stand together and the statement in the Court is such that the witness would be necessarily have made at the time of his earlier statement, then alone omission thereof can be considered to be a contradiction"

On the other hand, in the earlier case of *Herchun Singh v PP*, *supra*, the Federal Court agreed with the High Court's decision to accept the reasons given by the complainant who was a victim of a robbery to explain an important omission made in his first information report which was made shortly after the robbery. His F.I.R. not only failed to identify the accused but contained the further statement, "I do not know them (saya tidak kenal)".

[7] Right of informant to be informed of the status of the investigation

Under section 107 CPC, information relating to the commission of an offence may be made to a police officer on duty in a police station or anywhere else. Upon receiving the police report, the police must commence investigation on the case. According to new section 107A, the informant of the report may request for a report on the status of the investigation of the offence complained of in his report from the police who are obliged to give within two weeks from the receipt of the said request, or else, the informant may make a report to the Public Prosecutor of the failure to comply by the police who will then direct the police to do so. However this applies only to seizable offences and the police need not comply with the request if the status report would adversely affect the investigation of the case or the prosecution of the case.

Section 117 Criminal Procedure Code

- [1] Introduction**
- [2] Scope**
- [3] Detention of arrested person under Section 117 a judicial function**
- [4] Unlawful arrest whether bar to detention under Section 117**
- [5] The Law On Remand - Duties of Magistrate**
- [6] Importance of Investigation Diary**
- [7] Right to legal representation in remand proceedings**
- [8] Recent Development In The Law**
- [9] Conclusion**

[1] Introduction

S.117 of the Criminal Procedure Code (CPC) may be regarded as a vital procedural provision in our criminal justice system, invoked daily by Magistrates throughout the land to facilitate the investigative process by the police after the lapse of 24 hours from the time of arrest.

Nevertheless, it is equally crucial to be reminded that the power to authorise detention without trial contained therein impinge upon the fundamental liberty of the citizen enshrined in Article 4 of the Federal Constitution that no person shall be deprived of his life of liberty save in accordance with law. Hence, the need for Magistrates to exercise the judicial discretion vested in them affecting the liberty of the subject judiciously and not mechanically, which appears to be common practice in some districts. Authorising detention should not be regarded as a routine exercise despite the volume of cases or under the pretext of expediency.

[2] Scope

This section empowers a Magistrate to order extension of the detention of a person under arrest and detained in custody, beyond the 24 hour deadline, in such custody as he thinks fit, for a maximum period of 15 days in the whole. Section 28 of the CPC limits the time a police officer may detain a person arrested until production of the person before a Magistrate to a period not exceeding 24 hours exclusive of the time taken for the journey from the place of arrest to the Magistrate's Court. It is for the Magistrate concerned to consider what would be a reasonable time for the said journey but unreasonable delay in this respect should not be condoned. The words "in the whole" bear significance as they would clearly imply inclusion of the initial 24 hours

stipulated by S.28 (3) CPC and care must be taken not to fall foul of the clear limitation of 15 days set by S.117 (2). Any detention exceeding what is authorised in S.117 would be rendered unlawful imprisonment and could be the subject of civil litigation against the Government. While on the one hand enabling sufficient time to be granted for effective criminal investigation, the conditions laid down in S.117 are also aimed at protecting the citizen against arbitrary action by unscrupulous police officers.

[3] Detention of arrested person under Section 117 a judicial function

An order of a Magistrate authorising or refusing to authorise the detention of an arrested person pursuant to this section is in the exercise of a judicial function for it is an act done by a competent authority upon consideration of facts and circumstances and imposing liability of affecting the rights of others. When a Magistrate authorises the detention of an arrested person beyond the period of 24 hours he performs a judicial act and cannot found a claim for damages against the Magistrate (*Chong Fook Kam & Anor v. Shaaban & Ors* [1967] 2 MLJ 54).

In view of this pronouncement, it is incumbent upon the Magistrate issuing an order under S.117 to exercise the judicial discretion provided therein judiciously based on facts and circumstances on record founded on valid grounds to be recorded. Mechanical authorisation by Magistrates of detentions on the request of the police without compliance with procedural requirements and providing sufficient grounds has been severely criticised by both the superior courts in Malaysia and India (See Bhagwati, J. in *Hussainara Khatoon & Ors*. AIR 1979 SC 1360) on Section 167 of the Indian Code which corresponds to S.117 of our CPC]. In the Malaysian Court of Appeal Case of *PP v. Audrey Keong Mei Cheng* [1997] 4 AMR 3584, Shaik Daud, JCA said, *inter alia*, that:

“It cannot be gainsaid that where the liberty of a citizen a citizen is to be curtailed, the law must be adhered to strictly”.

The Court of Appeal has, thus, recognised that an order for detention under S.117 curtails the liberty of a citizen and as such, all the procedural requirements of this section must be strictly complied with before granting the order sought.

If the Magistrate decides to grant the order, he must exercise with care his discretion in determining the reasonable length of detention taking into account all the relevant circumstances, such as the gravity of the offence and the complexity of the investigations. It would not be just to authorise the maximum period of detention in every other case as a matter of course or routine without sufficient justification.

[4] Unlawful arrest whether bar to detention under Section 117

Is it the duty of the Magistrate conducting proceedings pursuant to this section to determine or be concerned about the legality of the arrest? The Court of Appeal in *P.P. v. Audrey Keong Mei Cheng* [supra] had to decide this fundamental point of law on arrest and detention under S.117, CPC. In this case, the learned Registrar (acting as Magistrate) had rejected the application to further detain the Respondent on the ground that her arrest was unlawful. In upholding the submission of the learned DPP that at the stage of proceedings under S.117, CPC, it was not the duty of the Magistrate to question the legality or otherwise of the arrest, Shaik Daud, JCA said (at p. 3589):

“On our perusal of the provisions of S.117 of the CPC we could not find anywhere in that section to show that before a Magistrate can act under that section the Magistrate has to be satisfied on the legality or otherwise of the arrest. We are of the view that at that stage of the proceedings the Magistrate is not to concern herself or himself on the issue of legality or otherwise of the arrest. It is not for the Magistrate to decide on the legality or otherwise of the arrest. To do so would require the Magistrate to embark on an inquiry which may in turn necessitate the calling of witnesses. That, to our mind, is not the purport of S.117 of the CPC”.

It is, thus, clear from the above principle that if a complaint is made by the suspect as to the legality of the arrest during proceedings under S.117, the Magistrate may record the complaint for record purposes but need not decide the issue and may in fact authorise further detention if the requisite conditions under S.117 are fulfilled and circumstances so warrant. In short, an unlawful arrest does not fetter the discretionary power of the Magistrate to make an order pursuant to S.117.

[5] The Law On Remand - Duties of Magistrate

It is incumbent for the Magistrate to fully appreciate not only the letter but the spirit and intent of the law as well in view of the wide powers conferred on him by this section to order detention merely on information supplied by the police purportedly based on investigations. Specifically, the Magistrate must comply with the mandatory requirements as stated and ensure that sufficient grounds as understood under the law exist before authorising detention. If there is non-compliance by the police, the Magistrate is at full liberty to refuse authorising any further remand.

The salient points of the law on remand can be summarised as follows, through not exhaustively (*Hamid's Criminal Procedure 2nd. Edition*, page 335):

- (a) It is mandatory for the police to produce the investigation diary ('ID') and the accused to the Magistrate for the purpose of obtaining a remand order (section 117(1) of the CPC).
- (b) The Magistrate must scrutinise the investigation diary and then decide whether to detain the accused person, failure to exercise this simple rigmarole would render the order of detention illegal (*Bir Bhadra Pratap Singh v. DM Azamgarh* AIR (1959) ALL 384 at page 387).
- (c) Before granting the remand, the Magistrate should satisfy himself that "there are grounds for believing that the accusation or information is well founded" (section 117(1) of the CPC).
- (d) That the presence of the accused while the police conducted the investigation would assist in discovery of some evidence and that the presence of the accused was indispensable for that purpose (*Emperor v. Kambu Kuki* 6 CLJ 36; 11 CWN 554).
- (e) It is not a sufficient reason to grant a remand on mere expectation that time would show the guilt of the accused or that further facts would come to light (*Khuda Baksh v. Crown* 17 PR 1872 (Cr)).
- (f) It is permissible to remand an accused person in order to record his caution statement under section 113 of the CPC or its equivalent.

[6] Importance of Investigation Diary

The mandatory requirement to produce the I.D. to show the entries under S.119 of the CPC to the Magistrate as well as the purpose of the information before issuance of the remand order were emphasized in *Re The Detention of R. Sivarasa & 9 Ors.* [1997] 2 CLJ and *PP v. Audrey Keong Mei Cheng* (supra). In *R. Sivarasa*, KC Vohrah, J (at pages 464 - 465) held:

"The failure to transmit to the Magistrate a copy of the entries was fatal to the application before the Magistrate as it meant that the Magistrate did not have the prescribed material (especially that referred to in S. 119(1)(d)) to act upon in her judicial enquiry whether to order further remand ... She had no jurisdiction to make the order of remand".

In reference to the same entries under S. 119, CPC, Shaik Daud, JCA said in *Audrey Keong Mei Cheng* (supra) at page 3591:

"...The details in such a diary would provide a true picture of the proceedings in the investigation in compliance with S. 119, CPC. Since

the police, in this case, failed to do this, the Registrar would be right, in law, to refuse to order further detention of the respondent”.

Similarly, under S. 117 (3), a Magistrate authorizing detention under S. 117 has a mandatory duty to record his reasons for so doing. Failure to do so would be fatal to the detention order issued as it constitutes non-compliance with a mandatory duty. [See *Saul Hamid v. P.P.* [1987] 2 MLJ 736].

[7] Right to legal representation in remand proceedings

The right to counsel is a fundamental right accorded to every person placed under arrest found in none other than the Federal Constitution itself [Article 5(3)]. The person arrested must as soon as possible not only be duly informed of the grounds of his arrest but shall also be permitted to consult and be defended by a legal practitioner of his choice. The question that arises in the present context is whether in the interests of investigation and due to urgency in gathering information he can be denied the right to be represented by counsel at the stage of remand proceedings while investigations are still in progress?

The present right is to be distinguished from the right of a suspect under arrest to consult his counsel during the period of police detention/investigation under S. 117, CPC. This fundamental point was dealt with by the Federal Court in the leading case of *Hashim b. Saad v. Yahaya b. Hashim & Anor* [1973] 2 MLJ 85 where Raja Azlan Shah, FJ, remarked in the Court’s judgement:

“We therefore did not agree with the proposition of law propounded by the learned judge that the right to counsel could only be exercised after the completion of the period of police investigation under section 117 CPC. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognizes only the form of criminal justifiable process and ignores the substance”.

In *Saul Hamid v. PP* [1987] 2 MLJ, Edgar Joseph Jr, J. recognising the principle in *Hashim b. Saad* (above), deliberated on the current issue at length and stated:

“The short but ever recurring and important point of law which arises in this revision may be stated shortly thus:

Has an arrested person the right to be represented by a legal practitioner in remand proceedings under Section 117 of the CPC?”

His Lordship answered the question posed in the affirmative as follows:

“The conclusion at which I have arrived is that generally an arrested person has a right to be represented by a legal practitioner in remand proceedings before a Magistrate under S. 117 unless the police can discharge the onus of satisfying the Magistrate that to allow him to exercise that right would result in undue interference with the course of investigation. I fail to see how they can discharge that onus by the simple unsworn ipse dixit of the police officer. The police will have to adduce evidence sufficient to convince a legal mind that there are substantial grounds to support their objection”.

The legal position is, thus, clear that an arrested person cannot as a general rule he denied legal representation during remand proceedings under this section if he so wishes save for exceptional circumstances as explained above by His Lordship. The onus lies on the police to prove the existence of these circumstances if an objection is raised against the suspect’s right to be represented by counsel at this stage.

[8] Recent Development In The Law

The *Criminal Procedure Act (Amendment) Act, 2006 (Act 1274)*, has *inter alia*, amended various sub-sections of Section 117.

Subsection (2) has been amended to limit the period of detention a Magistrate may authorize with the following additions:

- (a) if the offence which is being investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application.
- (b) If the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application.

By virtue of the above provisions, for all offences under category (a), the maximum period of detention the Magistrate may allow is seven (7) days after the 24 hour period whereas for all offences under category (b) the maximum period is as before, i.e. 14 days, but limited to a maximum of 7 days per application.

For new subsections have been introduced after subsection (2) which may be summarized as follows:

- (3) The Investigating Officer (I.O) shall state in the copy of the investigation diary (‘ID’) produced to the Magistrate whether the accused was detained for any period prior to the application whether or not the detention relates to the application.

- (4) The Magistrate in deciding the period of detention to be authorized shall take into consideration any previous detention period as per (3) above.
- (5) The Magistrate in making the above decision shall allow the accused to make representations by himself or through a counsel of his choice.
- (6) If the case is not within the Magistrate's jurisdiction and he considers further detention unnecessary, he may order the accused person to be produced before a Magistrate having such jurisdiction or if the case is tribal only by the High Court, before himself or another Magistrate having jurisdiction for the purpose of transmission to the High Court for trial.

The Original sub-section (3) has been renumbered as subsection (7)

[9] Conclusion

S.117 CPC obviously provides powers of detention after arrest with far-reaching implications and consequences. Hence, various leading authorities have, understandably, stressed the need for vigilance and care in exercising these powers strictly in accordance with the law with due regard for compliance with the procedural safeguards contained in this section in the interests of justice. Time and again it has been highlighted that failure to do so would result in injustice, particularly to the arrested person whose personal liberty guaranteed by the supreme law would be at stake. It is a time honoured legal principle that right or justice should not be sacrificed at the altar of convenience or expediency.

Bail

- [1] What Is Bail?**
- [2] Bailable Offences**
- [3] Non-Bailable Offences**
- [4] Breach Of Bail Bond**
- [5] Revocation Of Bail**
- [6] Amount Of Bond**
- [7] Discharge Of Sureties**
- [8] Bail Pending Appeal**

[1] What Is Bail?

The Criminal Procedure Code ('CPC') does not provide for the definition of bail. However, the reading of provisions in Chapter XXXVIII on bail shows that it is the surrendering of a person who was in lawful custody into of his or her sureties. There must have been an arrest and that the person arrested is required either to appear before the police for investigation of further investigation or before the court for trial or mention of his case.

Where the law permits, the court is more inclined to allow bail. The court in *Public Prosecutor v Dato' Mat @ Mat Shah bin Safuan @ Ahmad* (1991) 2 CLJ 1112 held that while remand is not intended to serve as pre-trial punishment, the outcome of such detention might be misconstrued as an oppressive privation of a person's liberty.

Section 2 (1) of the CPC defined "bailable offence" to mean an offence shown as bailable in the First Schedule to this Code or which is made bailable by any other law for the time being in force and "non-bailable offence" to mean any other offence.

[2] Bailable Offences

The provisions for bailable offences is found in s. 387. A person who is accused of a bailable offence has the right to bail. (*R v Lim Kwang Seng & Ors* (1956) MLJ 178, *Mohd Jalil bin Abdullah & Anor v Public Prosecutor* (1996) 5 MLJ at page 567, *Kim Woon v Public Prosecutor* (1999) 5 MLJ 114) However, the accused person must be prepared at any time to give bail in exchange for his release [s.387(1)]. The person accused, may be remanded if he could not provide fixed address. This happens in a situation where a person accused is released on his own bond. There is a fear that, that person may not attend court on the appointed date and there is no possibility of serving notices or even execute a warrant of his arrest for such failure.

[3] Non-Bailable Offences

The provisions for non-bailable offence are found in s. 388 of the CPC. In non-bailable cases, bail is at the discretion of the court. The court has a duty to exercise its discretion to consider the gravity of the offence. (See *Public Prosecutor v Mat Zain* (1948-1949) MLJ Supp 142)

In Mallal's Criminal Procedure (4th Ed) at page 551 thereof listed out the following factors for consideration in deciding whether bail should be granted or otherwise. They are:

- “1. *the nature and gravity of the offence charged;*
2. *the nature of the evidence in support of the charge;*
3. *whether there was or was no reasonable ground for believing the accused guilty of the offence;*
4. *the severity and degree of punishment which conviction might entail;*
5. *the guarantee that the accused, if released on bail, will not either abscond or obstruct the prosecution in any way;*
6. *the danger of the offence being continued or repeated;*
7. *the danger of witnesses being tampered with;*
8. *whether the accused, if released on bail, is likely to tamper with the prosecution evidence;*
9. *whether the accused is likely to get up false evidence in the support of the defence;*
10. *the opportunity of the accused to prepare the defence;*
11. *the character, means and standing of the accused;*
12. *the long period of detention of the accused and probability of further period of detention.”*

The above list is by no means exhaustive. In fact, the proviso to s.388(1) states that “the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.”

In the case of *Liew Nyok Chin v Public Prosecutor* (1999) 1 MLJ 437, it was held that, although the applicant came within the ambit of the said proviso, bail was however refused. The court did not find anything in the medical report to suggest that the accused was in danger of being driven to permanent insanity. Furthermore, the report revealed that the accused was under treatment. The report also stated that the accused suffered from major depression with psychotic features, symptoms which include hallucinations, delusions and suicidal tendencies. The court having weighed these factors, found that the larger public interest outweighs that of the accused and militates against the grant of bail.

The court also took into account the gravity of the offence in this case which was murder. Relying on the case of *PP v Latchemy* (1967) 2 MLJ 79 the court opined that discretion should be exercised sparingly and judiciously in granting bail which should only be granted where there are exceptional and very special reasons. The court found that the medical condition of the accused therein did not afford her exceptional or special reasons for bail.

The High Court in *Public Prosecutor v Dato' Balwant Singh* (2002) 4 CLJ JT (6) also had the opportunity to consider whether the accused who was of ill-health a sick and infirm person within the proviso of s. 388 (1) of CPC. Further, the court also addressed the issue on the social standing as well as the age of the accused in bail application.

The accused in that case was an advocate and solicitor. He was charged with the offence of murder after punishable under s. 302 of the Penal Code. He was alleged to have shot one, Gobala Krishnan a/l Rajamugundan on 7 June 2002 at about 4.30 p.m. at Jalan Maarof, Bangsar in Brickfields which resulted in death. He claimed trial and the defence then applied for bail pursuant to s. 388 of the CPC.

The court held inter alia that, bail may be granted in non-bailable offences at the discretion of the court under the section. The court found that the accused was afflicted with several diseases. He was 80 years old and fragile. These were revealed in the medical report which stood unchallenged by the prosecution. As such it was held, that the accused was a sick and infirm person within the meaning of the proviso to s. 388 (1) of the CPC.

The court having applied its mind to the materials made available before it, short of detailed examination of the evidence which would be prejudicial to either party, found that the prosecution had failed to show reasonable grounds under s. 388 (1) of the CPC for bail to be refused. In fact, the court found that the press statement made by the police which indicated that the "accused was probably justified in firing the shot," supported the plea of self defence in a murder charge, which was one of the factors to be considered in such application.

The prosecution had also not argued as to whether the accused would abscond or tamper with witnesses if the accused were released on bail. The court also noted that the police did not consider it necessary to arrest the accused. Furthermore, "the standing of the accused and his age also militate the prospect of him absconding."

While it may not be in public interest to grant bail in a murder charge, there were exceptional circumstances therein which compelled the court to conclude that the accused ought to be enlarged on bail subject to the imposition of certain conditions. The court also noted that bail were granted in several murder cases. They were in the Indian case of *Niranjan Singh and Anor v. Prabhakar Rajaram Kharote and Others* AIR (1980) SC 785, in the Australian cases of *R v Malone* (1903) St R Qd 140, *R v Vines* (1930) QWN 35 and *R v McDowell* (1954) QWN 47 and in the Canadian cases of *R v Stewart* (1946) 3 WWR 160 and *R v Hawken* (1944) 1 WWR 408.

In this case, the accused was released on bail in the sum of RM500,000.00 with two sureties subject to conditions imposed. In setting down conditions of bail the court referred to the case of (*PP v Dato' Mat* (1991) 2 MLJ 186, *PP v Abdul Rahim bin Hj Ahmad & Ors* (1988) 3 MLJ 272).

[4] Breach Of Bail Bond

If the person accused fails to attend court, he is in breach of the bail bond. A warrant of his arrest may be issued upon the application by the prosecution. A Notice to Show Cause must be issued to his sureties both returnable on a certain date allowing time for service.

In *Public Prosecutor v Chou Tai Chuan & Anor* (1988) 1 MLJ 511, it was held that where one surety was not served with the notice to produce the accused on the specified date, she was not responsible for such failure. See also *Ramlee & Anor v PP* [1969] 1 MLJ 42 and *Public Prosecutor v Tanggaah (No.2)* (1972) 1 MLJ 223.

On the returnable date, the accused person and his sureties must be given the opportunity to explain the breach. The sureties or bailors have to give satisfactory explanation as to why the accused failed to attend court. (*Khor Ewe Suan v Public Prosecutor* (1964) MLJ 220)

There must be reasonable steps taken on the part of the sureties to ensure his attendance. It is not enough for the sureties to inform the accused person of the date of hearing. There must be conscious effort to remind him frequently. (See *Yap Yin Kok v PP* (1988) 1 MLJ 238) If the court is not satisfied with the explanation, the bail amount may be forfeited in cases where it had been deposited. In cases where, where the amount was pledged, the court may enforce payment.

The procedure on forfeiture of bond is in s. 404 of the CPC. It must be established to the satisfaction of the Court that a bond under the Code had been taken [s.404(1)(a)] or the bond is for appearance before a Court [s.404(b)], it shall be forfeited. The grounds of such proof shall be recorded [s.404(1)]. Only then the Court may order any person bound by the said bond to pay the penalty or to show cause as to why it should not be paid.

The Court may proceed to recover the amount by attachment and sale of the property of the person concerned [s.404(2)]. The court may proceed to issue a warrant for the attachment and sale of the property of the person concerned if sufficient cause is not shown and the penalty is not paid [s.404(3)] The warrant may be “may be executed within the local limits of the jurisdiction of the Court which issued it, and it shall authorise the distress and sale of any property belonging to such person without such limits when indorsed by a Magistrate within the local limits of whose jurisdiction such property is found.

Where the distress and sale of the property attached does yield and proceeds for the purpose of paying the penalty “the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil prison for a term which may extend to six months.

However, the Court may exercise its discretion to remit any portion of the penalty mentioned, and enforce payment in part only [s.404(5)] Furthermore, the penalty or portion thereof is still recoverable “under the provisions of the law relating to civil procedure in force for the time being.”[s.404(6)] The aggrieved party may appeal to the High Court on the orders made in relation to the forfeiture [s.405]. It is also provided in s.406 that, “A Judge may direct any Magistrate to levy the amount due on a bond to appear and attend before the High Court.”

The court may proceed to recover the said amount by issuing a warrant for the attachment and sale of the property of the person concerned if sufficient cause is not shown and the penalty is not paid [s.404(3)]

[5] Revocation Of Bail

Any person who has been released on bail may be arrested and may be committed to custody at any subsequent stage of the proceedings [s.388(5)]. This provision is necessary for circumstances may arise where the person released on bail had attempted to intimidate witnesses. There may be tendency to commit further offences.

It was held in *Public Prosecutor v Dato' Mat @ Mat Shah bin Safuan @ Ahmad* (1991) 2 CLJ 1112 that, where there was power to admit, refuse or cancel bail it could be implied that there was power to vary or alter bail conditions.

In considering the cancellation of bail, the power must be exercised with care and circumspection in appropriate cases. It may not be granted if it is found that there was tampering of witnesses. (*Phang Yong Fook v Public Prosecutor* (1988) 1 MLJ 267)

[6] Amount Of Bond

The accused person and his sureties must be examined before bail or bond may be allowed. The police officer or court must be satisfied that the amount of money is sufficient. There may be times when the sureties may not be sure of their obligations under the bond. The sureties must therefore be informed about the possibility of the forfeiture of the bond if the person accused failed to appear in court at the time and place mentioned in the bond as and when directed [s.390(1)].

If the amount is set very high and beyond the means of the accused person, the likely result is the detention of the said person. (*Soo Shiok Liong v Public Prosecutor* (1993) 2 MLJ 381.

It is stipulated in s.389 of the Code that the amount of every bond be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested. It shall not be excessive. The accused person may seek recourse in the High Court for the amount to be varied if found to be excessive. Other matters to be considered may include the nature and seriousness of the offence, the likelihood of the accused attending the proceedings or otherwise, the accused's means.

[7] Discharge Of Sureties

All or any one of the sureties may apply to be discharged from the obligations under the bond. The application may be made before a Magistrate [s.393(1)]. This provision anticipates the incident where the sureties find that they are no longer able to ensure the accused's attendance in court. The Registrar of the Subordinate Courts may deal with the application in the absence of a Sessions Judge or the Magistrate (*Valliamai v Public Prosecutor* (1962) MLJ 280).

The Magistrate shall then proceed to issue a warrant for the arrest of the accused person for him to be brought before the court [s.393(2)]. The accused may however, surrender himself. Upon discharging the sureties, the accused person shall find other sufficient sureties to permit his release failing which he may be committed to custody pending trial. The accused may be released later should there sureties who are ready and willing to bail him out [s.393(3)].

The sureties may come before the court to explain why they wish to apply for a discharge from the obligation as a bailor. Any change in sureties and conditions must not prejudice the accused person in that, the accused person must be given the opportunity to be heard. (*Phang Yong Fook v Public Prosecutor* (1988) 1 MLJ 267). The accused may wish to look for other sureties.

[8] Bail Pending Appeal

An appeal shall not operate as a stay of execution. However, there is an automatic stay of whipping pending appeal [s.311 CPC] (*Sharma Kumari Oam Parkash v Public Prosecutor* (2000) 6 MLJ 847)

It was held in *Re Kwan Wah Yip* (1954) 20 MLJ 146 that once a person has been convicted of the offence and if there were no obvious defect on the face of the record, that person must be assumed to have been rightly convicted unless and until the conviction was set aside. It therefore follows that that person has to serve the sentence. The court there noted that a stay is pending appeal is automatic, that is sentence of whipping.

For bail pending appeal to be considered there must be special or exceptional circumstances. The court had in *KWK (A Child) v PP* (2003) 4 CLJ 5,1 after analyzing the cases of *Re Kwan Wan Yip*, *Ganesan v Public Prosecutor* (1983) 2 MLJ 369, *Yusof bin Mohamed v Public Prosecutor* (1995) 3 MLJ 66; and *Ralph v Public Prosecutor* (1972) 1 MLJ 242 enumerated several factors that may be considered as special circumstances. They are:

- “(a) the gravity or otherwise of the offence;
- (b) the length of the term of imprisonment; in comparison with the length of time which is likely to take for the appeal to be heard;
- (c) whether there are difficult points of law involved;
- (d) whether the accused is a first offender or has previous convictions;
- (e) whether the accused would become involved again in another offence whilst at liberty;
- (f) whether the security imposed will ensure the attendance of the applicant before the appellate court.”(At page 62)

The court therein admitted that the list is not exhaustive (See *Goh Beow Yam v Reg* (1956) MLJ 251).

This case was followed in *Dato' Seri Anwar Ibrahim v PP And Another Application* (2004) 1 CLJ 592. The Court of Appeal held inter alia that, "the 'critical factor the applicants must show reasonably to our satisfaction is that their cases come within the exceptional circumstances' category." However, the court found that, there was no medical evidence to support the claim that the condition of the first applicant has worsened which could meet the test of 'exceptional circumstances' for bail to be granted.

The court further held that, the issue of 'difficult point of law has not been considered as sufficient to 'demonstrate special or exceptional circumstances of the kind which would lead to a grant of bail,' (*Hanson and Anor. v The Director of Public Prosecutor* (Queensland) (2003) (unreported).

The court also held that although the gravity of the offence may a factor to be considered, there must be a distinction made between 'pre-conviction and post-conviction application for bail.' In post-conviction application for bail, a convict is not presumed innocent. The trial must be taken to have been properly conducted without error of law which resulted in that conviction (*R v Veleviski* [2000] NSWCCA 445).

The court held that the offence herein was not minor. The court also did not consider him to be a first offender in view of the fact that he had been convicted on another offence and that he was serving his sentence for the same. The Motion for bail was accordingly dismissed.

Fitness for trial

- [1] Fitness for trial and defence of insanity**
- [2] Rationale**
- [3] Who raises the issue of fitness?**
- [4] Test of fitness**
- [5] Investigations as to fitness: Procedure**
- [6] Pleading guilty and the defence of insanity**

[1] Fitness for trial and defence of insanity

Where an accused person suffers from a substantial mental incapacity, the issue of fitness to plead or fitness for trial or incapability of making a defence (s 342 Criminal Procedure Code) and the defence of insanity or unsoundness of mind (s 84 Penal Code) become relevant. Every person is presumed to be sane until the contrary is established (*PP v Ismail bin Ibrahim* [1998] 3 MLJ 243). The question of insanity may arise at the outset of the trial where the court has to determine as a preliminary issue whether the accused is fit to plead or fit to be tried. This should be distinguished from the case where the accused is fit to plead and be tried but relies on the defence of unsoundness of mind at the time of the commission of the offence.

[2] Rationale

The rationale for the principle that persons with mental illness should not be tried was referred to in *PP v Misbah bin Saat* [1997] 3 MLJ 495 as follows:

“The idea that persons of unsound mind should not be made to stand trial is one rooted in the age-old concept of fair play and fundamental justice. This ‘fitness principle’ is both the product of the basic fundamental right of an accused to defend himself and a logical extension of the common law rule which prohibits trials in absentia. An accused person suffering from mental disability is obviously unable to take the stress of a court appearance. It is also better for the dignity of the legal process that he should not be compelled to stand trial whilst labouring under such a condition. Indeed, if the accused is unable to comprehend the proceedings and to contribute to his own defence, it would be unjust to convict him because if he were capable of following the trial he might be able to exculpate himself. Moreover, mental disability may substantially diminish an accused person’s capacity to testify, to recall exonerating circumstances or identify witnesses and so

forth.”(Quoting M Cheang, “Fitness to plead in Singapore and Malaysia”, [1988] *Anglo-American Law Review* 209)

Therefore, s 342 Criminal Procedure Code (CPC) provides the statutory duty for the court to determine if a person is fit to stand trial. Section 342(1) CPC reads:

“Where a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness.”

[3] Who raises the issue of fitness?

When an accused person is brought before the court and the charges are read and explained to him, the accused will have to decide whether to plead guilty or not guilty. It is then that the accused’s sanity may arouse the suspicion of the court. It then becomes the duty of the court to investigate the fact of such unsoundness by virtue of s 342(1) CPC. The prosecution may also even before the trial to send the accused suspected of being of unsound mind to a mental hospital for observation. (s 342(5) CPC)

In *R v Dashwood* [1943] 1 KB 1, it was held:

“It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance, the medical officer of the prison where the defendant has been confined.” (cited with approval in *PP v Misbah bin Saat* [1997] 3 MLJ 503)

[4] Test of fitness

In determining whether a person a person is fit to stand trial, the court may receive in evidence a certificate in writing signed by a medical officer to the effect that the accused is of unsound mind: s 342(2) CPC.

In *PP v Misbah bin Saat* [1997] 3 MLJ 495 at 503, it was suggested that the court should not merely rely on the evidence of the medical officer but apply “a reasonable and common sense” test set out in *R v Presser* [1958] VR 45 and approved by High Court of Australia in *Kesevarajah v The Queen* (1994) 181 CLR 232. The High Court in *Kesavarajah* referred to *R v Pritchard* (1836) 7 C & P; 173 ER 135 where the minimum standards that the accused must comply with were (1) to understand the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused the offence charged; (4) to

follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge.

The trial should only proceed if the court is satisfied that the person charged is fit for trial.

[5] Investigations as to fitness: Procedure

If after a preliminary investigation, the court finds that the person charged is fit to plead, the trial can then proceed. If, however, the court finds that the said person is incapable of making his defence, then under s 342(3) CPC, the court must postpone the trial and remand the person for a period not exceeding one month for observation in any psychiatric hospital in Malaysia. The medical director of the hospital may ask for a further extension to a period of two months: s 342(4) CPC. Before the expiry of the remand period, the medical director is required to certify in writing to the court his opinion as to the state of mind of the accused.

If the court is satisfied that the person charged is of unsound mind and incapable of making his defence, the court shall find accordingly and the trial has to be postponed: s 343(2) CPC. In such a case, if the offence for which the accused is charged is bailable, the court may, in its discretion, release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person and for his appearance when required before the court: s 344(1) CPC.

Where the offence is bailable but sufficient security is not given, or if the offence charged is not bailable, the court shall report the case to the Yang di-Pertuan Agong in respect of the Federal Territory, or the Ruler or Yang di-Pertua Negeri of the State in which the trial is held. The Yang di-Pertuan Agong or the Ruler, may, in his discretion, order the accused to be confined in a psychiatric hospital: s 344(2) CPC. At the hospital, the Visitors and the Medical Director may jointly certify that in their opinion that the person is capable of making his defence: s 349 CPC. The court shall then proceed with the trial.

[6] Pleading guilty and defence of insanity

An important issue arises where a person is declared fit to stand trial but there is some evidence before the court to suggest that he was insane at the time of the commission of the offence. This often appears in the certificate of the medical officer. The issue is whether the accused in such a case is precluded from pleading guilty to the offence for which he is charged.

In *PP v Misbah bin Saat* [1997] 3 MLJ 495, it was held that once it was established that the accused is in a fit state to stand trial, on a charge being read to him, the accused, like any other person on trial, has an option to plead guilty to the charge or not. It was further held that such an accused person may choose whether to raise the defence of insanity.

However, in *PP v Ismail bin Ibrahim* [1998] 3 MLJ 243, the court held:

“To accept a plea of guilty by a person who could have succeeded on a plea of insanity is wrong in law as the plea will not amount to an offence due to absence of mens rea. Additionally, to allow such an accused person to plead guilty and be sentenced in order to avoid an order under s 348 of the CPC for whatever reasons that he may have amounts to a desire by him to gain a technical advantage which makes the plea equivocal and not genuine.”

On the issue of whether the accused person is at liberty to choose to raise the defence of insanity, the court in *PP v Ismail bin Ibrahim*, supra, also took the view that if the accused refuses to raise the plea of insanity as a defence, the court should itself conduct an inquiry into that issue in the course of the trial.

Plea of Guilt

- [1] What is Summary Trial?**
- [2] Procedure of recording a plea of guilt**
- [3] Charge to be read and explained to the accused**
- [4] Accused pleads to the charge**
- [5] Accused understands the nature and consequences of his plea**
- [6] Plea of guilt must be unequivocal**

[1] What is Summary Trial?

A summary trial deals with the whole procedure of a trial in the subordinate court of Malaysia. The procedure of a summary trial is contained in section 173 of the Criminal Procedure Code (CPC).

The procedure contained in section 173 CPC lays down the procedure from the time an accused appears or brought before the Court until a final decision is made by the Court whether to convict and sentence the accused of the offence he is charged with or to acquit and discharge him of the same.

[2] Procedure of recording a plea of guilt

The procedure to be adopted when recording a plea of guilt can be stated in the following terms.

[3] Charge to be read and explained to the accused

Before a charge is read to the accused, the Court must determine that the charge is a correct charge having regards to the procedure of drafting charges as contained in Chapter xviii of the CPC i.e. from sections 152 to 172 of CPC.

The Court must also determine that the offence stated in the charge corresponds to the offence stated in the law under which the offence is committed for example the Penal Code and other penal laws. A plea of guilty to an unknown offence in law is no plea at all [*Khor Swee Kim v PP* [1953] MLJ 117, *Maung Min Ong & Anor v PP* [2001] 5 MLJ 140]

Next, the Court must determine whether it has a jurisdiction to try the offence for which the accused is charged with.

The court will direct the charge be read and explained to the accused. It has to be remembered that the charge must not only be read but must be explained to the accused so that he understands the charge he is facing. To ensure that the accused understands the charge the charge must be read in the language

the accused is conversant with. [*Huang Chin Shiu v R* (1952) MLJ 214, *Nalliah v R* [1948] MLJ 185]

The charge must be read to the accused by a qualified court interpreter or an interpreter sworn in by the court for languages other than the normal languages of the country.

The fact that the charge is read and explained to the accused should be recorded by the Judge or Magistrate concerned and the language the charge is read and explained should be noted down.

The fact that the charge is read and explained as a general rule should be recorded in full. However where it is not possible to do so because of time constraints, abbreviation to that effect may be noted down. Normal abbreviations are TBTF in Bahasa Malaysia or CREU in English.

Where there is more than one charge against the accused, each charge should be read and explained separately and be also recorded separately. [*Mahmood Ali v PP* [1964] MLJ 57, *Subramaniam & Anor v PP* [1976] 1 MLJ 76]

Where there are more than 1 accused charged the charge should be read and explained to each accused and recorded separately.

[4] Accused pleads to the charge

After the charge is read and explained to the accused shall be asked whether he pleads guilty to the charge or claims trial.

This plea should be asked from the accused himself and nobody else even if he is represented by a counsel to ensure that the plea is made voluntarily. [*R v Than Tian Chai* [1932] MLJ 74]

The accused should also be allowed to plead in the language he is conversant with and the plea should be informed to the court by the qualified court interpreter.

When the accused pleads guilty to the charge the judge or magistrate should record the plea in full. Due to time constraints abbreviations may be used for example PG in English or MS in Bahasa Malaysia

Where there is more than 1 charge against the accused the plea for each of the charges must be noted down separately.

Where more than 1 accused is charged the plea of guilt of each accused should be recorded separately.

[5] Accused understands the nature and consequences of his plea

After the accused has pleaded guilty the court must determine he understands the nature and consequences of his plea.

To determine he understands the nature and consequences of his plea at least 3 things must be told to him.

The first is that the accused must be told if he pleads guilty a trial will not be held. In other words no witnesses will be called and he can be sentenced just based on his plea of guilt.

The second is that he can be sentenced to the maximum sentence for the offence he has committed and this would include a prison term, fine and also whipping where it is provided for. The accused must also be informed whether there is any minimum sentence provided for the offence concerned.

The third thing that the accused should be informed is that he can only appeal against his sentence but not conviction if he pleads guilty.

The matters informed to the accused as above should whenever possible be recorded by the Judge or Magistrate.

Where it is not possible the very least the Judge or Magistrate should record that the accused understands the nature and consequences of his plea. Normal abbreviations used are FSAP in Bahasa Malaysia or UNCP in English.

After the consequences have been explained the accused shall be again asked whether he still wishes to plead guilty.

The same procedure shall be adopted for each charge if the accused faces more than one charge. Further if the accused faces more than 1 charge it must be explained to him he will be sentenced separately for each of the charge and if an imprisonment term is imposed it can be consecutive or concurrent depending on the facts of the case and the discretion of the judge or magistrate.

Where there are more than 1 accused the same procedure shall be adopted for each accused.

[6] Plea of guilt must be unequivocal

It is a cardinal principle that a plea of guilty must be completely unreserved, unqualified and unequivocal. [*PP v Cheah Chooi Chuan* [1972] 1 MLJ 215]

In the case of *Heng Kim Khoon v PP* [1972] 1 MLJ 30 the High Court ruled that the plea of guilt of the accused in the lower court could not be accepted because

although he had pleaded guilty in mitigation he had stated the exhibits tendered were not his but had been left behind by a friend.

Recording Notes of Proceedings

- [1] Introduction**
- [2] Recording attendance of parties**
- [3] Recording witness details**
- [4] Observations of court**
- [5] Recording should be a narrative, not summary**
- [6] Cross-Examination/Re-examination**
- [7] Documents and Exhibits**
- [8] Use of abbreviations**

[1] Introduction

As a court of records, any issue relating to a matter in court is settled by referring to the record of proceedings. For this reason, the record must be complete and accurate. If the record of proceedings is inaccurate, it may cause injustice. The proceedings should be recorded in a calm manner. If the witnesses or counsel are speaking too quickly or if the court is unsure of what is said in court, the proper thing to do is to ask the parties to repeat what was said. Judicial officers taking down the notes of proceedings should also ensure that the notes recorded are legible. Problems are often encountered when other judicial officers have to take over conduct of part-heard cases and the notes taken by their predecessors can only be deciphered with some difficulty.

[2] Recording attendance of parties

The attendance of parties must be recorded clearly. The record should state not only the names of counsel but also the parties themselves. For example, a recording as follows is not encouraged:

“22 Oktober 2006
Ong – Plaintiff
Ranjit – Defendan”

Or “22 Oktober 2006
TPR Ahmad
OKT hadir
Peguam- Xavier”

Instead what is suggested is as follows:

“22 Oktober 2006

Encik Ong Kit Siang bagi pihak Plaintiff
 Encik Ranjit Singh bagi pihak Defendan
 Plaintiff hadir; Defendan hadir”

Or “22 Oktober 2006
 TPR Ahmad Rosli bagi pihak Pendakwa Raya
 OKT hadir
 Encik Xavier John mewakili OKT”

[3] Recording witness details

Witness details should be recorded in a clear and concise fashion. There maybe different ways of doing this. One suggestion is as follows:

For civilian witnesses:

SP1

Encik Samy a/l Nathan
 Angkat sumpah dan memberi keterangan dalam Bahasa Malaysia
 Umur 50 tahun
 Beralamat di AQ7, Setapak Garden, 50310 Kuala Lumpur
 Kerani

For government officials:

SP1

Sjn 5555 Othman bin Najib
 Angkat sumpah dan memberi keterangan dalam Bahasa Malaysia
 Umur 50 tahun
 Bertugas di Cawangan Trafik, Balai Polis Kuala Lumpur

[4] Observations of court

Observations by the court can be recorded within brackets to distinguish between the oral evidence and observations by the court. Some examples are as follows:

- Saya di arah oleh ASP Ramly untuk mengambil gambar di tempat kejadian [ASP Ramly bin Ahmad dipanggil, dicamkan]
- Saya boleh camkan orang yang tumbuk saya pada malam itu [Tertuduh dicamkan]

- Saya boleh camkan resit yang saya keluarkan kepada tertuduh. [Resit ID6 dirujuk] Ya, ini resit tersebut [ID6 dijadikan P6]
- Jarak apabila saya mula-mula lihat kereta yang langgar saya dari kandang saksi hingga ke meja peguambela [Mahkamah anggarkan jarak sebagai lebih kurang 10 kaki]
- Jarak antara tertuduh dengan saya apabila tembakan dilepaskan adalah lebih kurang 10 kaki [Saksi tunjukkan jarak dalam Mahkamah]
- Saya boleh tunjukkan tempat perlanggaran berlaku [Saksi tandakan “x” dalam dakwat merah tempat perlanggaran berlaku dalam rajah kasar P8]
- Saya ditugaskan untuk menjaga barang kes. Saya ada mencatatkan penerimaan barang kes dalam Buku Daftar Barang Kes di bawah entry 22/2005 [Buku Daftar ditanda P10. Atas permohonan Timbalan Pendakwa Raya, P10 boleh dikembalikan kepada saksi. Salainan fotostat entry 22/2005 boleh diterima dan ditandakan P10A]

[5] Recording should be a narrative, not summary

As tempting as it maybe, the court should record the words as used by the witness when giving evidence and not summarise them. This is to avoid any possible confusion that may arise later. Therefore, it is best to avoid recording evidence as follows:

- Pada 3/3/05 jam 3 petang saya menunggang WW 33
- Membawa pembonceng Ah Kow
- Kami datang dari arah Gombak menuju ke KL.
- Tiba-tiba apabila sampai dekat tol, kami dilanggar dari belakang oleh motokar BB 22.

Instead, the proper way is to record in a narrative fashion as follows:

Pada 3/3/05 jam 3 petang saya menunggang motosikal WW 33. Saya membawa pembonceng bernama Ah Kow. Kami datang dari arah Gombak dan menuju ke arah Kuala Lumpur. Tiba-tiba dekat tol, kami dilanggar oleh sebuah motosikal BB 22.

[6] Cross-examination/Re-examination

Evidence given during cross-examination is sometimes best recorded in a question and answer format. When a witness is challenged as to the accuracy or truth of the evidence given or another version of the events that transpired is

suggested, it is imperative that the both the question and answer is recorded. Even during re-examination, it may be difficult to understand the answer only without the question. Some examples are as follows:

- Saya tidak setuju yang saya tidak ambil apa-apa tindakan untuk mengelak motosikal plaintif
- Q. Saya cadangkan awak tidak ambil sebarang tindakan untuk mengelak motosikal plaintif oleh kerana kamu tidak memberi perhatian kepada kenderaan lain?

A. Tidak setuju

- Q. Semasa dalam pemeriksaan utama, kamu kata kamu boleh cam siapa yang pukul awak. Tapi dalam pemeriksaan balas kamu kata keadaan cahaya pada masa kejadian adalah gelap. Sila jelaskan bagaimana kamu boleh cam orang itu?

A. Walaupun gelap, saya boleh cam dis sebab dia berada dekat sahaja dan saya juga bawa lampu suluh pada masa itu.

[7] Documents and Exhibits

In civil cases, it is necessary to record and mark the bundle of documents that are filed. The recording can be done as follows:

'Ikatan Pliding - "A"

Ikatan Dokumen yang dipersetujui - "B"

Ikatan Dokumen yang tidak dipersetujui - "C"

In all cases during a trial, there will arise many occasions when documents or exhibits will be sought to be tendered in evidence. Sometimes there will be objections to their admissibility. In such cases, the nature of the objection, the submissions made and the court's decision have to be recorded. Once an exhibit is admitted into evidence, it can be marked as "P1" to indicate that it is the prosecution's first exhibit. If the piece of evidence is sought to be tendered by the defence, it should be marked as "D1". If an exhibit is being shown to a witness who is neither the maker nor person having custody, then it could initially be marked as "ID3", for example. The exhibit could then be tendered later when the maker is called and then remarked as "P3".

[7] Use of abbreviations

In order to record the evidence quickly, judges and magistrates often use abbreviations. For example in criminal cases, it is extremely important for the court to record the fact that the charge was read, explained and understood by the accused. Further, it is equally important to record, in cases where the accused pleads guilty to the charge, that the accused understood the nature and consequences of his plea. It is common therefore to see the notes of proceedings with the notation: "CREU PG UNCP".

For notes of proceedings in Bahasa Malaysia, the common abbreviation seen would be PBTF MS FSAP [Pertuduhan dibaca, diterangkan dan tertuduh faham; tertuduh mengaku salah; tertuduh faham akan sifat dan akibat pengakuan salahnya]. However when the notes are being prepared, it is preferable to set out in full any abbreviations used to avoid confusion.

Prima Facie Case

- [1] What is prima facie case?**
- [2] The Standard of proof**
- [3] The position of the law**
- [4] Recent Development In The Law**

[1] What Is A Prima Facie Case?

There is no statutory definition of what is a prima facie case. Oxford Companion of Law (page 907) gives the definition as:

“A case which is sufficient to call an answer while prima facie evidence which is sufficient to establish a face in the absence of any evidence to the contrary but is not conclusive”.

Mozley and Whiteley’s Law Dictionary, 11th Ed. defines prima facie case as:

“A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

Section 173(f) and section 180 of Criminal Procedure Code use the phrase “prima facie case”. Prior to the amendment in 1997, it contained the expression “if unrebutted would warrant his conviction.”

Section 173(f) reads:

- (i) When the case for the prosecution is concluded the court shall consider whether the prosecution has made out a prima facie case against the accused.
- (ii) If the court finds that the prosecution has not made out a prima facie case against the accused the court shall record an order of acquittal.

Prior to the amendment, section 173(f) read as follows:

If upon taking all the evidence herein before referred to the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal.

Prior to the amendment of Section 173(f) the principles enunciated can be found in the following cases:

- *Haw Tua Tau v PP* [1981] 2 MLJ 49.
- *Ragunathan v PP* [1982] 1 MLJ 139.
- *Munusamy v PP* [1987] 1 MLJ 492.

- *Junaidi Abdullah v PP* [1993] 3 MLJ 219.
- *Tan Boon Kean v PP* [1995] 3 MLJ 514.

After the amendment, the definition of a prima facie case has been discussed in many decided cases. In *PP v Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215 at pp 274 – 275, Augustine Paul J made the following observation:

“A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence must be such that, if rebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.”

It would appear that the effect of this subsection seeks to codify the decision of the Court in *Looi Kow Chai v PP* [2003] 1 CLJ 734. The trial court will at the end of the case for prosecution ask itself the question “If I now decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the evidence adduced by the prosecution?”

[2] The Standard Of Proof

What is the standard of proof required to be discharge by the prosecution at the end of its case?

Before the Privy Council decision in *Haw Tua Tau v PP*, supra, the burden upon the prosecution was to adduce evidence which if rebutted would warrant a conviction. The effect of *Haw Tua Tau* was that an acquittal may be had at the end of the prosecution case where either the fact adduced by the prosecution are “inherently incredible” or the fact though not inherently incredible have not established each essential element of the alleged offence.

When the court finds that the prosecution has made out a prima facie case at the close of its case it merely mean that the fact are not inherently incredible and there is some evidence on each essential element of the offence. This suggests the court is merely required to undertake a minimal evaluation of the evidence the close of the offence. However the standard of proof has changed to maximum evaluation of evidence tendered by prosecution (see *Arulpragasam a/l Sandaraju v PP* [1997]1 MLJ 1). A more vigorous test of credibility was to be applied to the prosecution evidence instead of the lower *Haw Tua Tau* standard of proof of a mere prima-facie test which called for a minimum evaluation of prosecution evidence.

Section 173 (h) CPC makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case. Section 173 (m) CPC states that at the conclusion of the trial prosecution have to prove its case beyond reasonable doubt.

As the accused can be convicted on the prima-facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt (see *Balachandran v PP* [2005] 2 MLJ 301).

[3] The Position Of The Law

In *PP v Mohd. Radzi bin Abu Bakar* [2005] 6 MLJ 399, the court viewed *Arulpragasam's* case as authority for the proposition that the test to be applied under the former section 173(f) and 180 of CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused could be called upon to enter his defence. After the amendment to section 173(f) and 180 of CPC the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence.

The judgment and interpretation of prima facie case in *Dato' Seri Anwar Ibrahim's* case, supra, was approved and preferred by Court of Appeal in *Looi Kaw Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and affirmed in *PP v Mohd Radzi bin Abu Bakar*, supra.

The Federal Court in *Mohd Radzi's* case also set out for the guidance of the courts, the following steps that should be taken by a trial court at the close of the prosecution's case:

- “(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
- (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;
- (iii) after the defence is called, the accused elects to remain silent, then convict;

- (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.”

[4] Recent Development In The Law

The Criminal Procedure Code (Amendment) Act 2006 (Act A1274) has, inter-alia, amended sections 173 and 180 of the Code.

A new sub-section 173 (h) (iii) now reads:

“(iii) for the purpose for subparagraphs(i) and (ii) a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if un rebutted or unexplained would warrant a conviction.”

Similarly, a new sub-section 180(4) now reads:

(4) for the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if rebutted or unexplained would warrant a conviction.”.

These amendments came into effect on 7 September 2007 and cannot apply retrospectively (*PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1). The chronological scenario relating to the interpretation of a *prima facie* was set out by the Federal Court in *PP v. Hanif Basree Abdul Rahman*, supra, where Zaki Azmi PCA (as he then was) said as follows:

“Prior to this amendment, as a result of the decision in *Haw Tua Tau*, there had been heated discussion on the term *prima facie* in relation to burden proof at the close of the prosecution case. After the amendment, the discussions on this subject continued culminating in *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, both Federal Court Judgments. Since then, Parliament has introduced the definition of *prima facie*. That term is now defined as “*where the prosecution has adduced credible evidence proving each ingredient of the offence which if un rebutted or unexplained would warrant a conviction*”. The saga of “the *prima facie* case” will continue when the curtain rises again in the near future. For now, it is not necessary to go into that subsection since it cannot apply retrospectively to our present case since it affects the substantial rights of the accused. There is nothing to indicate any intention as to its retrospective effect but even if it does, it would run foul of art. 7 of the Federal Constitution (see *Dalip Bhagwan Singh v. Public Prosecutor* [1979] 4 CLJ 645 at pp. 663 to 665) and *Public Prosecutor v. Ishak Hj. Shaari & other appeals* [2003] 3 CLJ 843 at pp. 851 and 852). At this stage, I should not be expressing any views on its interpretation without the benefit of a full argument.”

Charges

- [1] **Introduction**
- [2] **Form Of Charges (Section 152)**
- [3] **Where Previous Conviction Must Be Stated In The Charge**
- [4] **Particulars In A Charge (Section 153)**
- [5] **Further Particulars In Complicated Cases [Section 154]**
- [6] **Time And Date**
- [7] **Date In Respect Of The Offence Of Criminal Breach Of Trust And Dishonest Misappropriation**
- [8] **Amendment Of Charges**
- [9] **Duplicity Of Charges**
- [10] **Effect Of Duplicity**
- [11] **Joint Charges And Joint Trials**
- [12] **Effect Of Misjoinder**
- [13] **Appropriate Time To Order A Joint Trial**
- [14] **Principle Of Mutual Accumulation Of Exceptions**
- [15] **Effect Of Errors In A Charge**

[1] Introduction

A charge is:

- a notice to the accused of the matter that he is accused of and
- it is an information to the court of the matters to which evidence is to be directed (*Humayoon Shah v R* (21) WR 72, cited in *Mejar Ali Zaman bin Ali Hassan v Captain Abdul Kadir & Anor* [1989] 3 MLJ 39).

It is the first step in the institution of criminal proceedings. Therefore as stated in the above case, it must convey to the accused:

- with sufficient clearness and certainty
- that which the prosecution intends to prove against him and
- of which he will have to clear himself.

The law on charges is found in sections 152 to 172 of the Criminal Procedure Code.

[2] Form Of Charges (Section 152)

- Section 152(1) of the Criminal Procedure Code - Every charge shall state the offence with which the accused is charged.
- Section 152(2) - If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only. For example offences that have been given a specific name under the law such as murder, robbery, theft or rape must be described by that name only in the charge. Therefore a charge of murder would mean that the accused's act fell within the definition of murder under s. 299 and 300 of the Criminal Procedure Code and at the same time did come under any of the exceptions therein (see Illustrations to section 152).

Case law – *Ab. Malek Bin Atan v PP* [2002] 6 CLJ 405. In this case the accused was charged with rape and the defence contended that the specific limb of S. 375 of the Penal Code that was applicable in that case was not stated. It was held since the offence had been given a specific name, i.e. rape, it was sufficient to describe the offence by that name only in the charge.

- Section 152(3) - If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged (see illustration (d)). This provision should be read together with subsection (5) - The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. A complete definition of the offence as provided in the statute may or may not be necessary depending on whether it is sufficient to give notice to accused.

Case law – In *Ahmad bin Shafie* [1988] 1 MLJ 255, it was held the words “on his own behalf or on behalf of any other person, whether or not such person is in Malaysia” need be stated in the charge of trafficking under S. 39B DDA. In *Aw Kee Chuan v PP* [1991] 2 CLJ 979 which concerned the offence of retaining stolen property under section 411 of the Penal Code, it was held the element of knowledge or reasonable belief must be stated in the charge as it was essential ingredient of the offence. In *PP v LKI Holidays Leisure Sdn Bhd* [1998] 1 MLJ 315, the offence was running a “tour operating business” which defined under four limbs. It was held the limb that is applicable in the case of the prosecution should be stated in the charge.

- Section 152(4) - The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. This is important as it will give notice of the offence that the accused is alleged to have committed. In *Shawal Hj Mohd Yassin v PP* [2006] 6 CLJ 392, the accused was charged with assisting a foreigner to evade immigration inspection. However the offence creating section that was cited, i.e.

section 56(1A)B of the Immigration Act 1959/63 does not disclose this offence. It was held that the charge was defective.

[3] Where Previous Conviction Must Be Stated In The Charge

Some offences such as theft provide a heavier penalty for a subsequent offence. If the prosecution intends to increase the punishment on that account, the said previous conviction must be stated in the charge (section 152(6)).

Case:

PP v Govindnan a/l Chinden Nair [1998] 2 MLJ 181

[4] Particulars In A Charge (Section 153)

Section 153 enacts that certain particulars must be stated in the charge. The sufficiency of these particulars will give proper notice to the accused of the charge against him. They are in respect of :

- time
- place and
- the person or thing against whom the offence is committed.

The operative words of this provision are that particulars must be given “as are reasonably sufficient to give the accused notice of the matter with which he is charged”. This depends very much on the nature of the offence.

[5] Further Particulars In Complicated Cases [Section 154]

A charge, and especially a charge in a complicated case, should be accompanied by particulars of the acts complained of as constituting the crime charged when the mere mention of the time, place, persons and crime are insufficient to explain by what means the crime was committed (*Teoh Choon Teck v PP* [1963] MLJ 34). The next following provision, section 154, enacts that in cases where the particulars stipulated in section 152 and 153 do not give sufficient notice, the manner of commission of the offence must be stated in the charge. The Illustrations to section 154 give examples of the offences which require that the manner of commission of the offence be stated.

Examples:

- Cheating, giving false evidence, obstructing a government servant from performing his duty, disobeying a lawful direction to save somebody from punishment (as provided in the Illustrations to section 154).

- Cases – (Cheating - *Zulkiflee Bin Mohd Dom v PP* [1997] 4 MLJ 161, obstructing government servant – *Sia Geok Hee & ors v PP* [1995] 2 CLJ 841)

Case law also provides for a host of other cases where the manner of commission of offence must set out so that the accused has adequate notice of the charge.

Examples:

- Forgery (*Teoh Choon Teck v PP* (1963) MLJ 34, *PP v Raymond Chia Kim Chwee and another* [1985] 2 MLJ 63)
- Management of unlawful society (*Pek Tin Shu and anor v PP* (1948) MLJ 110)
- Abetment under section 87A(a) and section 122 (c) of the Securities Industry Act 1983 (*Datuk Tiah Thee Kian v PP & other appeals* [2002] 2 CLJ 21)

[6] Time And Date

Section 154 enacts that “time” is a particular that must be stated in the charge. However, it has been held that a mistake as to date is not material unless it is an essential part of the case for the prosecution. The oft quoted statement of law on this point is from Atkin J in the case of *Severo Dossi*:— (1918), 13 Cr App R 158, 159:

“From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.”

Cases:

Law Kiat Lang v PP [1966] 1 MLJ 215

Ho Ming Siang [1966] 1 MLJ 252

In the above cases, it was proved that the offence was committed on another day and not on the day stated in the charge. The qualification “unless it was an essential part of the alleged offence” was discussed at length in *Dato’ Seri Anwar Ibrahim v PP* [2004] 3 CLJ 737. If time is an essential part of the offence, it behoves the prosecution to prove that ingredient.

However, the specific time or date need be stated in the charge:

Cases:

Ku Lip See v PP [1982] 1 MLJ 194 – the charge stated the rape was committed between May and June of 1978.

Azahan Mohd Aminallah v PP [2005] 1 CLJ 374

[7] Date In Respect Of The Offence Of Criminal Breach Of Trust And Dishonest Misappropriation

Section 153(2) provides that it shall be sufficient to mention the gross sum and the date between which the alleged offence is committed as long as the time between the first and last date shall not exceed one year.

Cases where the accumulation of various sums of money into one charge was held to be good:

Sheik Hassan v Sheik Ibrahim [1940] MLJ 60

Ibrahim bin Daud v PP [1955] MLJ 78

Case where time period between first and last charge exceeded one year:

PP v Lim Swee Guan [1968] 2 MLJ 169

[8] Amendment Of Charges

This is provided in sections 158 to 162.

Best time to amend a charge:

- The general rule is that a charge can be altered or added at any time before judgment is pronounced (section 158(1)). This provision should be read together with section 173(h) which empower to amend a charge at the end of the prosecution's case. Furthermore, case authorities state unless the rights of the accused are not jeopardized, the best time to amend a charge is during the case for the prosecution or at the end of the case for the prosecution:

PP v Salamah binte Abdullah [1947] MLJ 178

Lew Cheok Hin v R [1956] MLJ 131

P v Tan Kim Kang & Ors [1962] MLJ 388

Procedure if charge amended or added

- If a charge is amended or added, it must read to the accused and his plea must be recorded (section 158(2)).

Case law:

Singah Mohamed Hussin v PP [1973] 2 MLJ 109 (held that failure to read the charge was fatal).

Hee Nyuk Fook v PP [1988] 2 MLJ 360 (it was held that requirement to read was directory only on the facts of that case and *Singah's case* was distinguished)

- The court should inquire whether the accused is ready to proceed with the trial on the amended or added charge. If the accused or prosecution would be prejudiced if the trial is proceeded with, the case should be adjourned. If otherwise, the trial should proceed (sections 159 and 160).

Case law :

Yee Fok Choy v PP [2003] 3 CLJ 696

- If the altered or added charge requires previous sanction, the trial should be stayed until such sanction is obtained (section 161).
- Whenever a charge is altered or amended, the accused should be given the right to recall any witness who had given evidence or call any new witness if material (section 162).

Case law :

Chiew Poh Kiong v PP [2001] 7 CLJ 249

Yeow Fook Kuen v PP [1965] 2 MLJ 81

[9] Duplicity Of Charges

Duplicity of a charge simply means that more than one offence is disclosed in single charge and this is prohibited by section 163. The general rule is that for every distinct offence there should one charge only. The exception is found in section 152(2) i.e for criminal breach of trust and dishonest misappropriation of money. Furthermore for every charge there should be a separate trial.

Cases:

PP v Norzilan Yaakob & anor [1989] 2 CLJ 345 (rep) – drug found in three places but only one charge.

PP v Mohamed Fathi [1979] 2 MLJ 75 – the offence was using four forged travel warrants and therefore there should have been four separate charges.

Mahendran a/l Manikam v Pendakwa Raya [1997] 4 MLJ 273 – In a single charge, two instances of rape were cited.

[10] Effect Of Duplicity

Generally the courts have held that it is an illegality.

- Illegality: *Ah Poon and ors v PP* [2006] 5 CLJ 521
Mahendran a/l Manikam v Pendakwa Raya [1997] 4 MLJ 273
Wee Hui Hoo v PP [1985] 1 LNS 6
Jagar Singh v PP [1936] MLJ Rep 114
Yap Liow Swee v PP [1937] MLJ 225
Muthan v PP [1947] MLJ 86)
- Irregularity: *PP v Mohamed Fathi bin Haji Ahmad* [1979] 2 MLJ 75
See Yew Poo v PP [1949] 15 MLJ 131

[11] Joint Charges And Joint Trials

The general rule is that every charge must be tried separately. Four exceptions are provided. The first three exceptions deal with one accused but several charges in single trial. The fourth deals with more than one accused persons in a single trial.

- Section 164(1) – When a person is charge with committing the same kind of offences within a period of one year. He can be tried in a single trial but the charges must not exceed three. “Offences of the same kind” is defined in section 164(2).
- Section 165 – One trial can be held for several offences committed in the same transaction. The widely accepted test of same transaction was given in *Amrita Lal Hazra v R* (1915) ILR 42 Cal 957. The important considerations are:

“proximity of time, unity or proximity of place, continuity of action and community of purpose”

The said test was accepted and applied in:

Jaafar bin Hussain v PP [1950] MLJ 154,

Chin Choy v PP [1955] MLJ 236,

Cheong Sik Kwan v PP [1959] MLJ 189

PP v Ridzuan Kok bin Abdullah [1995] 2 MLJ 745.

- Section 166 – Alternative Charges. If it is doubtful what offences the accused has committed, he may be charged for all the said offences or he may be charged in the alternative and these offences can be tried together.

Number of convictions – under illustration (a) if the accused is charged for three offences, there would be three convictions. But if he was charged in the alternative, there will be only one conviction.

Case law :

Hassan bin Ishak v Public Prosecutor [1948–49] MLJ Supp 179

Chan Chan Seng v PP [1932] MLJ 107

- Section 170 – Joint trial of more than one accused. The exceptions in sections 164-166 involve only one accused. Section 170 provides for joint trials of more than one charge and more than one accused but involving the same transaction. There is no limit to the number of charges.

These charges can include a principal offence and the offence of abetment or attempt by different accused persons. The test to apply is the test of same transaction. Thus in Illustration (a) two persons charged with same murder may be tried together whereas in Illustration (c) two members of opposing factions in riot must be tried separately.

Case law :

Datuk Hj Wasli Mohd Said v PP [2006] 6 CLJ 1

Jayaraman & Ors V. PP [1979] 2 M88

Murni Bin Hj Mohamed Taha v PP [1986] 1 MLJ 260

[12] Effect Of Misjoinder

- Joint trials in cases where it should have been ordered can be unfair to accused persons and will result in a conviction being quashed.

Case law :

Loh Shak Mow v PP and anor case [1987] 1 MLJ 362

Ahmad Shah Bin Yassin v PP [1952] MLJ 28

[13] Appropriate Time To Order A Joint Trial

- The proper time to determine whether a joint trial should be ordered is when the charges are read to the accused and not at the end of the trial. Therefore in cases where the same transaction principle applies, the court should determine whether the alleged acts were committed in the same transaction at the outset.

Case law:

Babulal Choukhani v Emperor AIR 1938 PC 130

PP v Ridzuan Kok bin Abdullah [1995] 2 MLJ 745

Jayaraman & Ors v Public Prosecutor [1979] 2 MLJ 88

[14] Principle Of Mutual Accumulation Of Exceptions

The principle works this way. The general rule is that every distinct offence should be tried separately. Four exceptions have been discussed above. These four exceptions are not mutually exclusive and thus can be used together. This simply means that if a set of facts fall within a certain exception for some charges but not for other charges, the remaining exceptions could also be invoked so that all charges are heard in a single trial.

Example:

Under section 164, the same kind of offences could be heard in a single trial if the charges do not exceed three and within a space of 12 months. However, if there are more than three charges including a charge involving a different kind of offence, they could all be heard in a single trial if the exception in section 165, i.e. the test of same transaction is also satisfied.

Case law :

Babulal Choukhani v Emperor AIR 1938 PC 130

Lim Yean Leong v PP [1940] 272

Tan Teik Leong v R [1956] MLJ 14

Cheong Sik Kwan v PP [1959] MLJ

Jayaraman & Ors v Public Prosecutor [1979] 2 MLJ 88

[15] Effect Of Errors In A Charge

Section 156 which is found in the chapter on charges in the Criminal procedure Code enacts that no error or omission in stating the offence or the particulars required shall be material unless the accused was misled by it. This would depend on the nature of the case. The Illustrations to this provision give the best examples. Section 422 of the Criminal procedure also provides that the judgment or order of any court shall not be reversed on account any error or omission in a charge unless it has occasioned a failure of justice.

Case law:

PP v Ong Kia Chan [2006] 4 CLJ 334

Abdul Hamid bin Udin v. PP [2000] 6 MLJ 334

PP v. Lee Hong Kee [1969] 2 MLJ 60

Wong Ah Kee v. Public Prosecutor [1949] 15 MLJ 68

Adverse Inference

- [1] Introduction**
- [2] Rationale**
- [3] Scope And Applicability**
- [4] Against Whom Can It Be Invoked : Prosecution**
- [4] Against Whom It Can Be Invoked : Accused**
- [5] Situations Where Presumption Will Not Arise**

[1] Introduction

The court may presume the existence of any fact from the evidence in relation to the fact which could be and is not produced would if be produced be unfavorable to the person who withholds it (s.114 illustration (g) Evidence Act 1950). This means that if a party suppresses or withholds some evidence in their possession, the court may presume that the evidence if produced would be unfavorable to the party's case thus invoking adverse inference against the party. The word "may presume" suggests that it is the discretion of the courts to make such a presumption of fact.

This presumption, being one of fact, can be raised at any stage of a proceeding (*PP v Chia Leong Foo* [2000] 6 MLJ 705).

It is to be noted that an adverse inference by virtue of this section can only be drawn against a party who alleges a fact and fails to produce evidence or a witness in relation to that fact. (*Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627)

[2] Rationale

In the case of *State of M.P v Bhim Mohd* [2002] Cri LJ 1906, it was held:

"Presumption is an inference of fact drawn from other known or proved facts. It means a rule of law that courts shall draw a particular inference from a particular fact or from a particular evidence, unless and until the truth of such inference is disproved. Presumptions help in determining the probative force of evidence by bringing the estimation of probative force under some inflexible rules..."

The presumption from withholding evidence under s 114 illustration (g) Evidence Act may be necessary in the interests of a fair trial and justice as no party should profit from withholding or suppressing best or material evidence which could throw light on the facts in issue in a trial. An adverse inference can then be drawn against a party who keeps his opponent out of possession of such evidence.

[3] Scope And Applicability

The application of s 114 illustration (g) was explained in *Murni bin Hj Mohd Taha v PP* [1986] 1 MLJ 260 in the following terms at 265:

“How should this section be applied? First, it is important to note that it is a matter of discretion for a court whether or not it presumes the existence of any fact. Secondly, as a matter of practical common sense, it is a section which ought to be narrowly construed. If it were broadly construed, it would impose on the prosecution an obligation to call many numbers of witnesses to give identical or almost identical evidence and would gravely fetter the principle that it is for the prosecution to decide which witnesses to call.

The cases to which I have referred suggest that the section should only be used where what was called an oblique motive on the part of the prosecution could be detected. If there is any evidence that the prosecution is failing to call, or make available to the defence, a witness who is likely to give evidence hostile to the prosecution case, this might well be a proper occasion on which the court would adopt a presumption under section 114 of the Evidence Ordinance.

In this present case, there was no suggestion of any oblique motive, or of any impropriety or attempt to conceal evidence, on the part of the prosecution. I do not consider that these are circumstances in which section 114 should be applied.”

The application of section 114 illustration (g) in relation to failure to produce a witness was also referred to in *PP v Mansor bin Mohd Rashid* [1996] 3 MLJ 560 FC at 579 as follows:

“Whether or not such an inference can be drawn is not a matter of an inflexible rule but depends on circumstances of each particular case. In determining this issue, the question to consider is whether the existence of a fact or state of things, the answer must naturally vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognized mode of proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned”

The type of evidence in which section 114 illustration (g) Evidence Act 1950 will be raised against party was also explained in *Munusamy v PP* [1987] 1 MLJ 492 SC at page 494:

“It is essential to appreciate the scope of section 114 illustration (g) lest it be carried to far outside its limits. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in its possession, or for non-production of not just

any witness but an important and material witness to the case”(cited in *PP v Mohd Isha bin Alias dan Satu Lagi* [2003] 3 MLJ 305 CA)

It was also said in *Dato’ Seri Anwar bin Ibrahim v PP (and Another Appeal)* 2003 5 AMR 481 CA at page 516:

“Now, it should be borne in mind that adverse inference is not to be invoked liberally by the courts. Indeed it is not in all cases of where there is an act complained of or a failure or omission to produce or adduce evidence that section is relied upon. Only in cases where there has been an intentional suppression of material or crucial evidence that it may be invoked” (citing *PP v Mansor Mohd Rashid & Anor* [1996] 3 MLJ 560 FC)

Therefore section 114 illustration (g) Evidence Act 1950 can and should only be invoked if a material evidence is withheld by a party in its possession, which will depend on circumstances of each case.

In the event there is an acute conflict of evidence on a material point in the evidence tendered, failure to tender material evidence for example a copy of search list prepared by police would result in the presumption being invoked (*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 FC)

[4] Against Whom Can It Be Invoked : Prosecution

The prosecution has a discretion whether or not to call a particular witness (*Dato’ Seri Anwar bin Ibrahim v PP (and Another Appeal)* [2003] 5 AMR 481 CA; *Khoon Chye Hin v PP* [1961] MLJ 105; *Adel Muhammed El Dabbah v A-G of Palestine* [1944] 2 All ER 139 PC). The important consideration, however, is that the prosecution must not have an improper, ulterior, oblique or wrong motive in not calling a particular witness.

In *PP v Chia Leong Foo* [2000] 6 MLJ 705 it was also held at 728:

“It is well settled that in criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not call in support of his case a witness whom he does not believe to be witness of truth. But there is an obligation on prosecution to call as witness persons whose evidence is essential to unfold the narrative upon which its case is based (citing *Seneviratne v R* [1936] 3 AER 36)”

It was also said in the same case that if the prosecution has proved its case even without calling some witnesses who are available, an adverse inference cannot be drawn for failure to call a witness when prosecution has discharged its burden (see also *Jazuli bin Mohsin v PP* [1990] 2 MLJ 190). In this regard, it was held in *Chua Keem Long v PP* [1966] 1 SLR 510 that whether the presumption of adverse effect applied was a distinct issue from whether the discretion of the prosecutor to call witnesses was correctly exercised. The former was evidentiary while the latter was procedural, failure of which could amount to a miscarriage of justice. The prosecution’s discretion to call

witnesses was not fettered by any obligation to call a particular witness; it was not obliged to allow the defence to test its evidence, or to act for the defence. Only if there is an intention to hinder or hamper the defence would a miscarriage of justice arise, requiring interference by the courts.

The prosecution also cannot, however, in an attempt to prevent an adverse inference being drawn, merely offer material witnesses to the defence where the result would be a gap in the prosecution case. It is not for the defence to call the offered witnesses to supplement the prosecution case (*Abdullah Zawawi v PP* [1985] 2 MLJ 16).

The presumption will not arise if the witnesses are offered to the defence (*Samsudin v PP* [1962] MLJ 405 CA). Even failure to offer or make available the remaining witnesses to the defence when case is proved may not be sufficient to draw an adverse inference (*Lee Lee Chong v PP* [1998] 4 MLJ 697 CA).

In the corruption case of *Dato Haji Azman bin Mahalan v PP* [2007] 3 AMR 285, at page 300 it was held that:

“...the prosecution must be conducted on the principle of absolute fairness and should not keep back matters which would assist the appellant for the truth to prevail in the trial and eventually would assist the court to ascertain the truth and come to a just decision...the exercise of the prosecution’s discretion should only be to such extent that no unfairness should be visited upon the accused...”

It was also said in the same case that merely offering a witness to the defence at the close of prosecution’s case, and which witness was called by the defence, does not relieve the prosecution of its duty to establish the charge on a prima facie case. It was further held at page 302:

“...The fundamental principle in our judicial system is that all relevant best evidence must be produced in a criminal trial for the court to ascertain the truth. However if the prosecution is allowed to take shelter under the guise that is for them to decide who they wish to call even if the particular witness is an important and a material witness, the fundamental principle would be seriously impaired just as clearly and with equal injury to our criminal justice system in this jurisdiction that an accused is presumed innocent until proven guilty”

In that case, an adverse inference was drawn against the prosecution for not calling an important and material witness considered necessary for the unfolding of the prosecution’s case, even though the witness was later called by the defence.

In *PP v Syed Muhamad Faysal bin Syed Ibrahim* [2004] 6 MLJ 302 where the accused was charged for murder it was held that making a witness available to the defence will not invoke the presumption but if the prosecution fails to prove a prima facie case at end of its case, it would be of no use to offer witnesses to the defence at that stage. If doubt exists in the prosecutions case, it is not for the defence to call the offered witness to supplement the prosecutions case.

In certain situations, even though the prosecution has discharged its burden at close of its case without calling the material witness to testify, the failure to call the same witness later to rebut the accused's defence was fatal to its case as the accused succeeded in raising a reasonable doubt in the prosecution's case (*PP v Ee Boon Keat* [2006] 2 MLJ 633)

[5] Against Whom Can It Be Invoked : Accused

In invoking a presumption under section 114 (g), great care must be taken in criminal cases where life or liberty are at stake and not to attribute to any force to which it is not entitled, but if the accused person suppresses or fabricates evidence, this is always a powerful circumstance to prove his guilt (Sarkar's Law of Evidence 11th Edition)

The general rule is that the presumption will not be raised against an accused in a criminal trial as there is no duty upon him to call any evidence. It was held in *PP v Tan Gong Wai* [1985] 1 MLJ 355 at 361:

“I realize that no adverse inference can be drawn against an accused by reason of his failure to call any witness or indeed to even give evidence on his behalf for all he has to do is to raise a reasonable doubt....”

however;

“...the failure to call any particular witness is a matter which the court may take into account in assessing the weight of the evidence (without drawing an adverse inference) especially so when the potential witnesses were persons in respect of whom prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence (*Regina v Gallagher* [1974] 1 WLR 1204; *PP v Lim Kuan Hock* [1967] 2 MLJ 114; *Tay Choo Wah v PP* [1976] 2 MLJ 95,100)”

It must be noted that the presumption maybe raised against an accused for failure to call witness where there is an onus on the defence to prove an issue, for example the issue of insanity (*Baharom v PP* [1960] MLJ 249; see also *Choo Chang Teik v PP* [1991] 3 MLJ 423 where rebuttal evidence had been led, the burden shifted on the accused to call the witness).

In drug related offences, where the accused is charged with trafficking and the presumption of trafficking has been drawn against the accused, he now has to discharge the legal burden by calling material witnesses to negate the presumed fact on balance of probabilities, otherwise an adverse inference will be drawn against him (*PP v Mohd Farid bin Mohd Sukis & Anor* [2002] 2 MLJ 401).

[5] Situations Where Presumption Will Not Arise

Adverse inference will not be raised in situations where:

- (a) if there is sufficient other evidence in support of the prosecution's case, (*Namasiyam & Ors v PP* [1987] 2 MLJ 336, 343 SC)
- (b) No adverse inference can also be drawn when a witness has been made available to the defence and the defence did not call the witness (*PP v Chee Kon Fatt* [1991] 3 CLJ 2564 HC)
- (c) The presumptions does not also arise where the prosecution has made sufficient attempts to trace an important witness, but this view must be read with caution in situations where if the testimony of the witness is essential for unfolding its case, this failure may result in prosecution not being able to discharge its burden. (*PP v Kalaiselvan* [2001] 2 MLJ 172).
- (d) If the defence failed to demand a document which that he could during trial, this failure prevents an adverse inference to be drawn against the prosecution (*Mohd Said bin Samad v PP* [1998] 2 MLJ 294 FC)
- (e) If the evidence (document) is privileged, the non-production of it does not raise the presumption as drawing an adverse inference for failure to produce a privileged document would destroy the privilege itself (*PP v Dato' Seri Anwar Ibrahim* [1999] 2 MLJ 1, 186 HC)
- (e) In drug offences, failure to call an informer as a witness will not attract adverse inference for the reason that their identity is protected under section 40 (1) Dangerous Drugs Act 1952, unless if he becomes an agent provocateur (*PP v Mohd Isha bin Alias dan Satu Lagi* [2003] 3 MLJ 305 CA and *PP v Ee Boon Keat* [2006] 2 MLJ 633 HC)

Identification Evidence

[1] Introduction

[2] Guidelines in *R v Turnbull* [1976] 3 All ER 549

[3] Appraisal of identification evidence

[4] Mode of identification

[5] Identification parade

[1] Introduction

Facts which establish the identity of anything or person whose identity is relevant is admissible under s 9 of the Evidence Act 1950. There appears to be no other specific provision either in the Evidence Act 1950 or the Criminal Procedure Code with regard to identification evidence or even identification parades which are sometimes held by the police to establish proof of identity. There are however guidelines established by a host of cases with respect to the appraisal of identification evidence.

[2] Guidelines in *R v Turnbull* [1976] 3 All ER 549

The Court of Appeal in England in *Turnbull* established useful guidelines in cases where identity is a crucial issue. These Turnbull guidelines as they came to be called are followed in various jurisdictions including Malaysia (see *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232). In *Jaafar bin Ali v PP* [1998] 4 MLJ 406, Augustine Paul J referred to *Criminal Evidence* (3rd Ed) by Andrews & Hirst which rearranged the Turnbull guidelines into four issues as follows:

“(a) *The need for the judge to warn the jury about the dangers of identification evidence*

First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance upon the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning, and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury

should be reminded that mistakes in recognition of close relatives and friends are sometimes made...(at pp 551-552).

(b) The need for him to direct the jury to examine various specific matters that may affect the strength or cogency of the evidence before them

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger (at p 552)

(c) The question of when a jury may properly be allowed by the judge to convict the accused even in the absence of other evidence supporting the crucial identification

In our judgment, when the quality [of identification] is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence, even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur ...

When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification (at pp 552,553).

(d) The question of what other evidence may properly be regarded as capable of supporting an identification

This [supporting evidence] may be corroboration in the sense lawyers use the word, but it need not be so if its effect is to make the jury sure that there has been no mistake in the identification. For example, X sees the accused: he gets only a fleeting glance of the thief's face as he runs off, but he does see him entering a nearby house. Later he picks out the

accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *R v Long* (1973) 57 Cr App Rep 871. The accused who was charged with robbery, had been identified by three witnesses in different places on different occasions, but each had only a momentary opportunity for observation. Immediately after the robbery, the accused had left his home and could not be found by the police. When later he was seen by them, he claimed to know who had done the robbery and offered to help to find the robbers. At his trial, he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment, odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness-box cannot provide evidence of anything, and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence, they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on, may stupidly fabricate an alibi and get lying witnesses to support it out of the fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only where the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying says he was (at pp 553-554)".

In *Jaafar bin Ali v PP*, supra, it was held that although the trial judge had warned himself of the special need for caution as set out in the Turnbull guidelines, such warning was insufficient as he (trial judge) had failed to instruct himself on the reason for the need for such warning as no reference

was made to the possibility that a mistaken witness can be a convincing one and that a witness can be quite honest and still be mistaken.

[3] Appraisal of identification evidence

In *Heng Aik Ren Thomas v PP* [1998] 3 SLR 465, the Singapore Court of Appeal used the *Turnbull* guidelines to put forward a three step appraisal of identification evidence as follows:

“The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken. If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence which goes to support the correctness of the identification? If the judge is unable to find other supporting evidence, he should then be mindful that a conviction which relies on such poor identification would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification” (applied in *PP v Syed Mohamad Faysal bin Syed Ibrahim* [2004] 6 MLJ 303).

[4] Mode of identification

Identification evidence could be obtained in many ways. Identification through fingerprints is accepted as an unforgeable signature and could be sufficient to

warrant a conviction (*PP v Toh Kee Huat* [1965] MLJ 76; *Parker v The King* [1912] 14 CLR 681). Evidence of identity could also be given through video tape recording of a crime in progress (*Taylor v Chief Constable of Cheshire* [1987] 1 All ER 225. Apart from visual identification, evidence of identity could also be proven through identification of voice although its weight is a matter of opinion (*Tan Kum Seng v PP* [1960] MLJ 225).

[5] Identification Parade

The prosecution may rely on the evidence of the identification parade to prove identity. The value of such evidence was explained in *ST Shinde v State of Maharashtra* AIR 1974 SC 791 as follows at 793:

“The evidence of test identification is admissible under section 9 of the Evidence Act, it is, at best supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification or the accused as the doer of the criminal act. The earlier identification made by the witnesses at the test identification parade, by itself, had no independent value”.

The importance, however, of having prior identification before trial was stated in the following terms in *Jaafar bin Ali v PP*, supra at p 418:

“Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused”.

In this regard also, the Federal Court in *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 held at p 75:

“But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. There may well be situations where an identification parade cannot or need be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances”.

Where the accused persons are already known to the witnesses, the question of an identification parade does not arise (*PP v Sarjeet Singh* [1994] 2 MLJ 290).

The court must be satisfied that the identification parade was conducted fairly and properly. The police must be scrupulous in ensuring that the identification is absolutely independent (*PP v Aling bin Ayun* [1970] 2 MLJ 160). The persons on the parade must be as far as possible from the same station in life as the suspected person and there should be no disparity of ages of the persons in the parade (*Chan Sin v PP* [1949] MLJ 106 CA). However, they need not all look similar (*Thirumalai Kumar v PP* [1977] 3 SLR 434). It was also not objectionable for them to be differently attired as the identification is done according to the faces of the accused persons. (*Lee Tiaw Chwee v PP* [1998] 3 SLR 563).

Where the witness had an opportunity to see the accused prior to the identification parade, then the identification parade has absolutely no weight (*Jaafar bin Ali*, supra). In a case where there are two or more suspects, separate identification parades must be held (*PP v Chan Choon Keong & Ors* [1989] 2 MLJ 427).

A distinction must be drawn between identification and recognition. Recognition of an accused by a witness is much stronger than mere identification. See *Dato' Mokhtar bin Hashim v PP* [1983] 2 MLJ 232; *Low Soo Song v PP* [2008] 1 CLJ 433.

However, when assessing identification evidence of an identifying witness who is familiar with the face of the person identified, the court should have regard to any mistake due to a confusion of ideas as the witness may honestly but mistakenly confuse a face familiar elsewhere as being the accused. See *Din Dayal v King Emperor* AIR 1924 Oudh 295.

The procedure as to an identification parade was summarized in *Mallal's Criminal Procedure Code* 4th Ed as follows at p 155:

“Identification Parade – How Conducted – The identification parade must be held at the earliest opportunity and all available witnesses should be required to attend at the very first parade. The proper practice in England is that the parade should be arranged by the officer on duty in charge of the station and not by the officer in charge of the investigation. The witnesses must not be allowed to see the accused until the moment when everything is ready and they walk to pick him out, and they should not have been previously assisted by photographs or by any verbal or written description. See *R v Bundy* 5 Cr App R 270

The accused should be placed among a number of persons – not police – not less than 10 if one accused, 15 if two and so on. He should be invited to stand where he pleases among these people, who stand in a row, and told he may change his position after each witness has been called in. He should be asked if he has any objection to any of the persons present or to the arrangements made, and he should previously have been asked if he wished to have his solicitor or friend present. Every effort should be made to make the parade a fair one, and to see that the accused admits that it is so. The place selected for the parade should be well lighted. A

suspect may be invited to walk, or move in any way likely to be distinctive.

The witnesses should be brought in one by one, and are usually directed to touch the person they identify. Each witness having succeeded, or failed, as the case may be, should be taken out by a different door and kept apart from the witnesses who are to come. Every circumstance connected with the identification, the names of the witnesses and their decisions, must be carefully noted by the officer in charge who must record the proceedings as fully and fairly and carefully”.

Expert Evidence

- [1] Introduction**
- [2] Scope of expert evidence**
- [3] Competency of expert**
- [4] Appraisal of expert evidence**
- [5] Subjects of expert testimony: foreign law**
- [6] Subjects of expert testimony: science or art**
- [7] Subjects of expert testimony: handwriting**
- [8] Subjects of expert testimony: finger impressions**

[1] Introduction

The criminal trial is always concerned with the question of proof. Any fact is proven by evidence which is defined in s 3 of the Evidence Act 1950. Section 5 of the Evidence Act emphasizes that only evidence which is declared by the law as relevant is admissible so as to avoid prejudicial evidence or evidence of little probative value. Section 60 of the Evidence Act declares that such evidence be direct in the sense that it is perceived directly by the witness through any of his senses. In other words, witnesses are only permitted to speak of facts which would be what they saw or heard but not express opinions. The function of coming to an opinion, conclusion or finding is that of the trial judge. One exception to this rule of direct evidence is the opinion of experts as set out in s 45 of the Evidence Act 1950 which reads as follows:

“(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identify of genuineness of handwriting or finger impressions, the opinions upon that point of persons specifically skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.”

[2] Scope of expert evidence

An expert witness is one who has specialized knowledge based on his training, study or experience. Expert evidence is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge. If, on the proven facts, a judge can form his own conclusions without help, the opinion of the expert is unnecessary (*R v Turner* [1975] QB 834; *Chou Kooi Pang & Anor v PP* [1998] 3 SLR 593).

There are however cases in which the court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience

on a particular subject. In such cases expert evidence is admitted to enable the court to come to a proper decision (*Syed Abu Bakar bin Ahmad v Public Prosecutor* (1984) 2 MLJ 19 FC).

[3] Competency of expert

The expert should at the outset satisfy the requirements of competency as set out in s 118 of the Evidence Act 1950. The test of competency of an expert witness under s 45 of the Evidence Act was set out as follows in *Junaidi bin Abdullah v Public Prosecutor* (1993) 3 MLJ 217, 229 SC:

“First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under inquiry? The answer to both questions must necessarily depend on the facts of each particular case. The specialty of the skill required of an expert under section 45 would depend on the scientific nature and the complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the court be required into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or the lack of it) of the expert.”

The competency of the expert should be determined with considerable laxity (*Dato’ Mokhtar bin Hashim v Public Prosecutor* (1983) 2 MLJ 232, FC). Expert must be skilled; either by special study or experience. Lack of skill or qualification goes to weight, not admissibility (*PP v Muhamed bin Sulaiman* (1982) 2 MLJ 320 FC; *Junaidi bin Abdullah v PP*, supra). A semi-skilled or semi-professional can be accepted as an expert (*Kong Nen Siew* [1971] 1 MLJ 262). Expertise acquired through repeated contact in one’s work, for example, a police armourer, can be accepted (*PP v Sam Hong Choy* [1995] 4 MLJ 121).

In order to determine his competency, the expert must give evidence of his qualification and then state whether he has given evidence as an expert in such cases and that his evidence has been accepted by the courts. (*Wong Chop Saow v PP* [1965] 1 MLJ 247) However, previous testification in court as an expert witness is not necessarily the primary consideration for an otherwise qualified person. (*Dato’ Mokhtar Hashim v PP*, supra) In criminal cases, judicial notice of expertise may not be accepted. (*PP v Lim Lian Chen* [1991] 1 MLJ 316)

[4] Appraisal of expert evidence

An expert's evidence is not one of fact but only advisory in nature. The duty of the expert is to furnish the court with the necessary scientific criteria for testing the accuracy of the conclusions thereby enabling the judge to form an independent judgment by the application of these criteria to the proved facts. The scientific opinion evidence, if intelligible, convincing and tested may become an important factor for consideration along with the other evidence of the case.

The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions. In order to bring the evidence of the expert witness, it has to be shown that the witness has made a special study of the subject or acquired a special experience therein or that he is skilled or has adequate knowledge of the subject. The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination. (*State of Himachel Pradesh v Jai Lal & Ors* [2000] 2 LRI 982 SC India)

As such, an expert must give reasons for his opinion (s 51 Evidence Act 1950) and the court must consider such reasons before deciding (see *Sim Ah Oh v PP* [1962] MLJ 42 where expert was not asked to elaborate on documents relating to public lottery). The grounds or reasoning can be inquired into by the court (*PP v Lee Beng Siang* [1992] 2 MLJ 120 where evidence of chemist in analyzing substances was held to be unsatisfactory). Where expert evidence is confined only to elementary nature and identity of substance, expert (chemist) need not go into laboratory details (*Munusamy v PP* (1987) 1 MLJ 492 SC). So long as evidence is credible, there is no necessity for chemist to show in detail what he did in his laboratory (*PP v Lam San* [1991] 3 MLJ 426 SC). An expert need not produce data and other materials on which his opinion is based if this is not asked by the defence (*PP v Mohamed Sulaiman*, supra).

An expert can rely on extrinsic material or extraneous information, for example, textbooks, journals, report of auctions etc. (*English Exporters (London) Ltd v Eldonwall Ltd* [1973] 1 All ER 726) but this should be stated in his evidence so that the cogency and probative value of the conclusion can be tested and evaluated by reference to it (*R v Abadom* [1983] 1 All ER 364). Expert's role is not to provide conclusions on matters which the court can decide (*Ong Chan Tow v R* [1963] MLJ 160 where it was held that motoring experts are there to assist in technical and mechanical matters and not to draw inferences which a layman can equally draw). This is to ensure that the expert witness does not usurp the function of the court. Similarly, in *Yong Sin Len v Wan Shoung Yin & Ors*, Mallal's Digest para 1386, a forensic scientist's opinion on where the collision took place was wholly rejected.

Where there is conflicting expert evidence, the court may prefer one opinion over the other (*Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43 PC). This is illustrated in two cases concerning the defence of diminished responsibility (*Khwan-Oh Natthapon v PP* [2002] 1 SLR 89 and *Tengku Jonaris*

Badlishah [1999] 2 SLR 260) and cases on drug consumption. (*Teh Thiam Huat v PP* [1996] 3 SLR 631 CA and *Heah Song Mong v PP*, Mallal's Digest para 1399)

Whilst a judge is not bound to accept the evidence of an expert, he cannot act on his own intuitions but on the evidence. If there is nothing to cast doubt on the expert evidence, it may not be open to reject it although the evidence of experts is not conclusive. (*PP v Mohamed Kassim* [1977] 1 MLJ 64) Perhaps the ever accelerating process of scientific and technological advances has encouraged the courts to more readily accept expert testimony.

[5] Subjects of expert testimony: foreign law

Foreign law on a particular issue is a question of fact. Questions of foreign law can only be decided by evidence adduced for the purpose in the particular case before the court and not through the production of books in which it is contained. However, statements as to any law of any foreign country contained in law books, printed or published under the authority of the government of that foreign country is relevant under s 38 of the evidence Act 1950 (*Mak Sik Kwong v Minister of Home Affairs, Malaysia* (No 2) [1975] 2 MLJ 175). The court cannot take judicial notice of foreign law (*Sivagami Achi v Public Prosecutor* (1959) MLJ 221).

The manner of proving foreign law was described in *The H156* (1999) 3 SLR 756 as follows at:

“The function of an expert on foreign law is to submit the proposition of foreign law as fact for the consideration of the court. The court will then make its own findings of what the foreign law is. Even though the expert may submit his conclusion, he must present the materials and the grounds he uses to make his conclusions. The expert may not usurp the function of the court and present his finding. Further he cannot decide the issue by applying the law to the facts without setting out the law and the reasoning process.”

[6] Subjects of expert testimony: science or art

The most common example of opinions under this category is that of medical personnel or other professionals such as accountants, engineers or architects. The scope of the term “science or art” has to be construed widely and not restricted to the subjects of pure science and art (*Chandrasekaran v Public Prosecutor* (1971) 1 MLJ 153; *Leong Wing Kong v PP* [1994] 2 SLR 54 CCA)

[7] Subjects of expert testimony: handwriting

Under this category, experts are allowed to give their opinions as to the genuineness of any disputed handwriting after comparing it with specimens that have been proven to be genuine to the satisfaction of the court. On the need for expert evidence on handwriting, it was held in *Syed Abu Bakar bin Ahmad v Public Prosecutor* (1984) 2 MLJ 19 FC at 23:

“It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence.”

In *Teng Kum Seng v Public Prosecutor* [1960] MLJ 225, Thomson CJ said that handwriting evidence “is of course always of very questionable value, particularly in the case of Chinese characters.”

The evidence of a witness giving his opinion on handwriting should be rejected outright unless he or she is an expert or saw the accused write the document in issue or there is established familiarity with the handwriting concerned. See *Zahari bin Yeop Baai v PP* [1980] 1 MLJ 160.

It should be noted that where there is a dispute as to handwriting and there arises a need for comparison, the judge can invoke the provision of s 73(2) Evidence Act 1950. This would enable him to compare the words with any word proved or admitted. (*Syed Abu Bakar bin Ahmad v PP*, supra) This provision was explained in *Dr Shanmuganathan v Periasamy s/o Sithambaram* [1997] 3 MLJ 61 as follows at 86:

“Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which the judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such case, it becomes the plain duty of the court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert.”

The value of the evidence of a handwriting expert has however been held to be never conclusive (*Public Prosecutor v Mohamed Kasim bin Yatim* (1977) 1 MLJ 64 HC), very unsafe to base a conviction on (*Srikanth v King Emperor* (1905) 2 ALJ 444) and viewed with caution although such evidence is entitled to be given proper consideration and weight in the context of the other evidence available to

the court (*Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* (1992) 1 MLJ 1 SC). In *Dr Shanmuganathan v Periasamy a/l Sithambaram Pillai*, supra, the court considered the argument as to whether opinion evidence of a handwriting expert should not be acted upon without substantial corroboration. The Federal Court came to the following view:

“We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallized into a rule of law, that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the final analysis, is no more than a question of testimonial weight.”

The evidence of an expert on handwriting must be supported by cogent data showing the process by which the conclusion is reached (*United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* (1993) 1 MLJ 182 SC)

In s 47 Evidence Act 1950, the opinion of any person acquainted with the handwriting of a person is relevant when the court is to form an opinion on the handwriting of such person. The Explanation to the section makes it clear that there must be sufficient opportunity for the witness to acquire such knowledge of the handwriting in question.

[8] Subjects of expert testimony: finger impressions

There is little dispute or controversy as to the value of the evidence of finger print evidence. In *Jaganmohan Reddy J in HP Administration v Om Prakash* AIR (1972) SC it was held that the comparison and identification of the finger prints has now developed into science and the results derived there from have reached a stage of exactitude. Even in the case where the evidence of finger prints is the only evidence of identity, it has been held to be sufficient to support a conviction (*PP v Toh Kee Huat* [1965] MLJ 76; *Parker v The King* [1912] 14 CLR 681)

Documentary Evidence

[1] What Is Documentary Evidence

[2] Primary Documents

[3] Exceptions To Primary Documents

- i) Secondary Documents**
- ii) Public Documents**
- iii) Computer Generated Documents**

[1] What Is Documentary Evidence

Section 3 of the Evidence Act defines 'evidence' to include all documents produced for the inspection of the court: such documents are called documentary evidence.

Document is defined in section 3 of the Evidence Act as any matter expressed, described or however represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device. (*Koh Hor Khoon v R* [1955] MLJ196)

[2] Primary Documents

Section 61 of the Evidence Act state that documents may be proved either by primary or secondary evidence.

(*Jai Gopal Singh & Anor v Divisional Forest Officer* AIR 1953 310, *Lucas v Williams & Sons* [1892] 2 QB 113)

Section 62 states that Primary Evidence means the document itself produced for the inspection of the court

(*Katihis Jute Mill v Calcutta Match works* AIR 1958 133, *PP v Rengasamy* [1974]1 MLJ 223, *Ooi Thean Chuan Banqua Natinale De Paris* [1992] 2 MLJ 526)

Section 64 of the Evidence Act stated that as a general rule document must be proved by primary evidence. This is in line with the principle of Best Evidence Rule.

[3] Exceptions To Primary Documents

(i) Secondary Documents

Section 63 of the Evidence Act defines the category of secondary documents and this includes certified copies as well as Photostat copies.

(Smt Lacho v Dwari Mal AIR 1986 All 303, Lee Weng Kin v Menteri hal Ehwal Dalam Negeri Malaysia and 3 Ors [1991] 2 CLJ 1301, Tan Sri Tan Hian Tsin [1979] 1 MLJ 73)

Section 65 and 66 of the Evidence Act specifies the circumstances under which a secondary document can be admitted as well as the procedure for such admission.

Among this categories are primary document is in the possession of the person against whom it is to be proved and documents which have been lost or destroyed.

(Re Neo Guan Chye Deceased [1935] MLJ 271, Tsia Development Sdn Bhd v Awang Dewa [1984] 1 MLJ 301, Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, Kok Kee Kwong v PP [1972] 1 MLJ 124)

Even in a criminal case where secondary evidence is sought to be adduced the provisions of sections 65 and 66 are applicable and must be complied with before such secondary evidence is admitted. See *Jhabwala v Emperor* AIR 1933 All 690 at p 705; *Nityananda v Bashbehari* AIR 1953 Cal 456.

(ii) Public Documents

Section 74 of the Evidence Act specifies the categories of Public Documents

(Pg. Mahli bin Pg. Noordin v Dato Hj Abdul Rahman [1988] 2 MLJ 581, Khoo Siew Bee v Ketua Polis Kuala Lumpur [1979] 2 MLJ 49, Toh Kong Joo v Penguasa Perubatan Hospital Sultan Aminah, Johor Bahru [1990] 2 MLJ 235)

Section 76 of the Evidence Act specifies how the Public Documents shall be certified

(Anthony Gomez v Ketua Polis Daerah Kuantan [1977] 2 MLJ 24)

Section 77 of the Evidence Act state that contents of a certified copy of the Public Document shall be proof of its contents. The maker of the certified copy need not be called as witness. However Public Documents which are computer generated are now subject to the provision of Section 90A, B and C of the Evidence Act. This is provided for by section 78A of the Evidence Act.

(iii) Computer Generated Documents

Section 90A of the Evidence Act lays down the procedure for the admission of computer generated documents.

A document produced by a computer is admissible to prove its contents if the document was produced by the computer in the course of its ordinary use.

It may be proved that a document was produced by the computer in the course of its ordinary use by a certificate by a person responsible for the management of the operation of the computer or for the conduct of the activities for which the computer is used.

When this certificate is produced it shall be presumed that the computer was in good working order and operating properly.

Impeachment Proceedings

- [1] The law**
- [2] Former statement**
- [3] Impeachment procedure**
- [4] Position of witness in impeachment proceedings**
- [5] Proper time for submitting on the issue as to whether or not witness had given satisfactory explanation**
- [6] Proper time for making an order of impeachment**
- [7] Consequence of impeaching the credit of a witness**
- [8] Effect of witness not impeached**
- [9] Procedure where the previous statement is contained in a public document**
- [10] Trial within a trial**
- [11] Calling of witness party opposing statement**
- [12] When ruling to be made by court**

[1] The law

Section 155 of the Evidence Act 1950 sets out the ways in which credibility of witnesses may be impeached, namely;

- (a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;
- (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
- (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

Impeachment under paragraph (c) essentially consists of two elements:

contradicting the witness' evidence i.e. confronting him with the former inconsistent statement; and

proof of the statement.

(See *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121).

Paragraph (c) is general enough to include oral statements.

S 155 must be read together with s 145(1) and (2) of Evidence Act which provides that a witness may be cross-examined as to the previous statement made by him.

S 145 caters for two types of former statement, namely:

- (1) previous statements in writing made by witness or reduced into writing,
- (2) previous oral statement made by witness

S 145(1) has two distinct limbs; namely:

cross-examination of witness on the previous statement without it being shown to him or being proved;

attention being drawn to witness of those parts of the previous statement which are to be used for the purpose of contradicting him before the writing can be proved.

In *CGU Insurance Bhd v Asean Security Paper Mills Sdn. Bhd.* [2006] 3 MLJ 1, Federal Court held that if impeachment proceedings are contemplated, there must be strict adherence to the procedure laid down by s 145(1) of the Evidence Act, 1950.

[2] Former statement

It must be the statement of the witness.

A witness can be contradicted only by a former statement made by him and not by a third party (See *Abdul Khoder bin Shafie v Low Yam Chai* [1989] 2 MLJ 483).

The former statement is not substantive evidence. See *Driscoll v The Queen* (1977) 51 ALR 731; *R v Pestano and Others* [1981] Crim LR 397.

It must be extraneous to the evidence.

It does not include a statement given in evidence at an earlier stage of the same proceeding. It must have been made on a previous occasion (See *Public Prosecutor v Ramli bin Shafie* [2002] 6 MLJ 153; *PP v Chong Nyuk Min & Anor* [1995] 3 MLJ 642).

Collateral evidence should not form part of impeachment proceeding.

In *CGU Insurance Bhd v Asean Security Paper Mills Sdn. Bhd.* [2006] 3 MLJ 1, DW10 admitted signing an affidavit but not before Kala Singh. However,

Kala Singh testified, inter alia, that he attested the signature of DW10. The trial judge relied on the evidence of Kala Singh to impeach DW10. On appeal, Federal Court held that the evidence of Kala Singh is collateral to the main issue and the learned judge ought not to have allowed the collateral evidence of Kala Singh about the execution of exh. P51 to form part of the impeachment proceedings as it had no relevance whatsoever to the facts in issue in this case.

[3] Impeachment Procedure

In the case of *Muthusamy v Public Prosecutor* [1948] MLJ 57, Taylor J set out the proper procedure to be adopted in impeaching the credit of a witness. This decision was endorsed and approved of by the Federal Court in the case of *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121.

The procedure followed must be recorded and form part of the record (See *Mathew Lim v Game Warden, Pahang* [1960] MLJ 89, *Jusoh bin Awang v Public Prosecutor* [1950] MLJ 69, *R v Chua Eng Hong* [1937] MLJ 260).

Summary of Impeachment Procedure

First Step

On the request of either party the court reads the former statement for the purpose of determining whether there is any serious discrepancy between what is said in the former statement and what is said in evidence in court.

It is advisable to highlight the relevant part of the statement which is considered inconsistent with the evidence before it is handed to the Magistrate to ensure that the attention of the court is drawn only to the relevant passage in the former statement and only that relevant passage is shown to the witness (See *Ong Joo Chin v R* [1946] MLJ 1).

The defence is entitled to a copy of the statement made by the witness to the police for the purpose of cross-examination the witness. (See *Husdi v Public Prosecutor* [1980] 2 MLJ 80, *PP v Mohd Bandar Shah bin Nordin & Anor* (HC) [2005] 1 MLJ 349).

Second Step

If there is no serious discrepancy, the court will so rule and no time is wasted.

Per Taylor J in *Muthusamay v Public Prosecutor* [1948] MLJ 57, 58-59:

Differences may be divided into four classes:-

- Minor differences, not amounting to discrepancies;
- Apparent discrepancies;
- Serious discrepancies;
- Material contradictions.

Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expression used in either, and all the less so when he does not speak English.

Omission to state a material fact may amount to a contradiction.

In *Public Prosecutor v Heah Lian Khin* [2000] 3 SLR 609, 626, Yong Pung How CJ, referring the statement “a mere omission is hardly ever a discrepancy” by Taylor J in *Muthusamy’s* case, His Lordship [as he then was] said:

“Viewed in context, Taylor J was really referring to a truth witness who had omitted a detail due to genuine forgetfulness, differences in interpretation or the matter in which the statement was recorded. It would not extend to a witness who deliberately omitted the material facts in an attempt to paint a different picture of the events which occurred.”

The following passage from Sir John Woodroffe & Amir Ali’s *Law of Evidence* Vol 4 (15th Ed, 1992) at page 769 is instructive:

“...a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence...whether silence or omission amounts to an inconsistency depends upon the individual circumstances of each case...obviously there may be omission in the previous statements which make it inconsistent with and therefore contradictory to the evidence given by the witness in court. The test is, would it have been natural for the person to make the assertion in question...”

Reference was made to *Dasu v State of Maharashtra* 1985 Cri LJ 1933 at p 14, which explained thus;

“In order to see whether there is a contradiction by omission it is necessary to find out whether the two statements cannot stand together.....if the two statements made by the witness cannot stand together and the statement in the court is such that the witness would necessarily have made at the time of his earlier statement, then alone omission thereof can be considered to be a contradiction”.

In *Public Prosecutor v Mohd Bandar Shah bin Nordin* [2005] 1 MLJ 349 (HC), the court was satisfied that there was material omissions and contradictions between the witness’ evidence and his police report, and after reading and explaining the relevant passage in his police report and his evidence in court to the witness, the witness was given a chance to explain the discrepancies and omission.

A former statement does not cease to be one merely because the witness has no recollection of it.

Per Yong Pung How CJ in *Public Prosecutor v Heah Lian Khin* [2000] 3 SLR 609, 626:

A trial judge is perfectly entitled in the proceedings to conclude that a witness is deliberately lying about his recollection and to form his own conclusion as to why the witness is refusing to testify as to his true recollection. This will constitute evidence of an inconsistency between what the witness said at the trial, ie that he has no recollection of the material facts and what was said in the witness’ statement, ie a detailed recollection of it.

Third Step

If there is material difference as probably to amount to discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved.

At this stage contradicting the witness’ evidence occurs.

In *Yusoff bin Sidden v Public Prosecutor* [1971] 1 MLJ 203, Sharma J said:

“A prosecution or defence witness cannot be merely asked whether he made a previous statement to the contrary to the investigating officer and the matter left there. That answer of the matter cannot be used as evidence. The only way in which the previous statement can be used is by contradicting the witness by such writing and this can be by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradiction”.

Per Augustine Paul in *Public Prosecutor v Dato' Balwant Singh* (N0. 2) [2003] 3 MLJ 395, 434:

“...it is an elementary principle of law that if previous statement made by a witness are to be used for the purpose of contradiction he must be confronted with those statements and be given an opportunity of explaining any discrepancy. If a previous statement is to be allowed to be put in evidence against a witness in order to contradict him without giving him an opportunity to tender his explanation or to clear up the particular point of ambiguity or dispute it will be acting contrary to general principles of law....”

(See also *Yusoff bin Siddin v Public Prosecutor* [1971] 1 MLJ 203).

In *CGU Insurance Bhd v Asean Security Paper Mills Sdn. Bhd.* [2006] 3 MLJ 1, Federal Court held that if impeachment proceedings are contemplated, there must be strict adherence to the procedure laid down by s 145(1) of the Evidence Act, 1950. If it is intended to contradict a witness by the writing which it is said to be his previous inconsistent statement, his attention must, before the writing can be proved, be called to those part of its which are to be sued for the purpose of contradicting him.

Fourth Step

If the witness admits making the statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the Court, and he must have a fair and full opportunity to explain the inconsistency.

If the witness admits saying what is stated in the former statement, then no formal proof is required, and the court then can call upon him to explain the material contradictions or serious discrepancies. (*Public Prosecutor v Scott Allen Hazlett & Ors* [2005] 4 MLJ 564).

In *Public Prosecutor v Dato' Balwant Singh* (N0. 2) [2003] 3 MLJ 395, the defence tendered exh. D43 (former written statement by the accused) for the purpose of corroboration. The prosecution made an issue out of the contradictory part of exh. D43 and said that it showed that the accused was not a truthful and credible witness. It submitted that since exh. D43 amounted to an admission it could be used to contradict the accused without being put to the accused. It was held that the prosecution could not make use of exh. D43 to affect the credit and credibility of the accused under ss 145 and 155© of the Evidence Act, 1950 as they had failed to refer the accused to the contradictory part of such statement.

If the witness can explain and correct the contraction, the procedure ends there. (See *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121).

Fifth Step

If the witness denies making the former statement or challenge its authenticity or voluntariness, and the matter does not stop there, then the court must hold a trial-within-trial to determine and rule on the admissibility and proof of the statement.

At this stage proof of the former statement, occurs.

Once the witness denied making the former statement, the party seeking to use the former inconsistent statement to impeach the credit of the witness must prove the former statement.

Unless the former statement is proved to be genuine, no question of impeachment can arise. (See *CGU Insurance Bhd v Asean Security Paper Mills Sdn. Bhd.* [2006] 3 MLJ 1).

Although s 113 makes provision for the admissibility of cautioned statement made by the accused in the course of the investigation and for use to impeach the accused's credit, where its voluntariness is being challenged, the court should conduct a trial-within-trial to determine and rule on the voluntariness of the statement. (See *Krishnan*, supra).

Where the person sought to be impeached is a witness, there is no necessity to prove that the former statement was made voluntarily. (See *Sim Bok Huat Royston v Public Prosecutor* [2001] 2 SLR 348).

Where a statement to the police is admitted as an exhibit and is used for the purpose of impeaching the credit of a witness without being properly proved is clear illegality. (See *Jusoh bin Awang v Public Prosecutor* [1950] MLJ 69; *Public Prosecutor v Dato' Balwant Singh* (N0. 2) [2003] 3 MLJ 395).

Right to cross-examine

It does not matter whether the impeachment is sought by the prosecution or the defence, the witness whose credit is sought to be impeached should be given the right to cross-examine. (See *Dato' Mokhtar bin Hashim*, supra).

Burden and Standard of proof

The burden and standard of proof in impeachment proceedings is the same as in a trial within a trial i.e. it is upon the prosecution to prove the

voluntariness and authenticity of the previous inconsistent statement beyond reasonable doubt. (See *Dato' Mokhtar bin Hashim*, supra).

Sixth step

If it is proved that the witness has made the former statement or is admissible, then the two conflicting versions must be carefully explained to him, preferably by the Court, and he must have a fair and full opportunity to explain the inconsistency.

Seventh step

If the witness can explain the discrepancy, then his credit is saved.

If the witness cannot explain the differences then his credit is impeached.

[4] Position of witness in impeachment proceedings

In any impeachment proceeding, the witness is placed in the position of an accused. Therefore, if there is nay doubt, the benefit of the doubt should be given to him. (See *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and Anor Appeal* [2004] 3 MLJ 405).

[5] Proper time for submitting on the issue as to whether or not witness had given satisfactory explanation

In *Public Prosecutor v Scott Allen Hazlett & Ors* [2005] 4 MLJ 564, High Court following the decision of *Dato' Mokhtar Hashim*, ruled that submission on the plausibility of the witness' explanation should be made at that stage when submission of no case to answer were made by both side.

[6] Proper time for making an order of impeachment

The court should not make an immediate order impeaching the credit of the witness. It should consider his evidence as a whole either at the end of the case for the prosecution or the case of the defence, as the case may be.

In *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, the Federal Court said as follows:

“Abdoolcader J took the correct approach in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 when he refused an application to make an immediate order impeaching the credit of the witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution and then discounted it as discredited and wholly disregarded it in the circumstance. The procedure for impeachment should be on the line set out in *Muthusamy v Public Prosecutor* [1948] MLJ 57 but we must stress that the evidence of such a witness must be considered as a whole with the rest of the evidence at the appropriate stage and that any practice which might have developed, as we are told, in the lower courts of making an immediate order of impeachment once a material discrepancy is discovered and no explanation is either offered or accepted, is wholly wrong and should cease immediately”.

Where the court considered the evidence of the witness sought to be impeached as a whole at the end of the case for the prosecution and then discounted him as discredited. (See *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180; *Public Prosecutor v Adnan bin Ishak* [1992] 2 CLJ 1234; *Mohd Bandar Shah bin Nordin*, supra).

Where the judge, on an application by the prosecution, impeached the credit of the witness at the conclusion of the whole trial. (See *Public Prosecutor v Tan Gong Wai* [1985] 1 MLJ 333 – the procedure adopted was not the subject of disapproval or comment by the Supreme Court on appeal).

[7] Consequence of impeaching the credit of a witness

Per Abdul Hamid Mohamad FCJ in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and Another Appeal* [2004] 3 MLJ 405 at p 419:

“Thirdly, the effect of impeachment seems to be very harsh. Not only his whole evidence will be disregarded, he is also liable to prosecution for perjury”.

Whether the whole of evidence of the impeached witnesses be disregarded?

- There appear to be conflicting decision in Malaysian courts on the issue whether, where a witness is impeached, his whole evidence is to be disregarded.

- Former rigid view: Once the credit of a witness is impeached, his evidence becomes worthless. (See *Koay Chooi v Regina* [1955] MLJ 209; *Matthew Lim v Game Warden, Pahang* [1960] MLJ 89; *Public Prosecutor v Munusamy* [1980] 2 MLJ 133 (FC)).

- Following the Singapore law in this area (under Singapore law, an impeachment of a witness' credit does not automatically lead to a total rejection of his evidence), *Public Prosecutor v Mohd Ali bin Abang & Ors* [1994] 2 MLJ 12 and *Safri bin Koboy v Public Prosecutor* [2000] 1 MLJ 656, High Court took the view that after the impeachment of the credit of a witness, the trial judge must scrutinize the whole of the evidence to determine which part of the witness evidence are the true and which should be disregarded. It is noted that no reference was made to the case law mentioned in the preceding paragraph in these two cases.

- In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and Another Appeal* [2004] 3 MLJ 405, the trial judge accepted Azizan's explanation on the inconsistency between his testimony in the previous trial and the trial before the court. The Court of Appeal found that there was nothing wrong with the conclusion of the learned trial judge. The Federal Court was not absolutely satisfied with the explanation given by Azizan on the inconsistent statement in his testimony in the previous trial and in this trial. However, it was not inclined to disturb that finding for the reason that, inter alia, the effect of impeachment seems to be very harsh. The question whether, where a witness is impeached, his whole evidence is to be disregarded, was not argued before the Federal Court, but it seems the Federal Court is inclined to the rigid view before *Mohd Ali bin Abang*. Per Abdul Hamid Mohamad FCJ at p 419:

"The point is, if we accept the view prior to *Mohd Ali bin Abang* (supra), which we should, in view of *Munusamy*, a Federal Court judgement, then the effect of an impeachment order, if made against Azizan would be drastic. Not only that, he may even be subject to prosecution".

The former inconsistent statement cannot become positive evidence or relied upon to substitute for the evidence in court which is disbelieve.

The Federal Court held in *Harley* in *Public Prosecutor v Lo Ah Eng* [1965] 1 MLJ 241 as follows:

"....the content of that statement cannot become positive evidence'. It is a negative evidence in the sense that it can only be used to destroy or contradict the evidence which went before. In a sense, the previous statement is like an Indian

rubber – it does not produce written testimony, but merely erases the evidence given in the witness box, the earlier statement cannot be substituted for the evidence in court which is disbelieved”.

(See also *Jones v R* [1948] MLJ 182; *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121; *Pavone v Public Prosecutor* [1986] 1 MLJ 72; *Public Prosecutor v Wong Yee Sen & Ors* [1990] 1 MLJ 187; *Public Prosecutor v Abdul Kudus bin Japlus* [1988] 2 MLJ 310):

The impeached witness is liable to prosecution for perjury. Refer the impeached witness to the public prosecutor to consider whether he should be prosecuted for perjury.

[8] Effect of witness not impeached

The fact that a witness is not impeached:

Does not preclude the witness’s credibility being attacked on ground of contradictions in his evidence made in court and his previous inconsistent statement;

Does not mean that his whole evidence must be believed;

His evidence will have to be scrutinized with care;

His evidence may be found to be reliable in some parts and not in other;

If there is any doubt, the benefit of the doubt must be given to the accused.

(See *Dato’ Seri Anwar bin Ibrahim v Public Prosecutor and Another Appeal* [2004] 3 MLJ 405).

[9] Procedure where the previous statement is contained in a public document

Invoke s 76 of the Evidence Act, 1950 and call the proper officer having custody of the records to produce certified copy of the public document, then the presumption under s 79(1) and 80 (in respect of the certified copy of proceedings) will arise. Once the certified copy of the public document is produced and the Magistrate’s attention drawn to the alleged difference. If there is material discrepancy, then leave to cross-examine should be given and the procedure laid down in *Muthusamy’s* case followed. (See *Pavone v Public Prosecutor* [1986] 1 MLJ 72, the former statement sought to be proved against the witness was contained in the notes of proceedings in an earlier trial).

[10] Trial within a trial

It should be clearly stated in the records of proceedings, when a trial within a trial commences and ends. The party who wishes to introduce the statement calls the person to whom the relevant statement was made or by whom it was

recorded. In the case of oral statement, evidence must be given what that statement was. In the case of written statement, the writing itself should be produced. If the original writing is not available, with further proof as to its non-availability, a copy of the writing could be admitted. In the case of cautioned statement, the police officer recording it, in addition to giving evidence that he recorded the statement under caution has to go further and show that it was voluntarily made. The evidence of each witness is given on oath and is subject to cross-examination and re-examination.

[11] Calling of witness party opposing statement

After the party seeking to introduce the statement has finished presenting all the evidence it wishes to present, the opposing party has the right to call its own witness to challenge the evidence given by the party seeking to introduce the statement. After the opposing party has called all its witnesses, the party seeking to introduce the statement then has the right to call rebuttal witness, if necessary, to rebut the evidence adduced by the opposing. (See *Tan Too Kia v Public Prosecutor* [1980] 2 MLJ 187; *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321; *Krishnan's case* and *Dato' Mohktar Hashim's case*, supra).

[12] When ruling to be made by court

If the purpose of the trial within a trial is to determine the admissibility of a statement or confession, then, at the conclusion of a trial within a trial, the Magistrate must make an immediate finding or ruling as to the admissibility or otherwise of the statement or confession. If the purpose of a trial within a trial is to impeach the credit of a witness, then, at the conclusion of the trial within trial, the Magistrate should not make any immediate order as to the credit of the witness.

Hostile witness

- [1] Introduction**
- [2] Statutory provisions**
- [3] Principle behind procedure**
- [4] Grounds for treating a witness as hostile**
- [5] Procedure to be followed in treating a witness as hostile**
- [6] Court's discretion in allowing the application**
- [7] Credibility of a hostile witness**
- [8] Application can be made at any stage of examination**

[1] Introduction

As the name suggests a hostile witness is one who exhibits a bias against the party that calls him to give evidence and is not desirous of telling the Court the truth (*Re Wee Swee Hoon, Deceased; Lim Ah Moy & Anor v Ong Eng Say* [1953] MLJ 123). There is no definition of hostile witness in the Evidence Act 1950. In fact the term *hostile witness* is not found in the Act either. Under English Law, a witness can be declared a hostile witness if he appears adverse to the party that calls him or departs from his previous oral or written statements during examination in chief. Once he is declared as a hostile witness, with leave of court he may be cross-examined by the party that called him. This procedure is provided for in the Evidence Act 1950 although the term hostile witness is not used.

[2] Statutory provisions

Two sections of the Evidence Act 1950 are applicable on the subject of hostile witness. The provision that allows cross-examination of a hostile witness is section 154 which reads as follows:-

154. Question by party to his own witness.

The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

The other provision that is related to cross-examination of a hostile witness is section 145 which deals with the procedure to confront a witness with a previous inconsistent written or oral statement. This section is relevant as the usual ground given to seek permission to cross-examine a witness as hostile is

the perceived departure of his evidence from a previous statement. Section 145 reads as follows:-

145. Cross-examination as to previous statements in writing.

(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made such statement.

Generally speaking the prosecution is bound by the evidence of witnesses it calls. If it does not wish to be bound by the evidence of a particular witness it must treat that witness as hostile and impeach him or her. See *Abinash Chandra Sarkar v Emperor* (1936) 37 Cr LJ 439. But this general rule does not apply to a witness called by the prosecution to unfold his case. See *Haji Abdul Ghani bin Ishak & Anor v PP* [1981] 2 MLJ 230.

[3] Principle behind procedure

The logic behind the practice of allowing a party to cross-examine its own witness who turns hostile is this. It is generally assumed that the witness a party calls would give evidence in its favour. That is why a party may not put leading questions to its own witness. This assumption has given rise to the general rule that a party is bound by the evidence that its witnesses give. The Court of Appeal in *Lim Guan Eng v PP* (1998) 3 MLJ p.47 succinctly stated the general rule in the following passage –

"Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice, there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. The rule is enforced with full rigour in civil cases. See *M. Ratnavale v S. Lourdenadin* (1988) 2 MLJ 371".

Therefore in the case of a witness who unexpectedly turns hostile or in a criminal case where the prosecution has no alternative but to call a potentially

hostile witness to establish an essential fact, the party calling the witness may want to cross-examine the witness in the manner of an opposing witness. The prohibition against putting leading questions to one's own witness could then be relaxed by the court if the application to treat the witnesses as hostile is allowed (*Public Prosecutor v Loh Keng Koh* [1967] 1 MLJ 97. The following passage from Woodroffe & Syed on *Law of Evidence*, 15th edn, p. 812 (cited in *Lim Teng Leng v Public Prosecutor* [1998] 5 CLJ 400) gives an excellent insight into the principle behind the practice of cross-examining one's own witness:-

A party may with the permission of the Court, put leading questions to the witness under the provisions of s. 143 or cross-examine him as to the matter mentioned in ss. 145 and 146. The rule, which excludes leading questions, is chiefly founded on the assumption that a witness must be taken to have a bias in favour of the party by whom he is called; whenever circumstances show that this is not the case and he is either hostile to that party or unwilling to give evidence, the judge may, in his discretion, allow the rule to be relaxed. Further, by offering a witness, a party is held to recommend him as worthy of credence, and so it is not in general open to him to test his credit, or impeach his truthfulness. But there exist cases in which the rule should be relaxed at the discretion of the Court, as for instance, where there is a surprise, the witness unexpectedly turning hostile, in which and in other cases the right of examination *ex adverso* is given.

[4] Grounds for treating a witness as hostile

Section 154 is brief and without illustrations. However case-law from Malaysia as well as India gives very practical guidelines on the use of this provision which is open to abuse if not properly invoked. The most common reason for treating a witness as hostile is if his previous statement either written or oral departs from his court testimony. In *Sarkar on Evidence*, vol. 2, 14th edn, p. 2082 (cited in *Lim Teng Leng v Public Prosecutor* [1998] 5 CLJ 400), this ground to treat a witness as hostile is stated as follows:-

Unless there is something in the deposition of a witness which conflicts with the earlier statements made by him which will afford ground for thinking that he has been gained over by the defence, the prosecution is not entitled to declare him hostile [*Parameshwar v. R*, 99 IC 705: A 1926 P316]:

“.... Before granting permission to treat a witness as hostile, there must be some material to show that he is not speaking the truth or has resiled from his earlier statement [*Gopal Krishnan v. State*, 1981 Cri LJ NOC 160 (Delhi)]”.

The procedure laid down in section 145 would apply. Ong C.J. in *Munniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179 said as follows:-

“As all lawyers must know, in order to treat one’s own witness as hostile by cross-examining him, the only possible means is to confront the witness with his previous contradictory statement”.

Admittedly in practice, it would be much easier to apply to cross-examine a witness by confronting him with a previous contradictory statement. Nonetheless a contradictory previous statement by a witness is not the only ground to treat him as hostile. Section 154 does not limit the grounds for cross-examining a witness. Hostility or adverseness displayed by the witness to the very party who has called him is also a ground to invoke section 154 [see *In re Kalu Singh*, A 1964 MP 30 cited in *Sarkar on Evidence*, vol. 2, 14th edn, p.2082]. In the old Singapore case of *Re Wee Swee Hoon, Deceased; Lim Ah Moy & Anor V Ong Eng Say* [1953] MLJ 123, Brown J considered the meaning of an adverse witness. He said as follows:-

“A witness is considered to be adverse if, by his demeanour or by his manner of answering questions, he shows that he is hostile in mind to the party calling him, and is not desirous of telling the Court the truth”.

However as observed by Brown J, adverseness is not necessary to invoke section 154. In that case, the witness did not display adverseness but his evidence in court contradicted the evidence he had earlier given in the Police Court. Brown J held that if that were proven, the court has an unfettered discretion to allow the cross-examination of the witness. The authors of Woodroffe & Syed on *Law of Evidence*, 15th edn, p. 819 (cited in *Lim Teng Leng v Public Prosecutor* [1998] 5 CLJ 400) came to the same conclusion that the right to cross-examine can be invoked even if no hostility is displayed:-

“The discretion of the Court under Section 154 is wide and unfettered; it does not depend upon hostility. The discretion should be exercised liberally whenever it appears to Court that due to the demeanour, attitude way of answering question of the witness or the tenor of his answers or other reasons permission should be given in the interest of justice”.

However, merely giving unfavourable testimony cannot be sufficient to declare a witness as hostile for he might be telling the truth which goes against the party calling him (see *Dato' Hj Azman Mahalan v PP* [2007] 3 CLJ 495).

[5] Procedure to be followed in treating a witness as hostile

The steps to be followed in applying to treat a witness hostile based on his previous conflicting statement was discussed in *Re Wee Swee Hoon, Deceased; Lim Ah Moy & Anor v Ong Eng Say*, *supra*.. In that case the witness in question had given evidence in an earlier hearing in the Police Court which contradicted his testimony in the instant case. Brown J suggested the following procedure:-

“When a witness has given an answer or answers, which the party calling him knows to be in conflict with some statement or evidence which he has previously made or given, the proper procedure, in my opinion, is for Counsel then to ask him (as was done in this case) whether he made a statement (or gave evidence) at a certain place on a certain date. Having heard his answer (whatever it may be) no further questions should be put at that stage. But Counsel should then hand to the Judge the statement (or record of the evidence), and apply for leave to cross-examine him under the provisions of s 155 of the Evidence Ordinance. The Judge, having given the other side an opportunity of seeing the document and making his submissions on the application, will then give his ruling. That, in my view, is the proper procedure, in a situation of this kind”.

This case was quoted with approval in the Singapore case of *Yuen Chun Yui v Public Prosecutor* [1997] 3 SLR 57 where Yong Pung How CJ said that the primary safeguard is that the opposing party should be allowed to view the statement in question. The textbook authorities cited earlier say that the court has wide and unfettered discretion to order cross-examination of a party’s own witness. Therefore the court could be invited to consider the other grounds such as adverseness and hostility when applying to cross examine a witness.

[6] Court’s discretion in allowing the application

In exercising this discretion, Siti Norma J, in the case of *S. Lourdenadin v M. Ratnavale Nee Annalakshmi Vattivelu & Anor.* [1986] CLJ 481 (Rep) [1986] 1 CLJ 228, adopted the following guidelines from the Indian case of *Amathayaramal v. The Official Assignee, High Court Madras* [1933] IC 629:

- (1) Before the procedure can be adopted, the party wishing to cross-examine its own witness, must formally asks and obtain the Court's permission.
- (2) It is not necessary that the witness should first of all be determined to be hostile as in the law and practice in England.
- (3) Although section 154 gives the Court unfettered discretion, it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which make it necessary for facts to be got from the witness by means of cross-examination.

[7] Credibility of a witness who has been cross-examined

A hostile witness who has been cross-examined does not lose his credibility completely and his evidence can still be used by either party depending on the outcome of the cross-examination (see *PP v Tan Chye Joo & Anor* [1988] 1 LNS 174. Therefore just because a witness is declared hostile, his entire evidence does not get excluded or rendered unworthy of consideration (*Indian Supreme Court case of State Of Uttar Pradesh v Chet Ram & Ors.* [1990] 3 CLJ 468 (Rep) [1990] 1 CLJ 1079). The High Court in *Hj Elias Hanan v Hj Md Noor Salleh* [2002] 8 CLJ 448 quoted with approval the following passage from *Sarkar on Evidence* 15th edn vol 2 (see pp. 2255-2258) on issue of the credit of a hostile witness:-

The better opinion is that where a party contradicts his own witness on the part of his evidence, he does not thereby throw over all the witness's evidence, though its value may be impaired in the eyes of the court. Either party may rely on the evidence of a witness who is cross-examined by the party calling him. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. The rule of law is that it is for the jury to say. The evidence of such witness is not to be rejected either in whole or in part. It is not also to be rejected so far as it is in favour of the party calling a witness, nor is it to be rejected so far as it is in favour of the opposite party.

In the case of *PP v Tan Chye Joo & Anor* [1988] 1 LNS 174, Wan Adnan J said as follows in respect of the purpose and effect of the cross-examination:-

“The object of the cross-examination under s 154 of the Evidence Act is only to test the veracity of the witness. The grant of the permission to cross-examine is not an adjudication by the court adverse to the veracity of the witness. Whether the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination”.

The cross-examination of the hostile witness in respect of a previous statement will not have the effect of substituting the former statement for his court statement but may render negligible his court testimony which is unfavourable to the party that called him. Horne J in *P A Anselam v Public Prosecutor* [1941] MLJ 157 said as follows on that issue:-

“Such cross-examination is not for the purpose of substituting the unsworn statement for his testimony given in open Court on affirmation. All that such a cross-examination can do is to prevent the Court giving any value to his sworn statement that the woman always paid the rent. The Magistrate was clearly wrong in placing any reliance upon this witness. He should have been treated as negligible and the verdict found on the rest of the evidence, *Rex v Harris* (1927) Cr App R 144”.

Conversely failure to cross-examine a witness as hostile does not mean that the evidence he gives which is adverse to the party calling him should necessarily be accepted by the court. In *Lim Teng Leng v Public Prosecutor* [1998] 5 CLJ 400, the prosecution called the mother of an underaged rape victim to the witness stand although she was the lover of the accused and was unwilling to testify against him. Their purpose was solely to establish the age of the victim as she did not possess a birth certificate. They managed to establish the victim's age. However, as expected she gave exculpatory evidence in respect of the allegation of rape against the accused. Notwithstanding the failure of the prosecution to cross-examine her as a hostile witness, the High Court upheld the lower court's selective rejection of her evidence which was exculpatory of the accused. The court held as follows:-

"I am also in agreement with the two cases just mentioned (*PP v Kang Ho Soh* [1993] 3 CLJ 2914 and *Babu Ram v R*, A [1937] A 754) that there cannot be any automatic accreditation of truthfulness to a witness merely because he was not cross-examined or impeached. The court, notwithstanding the lack of cross-examination or impeachment, is entitled to ascertain the truth or otherwise of the evidence of the prosecution witness. In this regard the learned Sessions Court judge did not err. But it must be borne in mind that since the prosecution produced the witness, it must be that in the first instance, she is paraded as a witness of truth. Therefore, there must be some indication that the witness is not telling the truth before the court can embark on an exercise of discrediting the witness".

In *PP v Kang Ho So* [1993] 3 CLJ 2914, Shankar J said as follows:-

"The defence contends that because PW5 was not challenged or impeached the court should accept him as a witness of truth. If the prosecution was not relying upon his testimony it is contended that they should not have called him. As to this I hold that merely because the prosecution has called a witness it does not follow that he must be accepted as truthful".

[8] Application can be made at any stage of examination

The application to treat a witnesses as hostile can be made at any stage of the examination (see *BN Chobe v Sami Ahmad* [1969] 1 Andh LT 32, cited in *PP v Ramli Shafie* [2002] 8 CLJ 846). The need to cross-examine a witness during re-examination may also arise when the opposing party had elicited a new matter during cross-examination (see Woodroffe & Syed on *Law of Evidence*, 15th edn, p. 812 quoted in *Lim Teng Leng v Public Prosecutor* [1998] 5 CLJ 400). The discretion to permit cross-examination of a hostile witness during the re-examination is subject to the proviso that the adverse party is allowed to further cross-examine the witness (*Dahyabhai v R* 1964 AIR 1563 SC, quoted with approval in *Yuen Chun Yui v Public Prosecutor* [1997] 3 SLR 57). However the right to apply to cross-examine one's own witness exists only while the witness

is still giving evidence. Once the witness has finished his testimony, an application cannot be made to cross-examine him as a hostile witness (see *Ammathayarammal v Official Assignee*, AIR [1933] Mad 137; *PK Das v State* [1971] ILR 2 Cal 392, cited in *PP v Ramli Shafie*, *supra*).

Child Witness

- [1] Introduction**
- [2] Statutory Provisions**
- [3] Sworn And Unsworn Evidence Of A Child Witness**
- [4] Requirement For Preliminary Examination**
- [5] Failure To Conduct Preliminary Examination Of A Child Witness**
- [6] Who Is A Child?**
- [7] Caution Under Section 8 Of The Oaths And Affirmations Act**
- [8] Requirement For Corroboration**
- [9] Evidence Of Child Witness Act 2007**

[1] Introduction

Children have been frequently called to give evidence in recent times and sometimes not only as mere witnesses but also as victims of serious crimes. Sometimes the entire case for the prosecution rests on their testimony. It is important to appreciate that special provisions in the law apply to the treatment of children who appear as witnesses.

[2] Statutory Provisions

The significant statutory provision that governs the evidence of a child in a court of law is section 133A of the Evidence Act 1950. It reads as follows:-

133A. Evidence of child of tender years.

Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that section:

Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

Briefly this provision says that if a child does not understand the nature of an oath, the child may be permitted to give unsworn evidence if the court is of the

opinion the child *is possessed of sufficient intelligence and understands the duty of speaking the truth.*

The other statutory provisions that are relevant in considering child witness evidence are section 118 of the Evidence Act and Section 8 of the Oaths and Affirmation Act 1949 (revised 1977).

Section 118 of the Evidence Act 1950 reads as follows:-

118. Who may testify.

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by *tender years*, extreme old age, disease, whether of body or mind, or any other cause of the same kind. (italics supplied)

Explanation - A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

Section 8 of the Oaths and Affirmation Act 1949 (revised 1977) provides that a person of immature age may be admitted to give unsworn evidence after being cautioned to speak the truth.

[3] Sworn And Unsworn Evidence Of A Child Witness

Section 133A makes a distinction between the sworn and unsworn testimony of a child witness. If the court finds upon preliminary examination that the child understands the nature of an oath, the said child could be allowed to take the oath and give evidence. However, if the court is of the opinion that the child witness cannot understand the nature of an oath, the evidence is still receivable if he is *possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.* A useful discussion on this limb of section 133A is found in *Public Prosecutor v Gurdial Singh Pretum Singh & Ors* [2003] 1 CLJ 37. In that case the child was only nine years old. Although he was intelligent and precocious, the court did not allow him to take the oath because of his tender years. In order for the unsworn evidence to be receivable in court, section 133A prescribes it to be *taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code.* It shall then be deemed to be a deposition within the meaning of that section. Section 269 of the Criminal Procedure Code refers to the mode of recording evidence in inquiries under Chapter IX. The evidence must be read over to the witness and corrected if necessary. The witness shall also be asked to sign his deposition. It is implied in section 133A that if the court finds that the child does not understand the nature of an oath and at the same time is not possessed of sufficient intelligence and does not understand the duty of speaking the truth, the child must be rejected altogether as a witness. Similarly it is implied under

section 118, that if a person of tender years cannot understand the questions put or give rational answers, he or she is not competent to testify as a witness.

[4] Requirement For Preliminary Examination

Preliminary examination is necessary whenever a child of tender years is proposed as a witness, whether as a sworn or unsworn witness. The statutory requirement is found in section 113A itself. Although section 133A of the Evidence Act 1950 deals mainly with the treatment of unsworn evidence of a child, it also implies that the court must first determine whether the witness oath can be administered on a child. This issue was discussed at length in *Sidek bin Ludan v Public Prosecutor* [1995] 178, *Yusaini bin Mat Adam v Public Prosecutor* [1999] 3 MLJ 582 and *Public Prosecutor v Gurdial Singh Pretum Singh & Ors* [2003] 1 CLJ 37. In *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178, it was argued that the lower court should have held a preliminary hearing in the nature of a *voir dire* to ascertain whether the oath to tell the truth should be administered on a child witness. The High Court ruled that it was not necessary as voluntariness of a statement is not in issue. However the court held that the presiding judge should test the competence of the child witness by asking some preliminary questions in respect of the significance of an oath and the moral obligation to tell the truth. The lower court in that case recorded in the notes of proceedings as follows:-

Mahkamah menyoal saksi untuk memastikan jika beliau memahami sifat keterangan bersumpah. Saksi diingatkan beliau harus bercakap benar dan saksi berkata beliau faham atas maksud sumpah iaitu mesti mengikut apa yang dikatakan dalam sumpah dan dalam keadaan ini untuk bercakap benar. Oleh kerana pada pendapat mahkamah saksi ini faham akan sifat bersumpah (oath) maka saksi ini boleh mengangkat sumpah untuk beri keterangan.

This was found to be sufficient and desirable by the High Court. However, it would be prudent for trial courts when conducting the preliminary examination of a child witness to record down some of the questions posed by the court and the response of the child so that the appellate court would be in a better position to appreciate the competence of the child as a witness if the same is made an issue during the appeal. This course was suggested in the case of *Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306 and *Arumugam Mothiyah v Public Prosecutor* [1995] 1 CLJ 58. The court in the latter case said as follows:-

It is also desirable, in my considered view, that the Sessions Court Judge should apply and record appropriate questions in the notes of evidence so as to ascertain whether the complainant understands the solemn duty of speaking the truth or not. Arising out of this, the Sessions Court

Judge should also record in the notes of evidence his opinions and reasons in arriving at the conclusions as to whether the complainant understands the solemn duty of speaking the truth or not. The notes of evidence would form the record of proceedings and, through it, the appellate Court will be able to ascertain whether the correct procedures had been adopted (*Krishna Kahar v. Emperor* [1940] AIR Cal. 182).

It is suggested that at least very basic questions be recorded such as whether the witness knows what it means take oath and give evidence, whether the witness has any understanding of the consequences of lying, whether witness knows that the duty to tell the truth under oath is different from the normal duty in social situations. If the witness oath is administered or the witness is invited to give unsworn testimony, the witness should be cautioned to speak the truth, the whole truth, and nothing but the truth and this should be recorded as well.

[5] Failure To Conduct Preliminary Examination Of A Child Witness

In the case of *Yusaini bin Mat Adam v Public Prosecutor* [1999] 3 MLJ 582, the lower court failed to ask the child witness preliminary questions to test her understanding of the solemnity of an oath. The conviction was set aside by the High Court on this ground. The learned High Court judge in that case quoted the following illuminating passage from the English case of *R v. Hayes* [1977] 64 Cr. App. R 194:-

It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. *The important consideration we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct.* (emphasis added)

[6] Who Is A Child?

There is no definition in the Evidence Act 1950 in respect of who is a child. For the purpose of determining maturity to give sworn or sworn evidence in court, it may not be practical to prescribe a cut-off age to determine who can take the oath and who cannot. Some children would attain a level of precocity sufficient for the witness oath to be administered before they reach their teens whereas others may take a much longer period to reach similar understanding and awareness of the solemnity of oath. Similarly some children would have a better understanding of the duty to tell the truth than others. This is something that the court must assess under Section 133A by asking some preliminary questions. The following are the ages of the children in some of the cases where this issue was considered. In the case of *Public Prosecutor v*

Gurdial Singh Pretum Singh & Ors, the court was not convinced after preliminary examination that the child who was nine years old truly understood the significance of taking the oath. However the court found that the child had more than sufficient intelligence to justify the reception of his evidence and understood the duty of speaking the truth. He was allowed to give unsworn evidence. In *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222, the child was 10 years old at the time of trial and 7 years old at the time of the incident. The court formed the opinion that the child did not understand the nature of an oath but thought she possessed sufficient intelligence and understood the duty of speaking the truth to justify the reception of her evidence. In *Yusaini bin Mat Adam v Public Prosecutor* [1999] 3 MLJ 582 and *Sidek bin Ludan v Public Prosecutor* [1995] 178 which was discussed earlier, the child witnesses were 10 years old. In the case of *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174, the witness in question was a 14 year old boy at the time of trial (13 years old at the time of the incident). The learned trial judge did not consider him a child of tender years and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. In the unreported case of *Public Prosecutor v Goh Choong Ting & 2 Ors* [2001] 1 LNS 282, the witness was 16 years old at the time of giving evidence and 15 years old at the time of the incident. The court did not consider him a child of tender years after considering his answers and observed that under section 2 of the Juvenile Courts Act 1947 (now repealed and replaced by the Child Act 2000), a child must be below the age of 14 years. It must be noted that under the Child Act 2001, a child is defined as a person under the age of 18 years. Be that as it may, it would be prudent and practical for courts to conduct the exercise of testing the understanding of any child even if he or she is about to reach the age legal maturity before administering the oath of a witness.

[7] Caution Under Section 8 Of The Oaths And Affirmations Act

Section 8 of the Oaths and Affirmation Act 1949 (revised 1977) reads as follows:-

8. Evidence of persons of immature age.

Any person who by reason of immature age ought not in the opinion of the court to be admitted to give evidence on oath or affirmation shall be admitted to give evidence after being cautioned by the court to speak the truth, the whole truth, and nothing but the truth.

(Note: In Sabah, the equivalent provision is Section 5(2) of the Oaths Ordinance (Cap.89) whereas in Sarawak it is section 3 of the Oaths and Affirmation Ordinance (Cap 55)

This provision refers to the unsworn evidence of a child. A child who is not admitted to give evidence on oath may give unsworn evidence after being cautioned by court to speak the truth. This provision must be read together with section 133A. The court must first determine that the child possesses

sufficient intelligence and understands the duty of speaking the truth. It would also be prudent to record in the notes of proceedings that the caution prescribed in section 8 has been administered. This became an issue in the case of *Ng Kwee Piow v Regina* [1960] MLJ 278 where it was argued that the trial court did not administer the caution in the words of section 8, i.e. “to speak the truth, the whole truth, and nothing but the truth”. The appellate court however held that having regard to the notes recorded in that case, it was only an irregularity. In the case of *Dabal B. Anding v Public Prosecutor* [1994] 2 CLJ 383, the High Court advised lower courts to caution children to speak the truth, the whole truth and nothing but the truth as prescribed in section 5(2) of Oaths Ordinance of Sabah instead of having regard only to section 113A and 118 of the Evidence Act 1950.

[8] Requirement For Corroboration

Section 133A in its present form was inserted in 1971. The present 133A distinguishes the sworn testimony from the unsworn testimony of a child witness. It enacts that the accused *shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him*. This is a mandatory requirement after 1971. In respect of the sworn testimony of a child, there is no similar statutory requirement for corroboration. However this does not mean that corroboration is not important in cases where a child had given sworn testimony. Prior to 1971, the law did not distinguish between sworn and unsworn testimony of a child. The rule of prudence demanded that the evidence of a child, whether sworn or unsworn, must be corroborated unless the court warns itself of the danger of proceeding on the uncorroborated testimony of a child of tender years. The reason for this was famously given by Thomson C.J. in *Chao Chong & Ors v Public Prosecutor* [1960] MLJ 238 as follows:-

“.....it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between results of observation and the results of imagination.”

After 1971, the rule of prudence become a rule of law in cases of unsworn testimony. However, the rule of prudence still applies in the case of sworn testimony. This means that if the trial court does not sufficiently warn itself of the inherent danger of convicting solely on the uncorroborated sworn testimony of child, the conviction could be set aside (see *Chao Chong & Ors v Public Prosecutor* [1960] MLJ 238 and *Loo Chuan Huat v Public Prosecutor* [1971] 2 MLJ 167). The warning in respect of evidence that needs corroboration need not be worded in any particular way but as Lord Donovan said in *Chiu Nang Hong v PP* [1965] 1 MLJ 40 said at p 43, *what is necessary is that the judge's mind upon the matter should be clearly revealed*.

It should also be remembered that the unsworn testimony of one child cannot be used to corroborated the unsworn testimony of another (see *Director of Public Prosecutions v Hester* [1972] 3 All ER 1056, *cited in Public Prosecutor v*

Mohammad Terang bin Amit [1999] 1 MLJ 154). However the testimony of other witnesses whose evidence do not require corroboration, including the parent of a child witness, can be used to corroborate the testimony of the child (see *Teo Keng Pong v Public Prosecutor* [1996] 3 SLR 339).

[9] Evidence Of Child Witness Act 2007

This Act came into force on 31.12.2007. It introduces significant changes to the manner in which child evidence is received by the courts. The provisions of the Evidence Act 1952 however shall continue to apply except in so far as those provisions are expressly modified by this Act (Section 16). Section 3 provides for the reception of child evidence by live video link or by video recording. It also provides for a screen to be placed between the child and the accused. The child is also allowed to give evidence through an intermediary. However, the unrepresented accused shall not be entitled to question a child witness directly but may do so through an intermediary. The court may allow a child witness to be accompanied by an adult while giving evidence. Possibly, to make the court atmosphere child friendly, formal court attire such as coats and gowns can be dispensed with if directed by the court. In respect of the question who is a child, it defines a "child witness" as a person under the age of sixteen years who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence. The procedure to allow giving of evidence by video or television link is similar to the recently enacted section 272B Criminal Procedure Code (vide Act A1274 with effect from 7.9.2007). Section 272B provides that any person, other than the accused, may, with leave of the court, give video or live evidence through a live video or live television link in any trial or inquiry, if it is expedient in the interest of justice to do so.

Procedure In Court For Children

- [1] Introduction**
- [2] Definition Of Child**
- [3] Constitution And Jurisdiction**
- [4] Venue Of The Court For Children**
- [5] Who May Be Present?**
- [6] Institution Of A Criminal Charge Against A Child**
- [7] Bail And Remand Applications**
- [8] Explaining The Charge To A Child**
- [9] When The Child Admits To The Offence**
- [10] When The Child Does Not Admit To An Offence**
- [11] Powers Of Court When Offence Proved**
- [12] Social Aspects Of Child Act 2001**
 - [i] Child In Need Of Protection**
 - [ii] The “Protector”**
 - [iii] Media Restrictions On Reporting**
- [13] Conclusion**

[1] Introduction

The *Child Act 2001* came into force on 1 August 2002. The purpose of this Act can be seen in its preamble, which states:

“An Act to consolidate and amend the laws relating to the care, protection and rehabilitation of children and to provide matters connected therewith and incidental thereto.”

Pursuant to the enactment of the *Child Act 2001*, the *Women and Girls Protection Act 1973*, the *Child Protection Act 1991* and the *Juvenile Court Act 1974* were repealed.

This chapter attempts to give an overview of the *Child Act 2001* especially in relation to the jurisdiction and procedure of the Court For Children including the social and welfare considerations that underpin its set-up. The lengthy preamble to the Act gives statutory recognition to the widely held belief that children are the future of the country and that due to their emotional and physical immaturity they must be given special care and assistance to fully participate in society. The preamble actually gives the rationale for treating child offenders differently from adult offenders.

[2] Definition Of Child

Pursuant to s 2(1) of the *Child Act 2001*, a child is:

- (a) A person who is under the age of 18;
- (b) In a matter relating to criminal proceedings, a person who has attained the age of criminal responsibility, as stated in s 82 of the Penal Code.

Therefore, a child who falls within the definition of s 2(1) of the *Child Act 2001* shall be tried in a Court for Children if he/she commits an offence (s 83(1)). However a child who attains the age of 18 after the charge was laid in Court for Children, shall continued to be tried in that court (s. 83(2)). On the other hand, a person who was a child at the time of the alleged offence but was already an adult by the time he was charged, will have his case heard in the normal courts (s.83(3), see also the case of *PP v Mohd Turmizy Mahdzi & Anor* [2007] 9 CLJ 187). In respect of a child who is jointly charged with an adult, the normal courts shall have jurisdiction but that court shall in respect of the child exercise all the powers under the *Child Act 2001* and consider the probation report prior to sentencing (s. 83(4)).

[3] Constitution And Jurisdiction

Section 11 reads as follows:

(1) Courts constituted in accordance with this Act and sitting for the purpose of-

(a) hearing, determining or disposing of any charge against a child;
or

(b) exercising any other jurisdiction conferred or to be conferred on Courts For Children by or under this Act or by any other written law,

shall be known as the "Courts For Children".

(2) A Court For Children shall consist of a Magistrate who, in the exercise of his functions as a Court For Children except when making an order under subsection 39(4), 42(4), 84(3) or 86(1), as the case may require, shall be assisted by two advisers to be appointed by the Minister from a panel of persons resident in the State.

(3) One of the two advisers mentioned in subsection (2) shall be a woman.

(4) The functions of the advisers are-

(a) to inform and advise the Court For Children with respect to any consideration affecting the order made upon a finding of guilt or other related treatment of any child brought before it; and

(b) if necessary, to advise the parent or guardian of the child.

(5) A Court For Children shall have jurisdiction to try all offences except offences punishable with death.

(6) Except as modified or extended by this Part, the Criminal Procedure Code [Act 593] shall apply to Courts For Children as if Courts For Children were Magistrates' Courts.

Pursuant to section 30 of the *Child Act 2001*, the Court for Children may impose orders. However, s 96(1) of the *Child Act 2001* states that no children under the age of 14 years shall be ordered to be imprisoned for any offence or to be committed to prison in default of payment of a fine, compensation or costs. Children aged 14 or above shall not be ordered to be imprisoned if he can be suitably dealt with in any other way, whereby through probation, detention or by being sent to an approved school. Further, if a child aged 14 years or above, if imprisoned, shall not be allowed to associate with adult prisoners.

Section 97 of the *Child Act 2001* bars the sentence of death against a person convicted of an offence if it appears that at the time when the offence was committed he was a child. In lieu of the death sentence, the person will be detained under the pleasure of the Yang di Pertuan Agong or Ruler of the Relevant State. The constitutionality of section 97 was recently affirmed by the Federal Court in *PP v Kok Wah Kuan* [2007] 6 CLJ 341.

Besides section 11(5) of the *Child Act 2001* which limits the jurisdiction of the Court for Children, there are other situations where the Court for Children will not have jurisdiction: where the ESCAR trial is applicable (Rule 3(3) ESCAR), and where a child is charged jointly with a person who has attained the age of 18 years (section 83(4) of the *Child Act 2001*).

[4] Venue Of The Court For Children

The *Child Act 2001* lays emphasis on the place of sitting of the Court for Children. In other words, the building or the place which holds a Court for Children is one of the major concerns of the *Child Act 2001*. It is believed that the main reason for such a concern is the psychological welfare of the child. The child, if possible, is not to be exposed to the normal environment of the criminal court. The privacy of the child should not be invaded either. S. 12 (1) of the *Child Act 2001* enacts as follows:

1) A Court For Children shall, if practicable, sit-

(a) either in a different building or room from that in which sittings of Courts other than Courts For Children are held; or

(b) on different days from those on which sittings of those other Courts are held.

(2) If a Court For Children sits in the same building as other Courts, the Court For Children shall have a different entrance and exit from those of the other Courts to enable children to be brought to and from the Court For Children with privacy.

[5] Who May Be Present?

Section 12 (3) clearly demonstrates a clear legislative intention to restrict the attendance of the general public "*at any sitting of a court for children*" as oppose to any open court trial. The wisdom for such a requirement is "*... to enable children (in such trial (s)) to be brought to and from the court for children with privacy.*" as provided by section 12(2) of *Child Act 2001* which justifies the restrictions quoted above. Those who may be present are:

(a) members and officers of the Court;

(b) the children who are parties to the case before the Court, their parents, guardians, advocates and witnesses, and other persons directly concerned in that case; and

(c) such other responsible persons as may be determined by the Court.

In determining who are the responsible persons under the ambit of the *Child Act 2001*, the court in the case *Iskandar Abdul Hamid v PP* [2005] 6 CLJ 505 held that the court "*must take sufficient judicial consideration of all the relevant facts*".

[6] Bail And Remand Applications

The provision of bail is provided for under section 84 of the *Child Act 2001*. The Court of Appeal in the case of *PP v N (A Child)* [2004] 2 CLJ 176 in deliberating whether or not section 117 of the *Criminal Procedure Code* is applicable for the detention of a child for purposes of investigation (remand) held that there is no provision in the *Child Act 2001* for such detention in the case of a child. Such provision is only available under section 117 of the *Criminal Procedure Code* and is therefore similarly applicable to a child.

Section 86 complements section 84 of the *Child Act 2001*. Both sections contemplate detention of a child pending ‘the hearing of the charge’ and not for the purposes of investigation or remand. When a child is arrested for an offence, he must be brought within 24 hours before a Court For Children, whereupon he is to be released on a bond pending the hearing of the charge unless section 84(3)(a), (b) and (c) applies i.e. the charge is one of murder or other grave crime as defined in section 2 of the Child Act, it is necessary to remove the child from association with any undesirable person or the release of the child would defeat the ends of justice.

When a child is released on a bond with or without securities, the bond shall normally be executed by his parents or other responsible person likely to secure the attendance of the child to court. Where bail is not allowed, the child is required to be detained in a place of detention gazetted by the Minister under s 58 of the *Child Act 2001*. Section 85 of the Child Act, prevents a child who is detained in a police station, police cell or lock up from associating themselves with an adult who is charged with an offence.

[8] Explaining The Charge To A Child

The procedure in the Court For Children is envisaged under section 90(1)-section 90(18) *Child Act 2001* and is akin to a summary trial procedure under section 173 of the Criminal Procedure Code. The Magistrate sitting in the Court For Children has the duty of ensuring that the charge is read and explained to the child in a simple language fit for his age, maturity and understanding the substance of the alleged offence. It is important that the child fully understands the nature of the charge against him so as to enable him to enter his plea. Although section 90(2)(a) and (b) *Child Act 2001* states that the duty to explain may be undertaken by the Defence Counsel acting for the child or any other responsible person determined by the court, the task is normally performed by the Court’s interpreter in a language or dialect preferred by the child. When it is clear that the child understands the content of the charge, he shall be asked whether he admits to the offence or otherwise.

[9] When The Child Admits To The Offence

If the child admits to the offence, the nature and consequences of his admission i.e. the penalty provided for under the offending Act shall be explained to him. If the child, upon understanding the nature and consequences of his admission still wishes to maintain his plea, the court shall record a finding of guilt under s 90(4) of the Child Act.

In simple cases, the brief fact that follows upon an admission of a child would be as per the charge. In most cases, the brief facts in support of the charge would be presented by the Prosecution. It is trite that the brief facts and

exhibits tendered must support the charge. In a case where the child disputes the accuracy of the brief facts, the court must reject the admission of the offence and the finding of guilt.

[10] When the Child Does Not Admit To An Offence

When the child claims trial, the court shall proceed under section 90(5) *Child Act 2001* to hear the evidence of the Prosecution's witnesses in respect thereof. Section 90(5) *Child Act 2001* allows a child to cross examine all the Prosecution's witnesses and in doing so the child can be assisted by his parents or guardian unless a child is legally represented. Section 88 (1) of the Act that imposes legal and moral duty for the parents of the child to attend the Court's proceedings at all stages unless the court is satisfied that it would be unreasonable to require the attendance of the parents or guardian. In such cases, the attendance of the parent/parents/guardian may be dispensed with by the Court For Children.

If a child is not represented either legally or assisted by his parents/guardian, the court may, in accordance with section 90 (8) of the Act put to the child such questions necessary to bring out the assertions of the child. The court shall then put to the witnesses necessary questions on behalf of the child. If the Court For Children is of the opinion that a prima facie case is proven, the substance of the evidence and any adverse points requiring his explanation shall be pointed out to the child. Contrary to the Criminal Procedure Code, section 90(9)(b)(i) and section 90(9)(b)(ii) of the *Child Act 2001* provide only two methods of entering defence; the child shall be allowed to give sworn or unsworn evidence. The option to remain silent is not stated in the Child Act (*An overview of the Child Act 2001* [2003] 2 MLJ iv). An order of acquittal shall be recorded if the child is found not guilty under section 90(10) of the *Child Act*.

Once the court is satisfied that the offence against the child is proven, section 90 (11) *Child Act 2001* allows the child and the child's parents or guardian to put forward anything in mitigation before the Court. Section 90 (12) of the Act makes it mandatory for the Court For Children to consider the probation report before deciding how to deal with a child under section 91 of the Child Act. A probation report must contain all relevant information pertaining to the child (as stipulated under section 90(13) of the Act) and must be tendered as evidence by the Probation Officer from the Welfare Department. It is also important for the contents of the report to be read and explained to the child and the salient parts of the report which the court considers material in assessing the appropriate order be equally highlighted by the court. Section 90 (17) of the Act states that the court shall ascertain the opinion of the advisers before deciding on the order to be imposed. Section 11(2) of the *Child Act* clearly specifies that the Court For Children shall be assisted by two advisers one of whom shall be a woman. While the court is not bound to conform to the opinions of the advisers, the reasons for dissenting must be recorded in the court's proceedings under section 90 (18) of the *Child Act*.

The roles of the advisers as stipulated under section 11 (4) of the *Child Act* are apparent. The advisers are to advise the Court For Children in respect of any orders affecting the child and if necessary to advise the parent/parents/guardian of the child.

[11] Powers Of Court When Offence Proved

Section 91 *Child Act 2001* empowers the Magistrate presiding in the Court For Children to impose any of the punishments contained in paras (a)-(h) of the Act upon being satisfied that an offence has been proved. In *PP v Velory Libong* [2005] 4 CLJ 813, the court held that section 91(1)(a)-(h) should be read disjunctively. In addition to exercising any of the powers under section 91 the Magistrate shall under section 93 *Child Act 2001* order the parent or guardian of the child to execute a bond for the child's good behaviour with or without security. An order made under section 93 *Child Act 2001* shall be coupled with one or more of the conditions stipulated under section 93(a)-(e).

Section 91(1)(h) *Child Act 2001* provides for imprisonment sentence to be imposed. The imposition of this sentence, however, must be subjected to section 96 *Child Act 2001* which prohibits a child under the age of 14 years from being imprisoned for any offence. Pursuant to section 96(2) of the Act, even if a child is aged 14 years or above, he shall not be imprisoned if he can be suitably dealt with in any other way, whether by probation, or fine, or being sent to a place of detention, or an approved school, or a Henry Gurney school, or otherwise.

Before a child is sent to an approved school or Henry Gurney school, the prerequisites of section 67 and section 75 *Child Act 2001* must be respectively fulfilled. Under section 67 of the Act, a child can only be sent to an approved school if the probation report reveals that the parents or guardian of the child is incapable of exercising any proper control over him and that the child is in need of institutional rehabilitation. On the recommendation of the Probation Officer, the Court For Children may order a child, so long as he is not under the age of ten years, to be sent to an approved school for a period of three years under section 67(2) *Child Act 2001*.

Similarly, section 75 *Child Act 2001* allows a child who has been found guilty of any offence punishable with imprisonment to be sent to a Henry Gurney School if the probation report reveals that the parents or guardian of the child is incapable of exercising any proper control over him and that the child is habitually in the company of persons of bad character. In this case, if the Court For Children is satisfied that the offence committed is serious in nature and it is expedient for the child to be subjected to such detention, the child shall be ordered to be sent to a Henry Gurney School for a period of three years under section 75(2)(a)(i) *Child Act 2001*. Section 74 of the Act precludes a child under the age of fourteen years to be sent to a Henry Gurney School. Be that as it may section 75(2)(a)(ii) of the Act specifies that a detention of a child in a

Henry Gurney School is only valid up to but not after he has attained the age of twenty one years. (See Table below)

Where a child is concerned, a conviction must be construed as a 'finding of guilt' and a sentence is to be interpreted as an 'order made' upon the finding of guilt.(section 91 (2)).

Table

Approved School (Section 65)	Henry Gurney School (Section 75)
1.Child aged 10 years and above	1.Child aged 14 years and above
2.Parents incapable of exercising proper control	2.Parents incapable of exercising proper control
3.Child in need of rehabilitation	3.Child habitually in company of bad character
4. Offence may not be in serious nature	4.Offence is serious in nature.
5. On recommendation of the Probation Officer	5.Child not suitable to be rehabilitated in an Approved school
	6.On recommendation of the Probation Officer.

[12] Social Considerations Of The Child Act 2001

[i] Child In Need Of Protection

The notion behind the *Child Act 2001* is believed to protect the child's welfare. Hence, the social aspect of the *Child Act 2001* shall be considered when one is discussing about the *Child Act 2001* as a whole. The *Child Act 2001* covers the child who is in need of care and protection. Section 2 of the *Child Act 2001* deals with the definition of the protector. The Part III of the *Child Act 2001* also tells us the appointment of the caretaker & protector for the child that comes under the *Child Act 2001*. It also talks about the duties of the members of the family, the caretaker, the medical officer and the courts when it comes to the welfare of the child under the *Child Act 2001*.

Section 17 of the *Child Act 2001* provides the situation or circumstances when the child is in need of care and protection. A child is in need of care and protection if the child has been or there is substantial risk that the child will be injured, either physically or emotionally; or sexually abused by the parents, guardian. A child needs also protection pursuant to section 17 *Child Act 2001* if his parent or guardian is unfit or unwilling to do so. Most importantly, a child is in need of protection if in any case, if protection is not given, the child will be injured or harmed.

[ii] The “Protector”

“Protector” as defined in section 2 means:

- (a) the Director General;
- (b) the Deputy Director General;
- (c) a Divisional Director of Social Welfare, Department of Social Welfare;
- (d) the State Director of Social Welfare of each of the States;
- (e) any Social Welfare Officer appointed under section 8;

When the child is in need of protection, the Minister may appoint a member of the Social Welfare to be a protector. The powers of the protectors are stated in section 8 of the *Child Act 2001*. the protectors can only exercise his/her power subject to the condition laid down in section 8 (2) of the *Child Act 2001*, whereby he/she:

- (a) shall have the power of a Magistrate in respect of the taking of evidence at any inquiry held by him under this Act;
- (b) shall furnish to the Court a copy of the notes of such evidence when called upon to do so by order of the Court; and

(c) shall not be compellable in any judicial proceedings to answer any question as to the grounds of his decision or belief-

(i) in any case dealt with by him under this Act; or

(ii) as to anything which came to his knowledge in any inquiry made by him as Protector.

[iii] Media Restrictions On Reporting

Section 15 deals with the media and its restrictions in reporting and publication. It places emphasis on the need to protect the interest of the children and therefore, it reflects the intention of the Parliament in passing the *Child Act 2001*. Any person who contravenes this position can be fined up to RM10,000 or face imprisonment for a term not exceeding five years or to both (section 15(4) *Child Act 2001*). The media is not allowed to report on children in the following circumstances:

(a) a child concerned or purportedly concerned in any criminal act or omission, be it at the pre-trial, trial or post-trial stage;

(b) any child in respect of whom custody is taken temporary (Part V);

(c) any child in respect of whom any of the offences specified in the First Schedule has been or is suspected to have been committed; or

(d) any proceedings under Part VI of *Child Act 2001*,

The media shall not also reveal the name, address or educational institution or any particulars that could lead to the identification of a child. The same applies to child who is a witness to an action (section 15 (1) *Child Act 2001*). Section 15 (2) of the *Child Act 2001* states that the media shall not publish a picture of a child or any other person that may lead to the identification of that child. However, such strict restriction may be dispensed with where the Court for Children is satisfied that it is in the interest of justice to do so and in the case of an application by or with the authority of a protector as defined in section 2 (*supra*).

[13] Conclusion

The Court For Children plays a pivotal role in achieving the aims set out in the preamble to the Child Act 2001. Parliament has recognised that children should be dealt with on a different footing from adults by the criminal justice process. It is for this reason, ordinary punishments can be dispensed with if the child can be suitably dealt with under the alternative orders provided under the Act.

The Law on Alibi

- [1] Introduction**
- [2] The law**
- [3] Purpose of S.402A**
- [4] Pre-condition of the defence of alibi**
- [5] Instances when the notice in s 402A need not be served**
- [6] Meaning of “commencement of the trial” in s 402A**
- [7] Addition of charges and the defence of alibi**
- [8] Amendment of charges and the defence of alibi**
- [9] Particularization of time and place of the commission of offence in charges and the defence of alibi**
- [10] ‘Evidence in support thereof’ as provided in s 402A**
- [11] Defence of denial and the defence of alibi**
- [12] Burden of proof**

[1] Introduction

Alibi is a defence. The Oxford English Dictionary states that it means “elsewhere” or “the plea of having been elsewhere when any alleged act took place.” When an accused person puts forward a defence of alibi, he is saying that by reason of the presence of the accused at a particular place or a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

[2] The law

The provision for the defence of alibi is found in S 402A of the Criminal Procedure Code. S 402A(1) lays down a pre-condition for the admission of the evidence in support of the defence of alibi, namely; the accused seeks to rely on this defence must give notice in writing to the public prosecutor at least ten days before the commencement of the trial. Evidence in support of alibi will not be admitted if no notice is given or is given less than ten days.

Subsection (2) stipulates that the notice in subsection (1) must include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[3] Purpose of S.402A

- To avert the mischief of the defense disclosing his defence of alibi towards the end of trial.
- It prevents surprise to the prosecution as it enables the prosecution to check upon the veracity of the alibi [See *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121].
- It prevents unnecessary prosecution of a person who could clearly show that he was not at the scene thereby saving cost.
- It helps the prosecution to prepare rebuttal evidence on alibi evidence and avert the need for adjournment.

In *Tan Kim Hoo v PP* [2007] 6 CLJ 557, the Court of Appeal defined the defence of alibi as follows :

“To constitute the defence of alibi, the plea of the accused must be that he was not present at the scene of the occurrence at the time when the incident in question occurred : *Bhagsingh v. State of Rajasthan* [1984] Cr LR (Raj) 679. What is the “scene of the occurrence” depends upon the facts alleged in the charge.”

[4] Pre-condition of the defence of alibi

In *Public Prosecutor v Lim Chen Len* [1981] 2 MLJ 41, Mohamed Azmi J held that the requirement of giving written notice at least ten days before the commencement of the trial is mandatory and the courts have no discretion in the matter.

In *Rangapula & Anor v Public Prosecutor* [1982] 1 MLJ 91, the appellants were charged for offences under ss 326 and 324 of the Penal Code. The appellants were precluded from adducing evidence of alibi by reason that no notice was filed in compliance with s 402A of the CPC. On appeal against the conviction, it was held that a trial magistrate had no discretion to admit any evidence in support of a defence of alibi where the provisions of s 402A of the CPC have not been complied with. It further held that the trial President was right in not allowing the evidence of the appellants’ respective wives to be adduced as the appellants had failed to comply with s 402A of the CPC.

[5] Instances when the notice in s 402A need not be served

In *Rangapula & Anor v Public Prosecutor* [1982], *supra*, at p 92 Yusof Abdul Rashid J. gave two instances when the notice in s 402A CPC need not be served. He said:

“In my judgment section 402A is not applicable and notice required to be served thereunder need not be so served to render “evidence in support of a defence of alibi” admissible –

- (a) where such evidence is in support of an alibi in respect of a day or time different from those specified in a charge; and
- (b) where a charge is amended in the course of the trial relating to either the date, time or place set out in the original charge. “

[6] Meaning of “commencement of the trial” in s 402A

The meaning of “commencement of the trial” is the commencement of the actual trial itself and not the date when the accused was first charged in court (See *Public Prosecutor v Lim Chen Len* [1981] 2 MLJ 41.

[7] Addition of charges and the defence of alibi

In *Wong Kim Leng v Public Prosecutor* [1997] 2 MLJ 99, after the trial had gone on for some days, 10 additional charges of cheating under s 420 of the Penal Code allegedly committed on 14 January were added by the deputy public prosecutor. Counsel for the appellant requested for an adjournment as he needed time to serve a notice of alibi. The adjournment was granted. No notice was, however served on the public prosecutor. The defence of the appellant was that, on the day of the alleged offences, he was working as a cashier at a hairdressing salon. He did not attempt to call any witnesses to support his defence of alibi. The Sessions Judge rejected the defence of alibi; and following the case of *Vasan Singh v PP* [1988] 3 MLJ 412, held that the defence was one of bare denial that he was at the scene of the alleged offence. She convicted the appellant on all the 10 charges. The High Court allowed the appeal against the conviction of the ten charges. It held that the appellant had a conditional right to admit evidence in support of his alibi and the condition was that he had to give a notice in writing to the public prosecutor at least 10 clear days before the commencement of trial. If the appellant was deprived of the opportunity to give such requisite notice through no fault of his, as in this case, then any trial which needed in evidence in support of the defence of alibi being statutorily barred from being given was clearly unfair and unjust in that it had deprived him of an important right.

[8] Amendment of charges and the defence of alibi

In *Dato Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 1 MLJ 177, the first and second appellants were charged with having committed carnal intercourse against the order of nature. The second appellant was additionally charged with abetment of the offence by the first appellant. On the application of the prosecution, the date of the offence charged was amended from May 1994 to

May 1992. When the second appellant served a notice of alibi on this charge, the charge was further amended to read as having been committed sometime 'between the months of January to March 1993'. Objections against the amendments to the respective charges were overruled by the trial judge. The 2ND appellant, after amendment to the charges at the commence of the trial at first instance, asked for an adjournment of the hearing of 12 days to enable the service of the notice of alibi in connection with the amended charges but was refused when the hearing resumed on 16 June 1999. The learned trial judge ruled, *inter alia*:

- “(i) that he was of the view that the notice of alibi served earlier on the public prosecutor in relation to the May 1992 charge was still valid and remained effective despite the amendment to the charges at the commence of the trial. And that it was not necessary for the second appellant to serve a fresh notice as in the circumstances the requirement of s 402A of the CPC had been duly complied with and that the second appellant was entitled to adduce evidence in support of his alibi;
- (ii) that in the circumstances of the case, he failed to see how the defence could be said to have been put in a disadvantage position with the amendment to the dates in the charges since the appellants were allowed to adduce evidence in support of their alibi. “

At the appeal, it was argued that the refusal by the trial judge in adjourning the hearing to enable the second appellant to serve the notice of alibi was a serious breach of a mandatory statutory provision which entailed the trial a nullity. Notwithstanding the stand taken by the prosecution in not demanding for notice of alibi to be served and for not objecting to the admission of evidence pertaining to the defence of alibi, that should not detract from the fact that there was a serious breach of mandatory statutory provision which entailed the trial a nullity. The Court of Appeal did not think the approach taken by the learned trial judge on the issue of alibi and the notice thereof was entirely wrong particularly in respect of the second appellant as to warrant a ruling that the whole trial was a nullity. It inclined to the view that the second appellant suffered no prejudice since there was already the first notice of alibi served. Further the second appellant was allowed to adduce evidence of his alibi pursuant of the first notice. Per PS Gil JCA (on the issue of amendment to the charges) at p 199:

“On the issue of the amendment to the charges in respect of the date alleged in the commission of the offences subsequent to the notice of alibi we need only to adopt the view expressed by the majority in the Supreme Court of Canada in the case of *Regina v P* (MB) CCC (3d) 289, [1994] CCC LEXIS 2454, 113 DLR (4th) 461, where Lamer CJ opined thus (at p 297):

The fact that an accused may have an alibi for the period (or part of the period) described in the indictment does not automatically “freeze” the dates specified in the indictment. That is to say, there is no vested right to a given alibi. Alibi evidence must respond to the case as presented by the Crown and not the other way around (emphasis added).

Accordingly, we hold that the mere giving of the notice of alibi by the second appellant should not be construed as having the effect of limiting or “freezing” the date or time specified in the charges preferred against them. As such, in our view, the hype on the three times changes to the dates in the charges was a result of a misapprehension of the true position of the law in respect of time factor when a charge is preferred against a person.”

[9] Particularization of time and place of the commission of offence in charges and the defence of alibi

In *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194, the applicant applied for the following two questions to be reserved for decision of the Federal Court –

- “(1) whether in an offence where the prosecution cannot specifically particularize the time and place when the offence was committed, evidence put forward by the defence to the effect that the accused was unlikely to have been present amounts to the defence of the evidence in support of alibi.
- (2) if the answer to the above is in the affirmative then whether in an offence where the prosecution cannot specifically particularize the time and place when the offence was committed, the defence is precluded from adducing evidence tending to show that accused was unlikely to have been present when the crime was committed by reason of his failure to give the required notice under section 402A of the Criminal Procedure Code.”

It was held that (from the headnote):

“(1) although the charge in this case had not stated when the offence was committed during the months of May and June 1978 it had nevertheless specifically defined the time and place sufficiently to enable the applicant to answer the charge. The applicant did not put forward any alibi defence, but his defence was in effect a complete denial of the prosecution case. The appellate judge quite rightly treated it as purely a question of fact;

(2) the first question posed in this case therefore was not a question of law within the scope of s 66(1) of the Courts of Judicature Act, 1964. No

question of law arose in the course of the appeal and there could not be any question of law that has affected the event of the appeal;

(3) the second question was dependent on the determination of the first question and therefore did not arise.

Semble: If a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under s 402A of the Criminal Procedure Code has been given, then the court has no discretion in the matter but to exclude such evidence.”

In *Dato Seri Anwar bin Ibrahim v Public Prosecutor & Anor Appeal* [2004] 3 MLJ 405, Abdul Hamid Mohamad FCJ said as follows at p 415:

“It must be borne in mind that the duty on the part of the prosecution at the close of the case for the prosecution is to prove beyond reasonable doubt, not only, that the offence was committed one night at Tivoli Villa, but also that that “one night” was in the month of January until and including the month of March 1993. Even if it is proved that the incident did happen but if it is not proved “when” in law, that is not sufficient. This is because the period during which the offence is alleged to have been committed is an essential part of the charge. It becomes even more important when the defence, as in this case, is that of alibi. The appellants must know when (usually it means the day or date, but in this case the period from and including the month of January until and including the month of March 1993) they are alleged to have committed the offence to enable them to put up the defence of alibi.”

[10] ‘Evidence in support thereof’ as provided in s 402A

In *Public Prosecutor v Magendran A/L Mohan* [2005] 6 MLJ 6 (HC), the accused did not call any witness to support his alibi, the Court held that the accused himself is competent to give evidence to support his alibi given through the notice served on the prosecution on 7.5.2003.

Per Balia Yusof J:

“Harun SCJ in the case of *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412 referred to a passage in *Public Prosecutor v Lim Chen Len* [1981] 2 MLJ 41 which quoted Azmi J (as he then was) saying:

As to the extent of the applicability of s 402 A(1), I am of the view that the words 'evidence in support thereof' includes evidence of alibi given by the accused himself if he elects to give evidence on oath Although the words 'evidence in support of alibi have not been statutorily defined in the Criminal

Procedure Code, it can be taken to mean evidence tending to show that by reason of the presence of the accused at the particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. The provision of s 402 A(1) which, *inter alia*, requires the pre trial notice under sub-s (1) to include particulars of the place where the accused claims to have been at the time of the commission of the offence, supports my view that the provision of Section 402 A(2) also applies to an accused person where he elects to be a witness and gives sworn evidence. (See also *Ku Lip See v PP* [1982] 1 MLJ 194.)”

[11] Defence of denial and the defence of alibi

In *PP v Zainal Ariffin bin Abu Bakar* [2007] 3 MLJ 487 (HC), the defence of the accused, in brief, is that he did not go anywhere on 14.12.2001 because he was painting his house in preparation for Hari Raya Puasa. Accused called two witnesses, his parents, who both testified that the accused was at home on that day. The court viewed the defence of the accused was really one of denial that he committed the crime, rather than an alibi, *per se*. So he did not deal with the issue on the failure on the accused to have given a proper notice (D15) in full compliance of s 402A(2) CPC and the consequent inadmissible evidence of the alibi witnesses.

[12] Burden of proof

- In *Dato Mokhtar bin Hashim and Anor v Public Prosecutor* [1983] 2 MLJ 232, the Federal Court held that the accused has a “probative burden” on the issue of alibi. The accused therefore has a duty to persuade the trier of fact on a balance of probabilities that he was somewhere else at the time of the alleged offence. If he fails to do so, the judge may convict provided that he is convinced that the prosecution has proved its case beyond reasonable doubt.
- In *Yau Heng Fang v Public Prosecutor* [1985] 2 MLJ 335, Mohamed Azmi S.C.J. (delivering the judgement of the Federal Court) denied that there was a legal burden on the accused with respect to his alibi. It was only a duty to adduce evidence of alibi and once such evidence is adduced, the judge should consider whether the evidence adduced, for the purpose of establishing his alibi had raised a reasonable doubt in the prosecution’s case, and not whether such evidence has created a reasonable doubt as to the accused’s innocence.
- In *Illian_& Anor v Public Prosecutor* [1988] 1 MLJ 421, then Supreme Court overruled the Federal Court’s decision in Mokhtar Hashim’s case.

Wan Suleiman S.C.J, decided that the burden is only an evidential burden.

- In *Lee_Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528, both appellants were charged with s 302 read with s 34 of the Penal Code. The first appellant premised his defence on his alibi and he gave notice as required under s 408A of the Criminal Procedure Code. The second appellant rested his defence on bare denial having failed to give the requisite notice for the defence of alibi. The trial judge rejected the defence of alibi and for that reason held that the first appellant failed to cast any reasonable doubt in the prosecution's case. He also found that the bare denial by the second appellant being in the vicinity of the crime scene at the material time without any supporting evidence did not create any reasonable doubt in the prosecution's case. Upon satisfying himself that the prosecution had proved the case beyond reasonable doubt, the trial judge convicted both appellants as charged. On appeal to the Court of Appeal, learned counsel for the appellants briefly submitted that the alibi of the first appellant was reasonable and legitimate which should have cast reasonable doubt to the case for the prosecution. Court of Appeal concurred with the learned trial judge's conclusion that the defence of alibi of the first appellant should be rejected. It affirmed the decision that the defence had not raised any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt that the appellants were guilty as per charge.

Corroboration

- [1] Introduction**
- [2] The Nature Of Corroborative Evidence**
- [3] Where Corroboration Is Required By Law**
- [4] Cases Where Corroboration Is Required As A Matter Of Practice And Prudence**
- [5] Accomplice Evidence In Corruption Cases**
- [6] Corroboration In Cases Of Sexual Offence**

[1] Introduction

What is corroboration? In the case of *Aziz b Muhamad Din v PP* (1996) 5 MLJ 473, His Lordship Augustine Paul JC (as he then was) said as follows ;

“Corroboration is not a technical term. It simply means “confirmation” (see *Director of Public Prosecution v. Hester* [1973] AC 296).

In *Ah Mee v. Public Prosecutor* [1967] 1 LNS 3; [1967] 1 MLJ 220, Ong Hock Thye FJ said (as p. 222):

“Corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence”

[2] The Nature Of Corroborative Evidence

It has been defined in a number of cases as “independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particulars not only that the crime has been committed but also that the accused committed the offence.

In the case of *R v. Baskerville* [1916] 2 KB 658 Lord Reading CJ expressed the requirements of corroborative evidence thus :

“Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration it thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The nature of the corroboration will necessary vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that the corroborative evidence is evidence which shows or tends to show that the story of the accomplice that

the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused”.

[3] Where Corroboration Is Required By Law

In the Evidence Act 1950, there is only one section that requires the evidence of witness to be corroborated. The section is section 133A which deals with the unsworn evidence of a child of tender years. The effect of the section simply means a conviction cannot stand on the uncorroborated evidence of an unsworn child witness. However, if the child is a sworn witness, the evidence of the child is admissible and safe to be relied on provided the court adopts the rule of prudence, and warns itself of the danger of convicting the accused on the uncorroborated evidence. See the case of *Yusaini Mat Adam v PP* (2001) 1 CLJ 206.

[4] Cases Where Corroboration Is Required As A Matter Of Practice And Prudence

In *Lim Guan Eng v PP* [1998] 3 MLJ 14, the Court of Appeal summed up the law on corroboration as follows :

- “(1) As a general rule, the conviction of an accused may proceed upon the uncorroborated evidence of one witness.
- (2) There are cases where either common law – as a matter of practice which has, through passage of time, acquired the force of law – or statute, creates an exception to the general rule in respect of certain categories of witnesses by calling for, or indeed demanding, that their evidence may not to be acted upon in the absence of independent corroboration. Accomplices illustrate the common law exception, while s 6(1) [of the Sedition Act 1948] illustrates the statutory exception.
- (3) Evidence that requires corroboration, whether as a matter of practice having the force of law or by direction of statute :
 - (a) must first be capable of belief before any question of corroboration may arise, for evidence that falls of its own inanity cannot be saved by the presence of abundant corroboration;
 - (b) cannot corroborate itself, for tainted evidence does not remove its taint by repetition, notwithstanding s 157 of the Evidence Act 1950; and
 - (c) cannot be corroborated by evidence that itself requires corroboration.
- (4) To constitute true corroboration in the eyes of the law, the corroborative evidence must :
 - (a) be capable of belief;
 - (b) be independent in the sense mentioned in proposition (3)(c) above;
 - (c) be in respect of the fact or facts that lie at the axis of the dispute, that is to say, upon the fact in issue and not upon some collateral matter or upon a fact in respect of which there is no quarrel. In other words, it

must be corroboration upon a material particular but need not be identically repetitive of the evidence that requires corroboration.

(5) At common law, a trial court is entitled to act upon uncorroborated evidence which in itself requires corroboration provided that it warns itself of the danger of so acting. The warning must not amount to mere lip-service. Good reasons must be furnished for departing from the accepted rule. Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious moral stigma.”

The requirement of corroboration extends to witnesses who belong to a class of persons who are at the best not reliable witnesses. See *Mahadeo v The King* [1936] 2 All ER 813, applied in *TN Nathan v PP* [1978] 1 MLJ 134.

Accomplice Evidence:

In the case of *PP v Mohd Azam Basiron* (2004) CLJ at page 527, Jeffrey Tan J states that the need for corroboration in cases involving accomplice evidence as follows :

“In the case of accomplice evidence the need for corroboration rises from the nature of the witness who is somebody who may have an interest in making out the guilt of another in preference to his own” (*Din v. Public Prosecutor* [1964] 1 LNS 33; [1964] 1 MLJ 300 per Thompson CJ). “The evidence of (an accomplice) ... must be received with the greatest possible caution as it is not unlikely that he would not give untruthful evidence under the circumstances. Therefore the nature and extent of corroboration is relevant” (*Yap Ee Kong & Anor v. PP* (supra) per Raja Azlan CJ (Malaya), as HRH then was).”

In the Evidence Act 1950 that are two sections that deal with accomplice evidence i.e. S.114 (b) and S.133.

Section 114 (b) of the Evidence Act states that :

“An accomplice is unworthy of credit unless he is corroborated in material particulars.”

AND section 133 of the same Act states ;

“That an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice”;

Based on the above section read together, the evidence of an accomplice is admissible even if it is not corroborated provided that the court must adequately warn itself of the danger of convicting on the uncorroborated evidence. In *Jegathesan V Public Prosecutor* (1978) 1 LNS 74, it was held that :

“Where a Judge sits alone as a Judge of fact as well as a Judge of law, he must adequately warn himself of the danger of convicting on the uncorroborated evidence of an accomplice. If he ignores or disregards any of these principles, then I think it is the duty of this Court (the High Court in

its criminal appellate jurisdiction) to quash the conviction, but if it appears that he has clearly present in his minds the danger of convicting on the unconfirmed evidence of an accomplice but nevertheless believes that evidence and convicts, this Court will not interfere with the conviction, merely on the ground of want of corroboration.” Per Woodward A-G CJ in *Lim Yam Yong*, 14 SSLR 152.

In dealing with uncorroborated evidence of accomplice, it is important for the court to show in its judgment that it was aware of the danger of convicting an accused based on the uncorroborated evidence and the warning to that effect must be clearly stated in the judgment.

In the case of *Aziz Muhamad Din V PP* (1997) 1 CLJ Supp 523, Augustine Paul J (as he then was) said :

“But the rule of practice regulates the manner in which uncorroborated evidence is to be treated, that is to say, the Judge must warn himself of the dangers of convicting on such evidence.”

In saying that the warning must appear in the judgment or grounds of decision for the trial Court though no particular form of words need be used, Seah SCJ in delivering the judgment of the Supreme Court in *Ng Yam Thai v. PP* [1987] MLJ 214 said at p. 216 :

“The warning as to the danger of convicting on uncorroborated evidence if the prosecution is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial magistrate, or that some particular form of words or incantation has to be used and if not used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and not set words which must be adopted to express the warning”.

In cases where there is an allegation that a witness is an accomplice, it is the duty of the court to decide on the status of the witness first, before the question of corroboration can arise.

In the case of *Nathan v Public Prosecutor* (1972) 2 MLJ 101, it was held :

“In applying general principles regarding accomplice evidence, it is advisable to bear in mind what was said in *Public Prosecutor v Haji Ismail & Anor.*” A magistrate should first decide whether a witness is an accomplice, then determine on the evidence whether he is corroborated in any material particular: and then, if he is not corroborated, subject the accomplice’s evidence to a close scrutiny to satisfy himself that, without corroboration, there is nevertheless evidence which is credible and sufficient to establish the guilt of the accused.”

If after hearing the accomplice and it is found that accomplice is a credible witness, then the question of corroboration would be relevant and it becomes necessary for the court to seek corroborative evidence in support of the evidence of the accomplice. The principle on this point has been laid down in a number of cases such as the case of *Sabarudin Non V PP* (2005) 1 CLJ page 466, where Gopal Sri Ram JCA states as follows :

“In his grounds of judgment the learned judge found PW34 to be a credible witness. Only then did he proceed to the issue of corroboration. In our judgment he correctly directed himself on the law”.

In determining the admissibility of the corroborative evidence, it is important to determine that the evidence itself is credible.

In the case *Yapp Ee Kong & Anor v. PP* (1980) 1 LNS 117 [1981] 1 MLJ 144 where Raja Alan Shah CJ (Malaya) (as His Highness then was) said at p. 146 :

“In such a situation the principles enunciated by Lord Morris of Barth y Gest in *Director of Public Prosecutor v. Hester* [1973] AC 296, 315 should be applied :

The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if itself is completely credible evidence.”

[5] Accomplice Evidence In Corruption Cases

In the Anti Corruption Act 1967, the section that deals with accomplice evidence is stated in section 44. The section reads as follows :

S. 44. Evidence of accomplice and agent provocateur.

- (1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act-
 - (a) no witness shall be regarded as an accomplice by reason only of such witness having
 - (i) accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any gratification from any person;
 - (ii) given, promised, offered or agreed to give any gratification; or
 - (iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence.
- (2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

This section is inserted in the 1997 Act to replace section 18 of the Prevention of Corruption Act 1961 [Repealed by section 61 Act 575]. Although wider in scope as

compared to the provision of section 18 (see case of *Shaiful Idzam Sulaiman v PP* (2004) 2 CLJ 121, the effect of the section is still similar to the old section 18 that is, it is only applicable to the evidence of witness who is not actively involved in the transaction. If the witness has taken an active part in the transaction, then he is not protected under the section and the ordinary rule on accomplice evidence applies.

In *Daimon Banda v. PP* [1951] 1 LNS 14[1951] 17 MLJ 11, Taylor J said at p.11

“That provision, however, does not abrogate the rule. It introduces only a limited modification. It does not apply to accomplices generally. The word “accomplice” does not appear in the sub-section. The effect of the new provision is that in corruption cases the mere fact that a man has made an improper payment is not by itself enough to brand the man as person whose evidence, if uncorroborated, is probably untrustworthy. If the man has taken part in the transaction in such a way as to show that, apart from the bare payment, he was an accomplice, then the ordinary rule applies.”

The principles on the applicability of s.13 of the old Ordinance (which is substantially in pari materia with S. 18 of the repealed Act), which was discussed in *Daimon Banda v PP* was followed in the case of *Rattan Singh v PP* 1970 1 LNS 132. In Rattan’s case the court in deciding whether a witness in that case was an accomplice, held that since the role of the witness was beyond concurring for the payment of the bribe, the witness was an accomplice and therefore he is not protected under S. 18 of the Act. In that case Sharma J held that ;

“Considering the parts played in the case by PW 1, in the circumstances there was no doubt that his action went beyond concurrence, because after concurring, he went to see his two colleagues, PW 2 and Mahadevan, and suggested that each of them should raise the money to pay the appellant to which they all agreed. He did not make a report until after PW 2 had told him that he (PW 2) had already done so. In other words, he was quite prepared to bribe the appellant and negotiated with PW 2 and Mahadevan on the matter. In my view, this amounted to an infamous conduct and therefore he was an accomplice in the real sense of the word”.

In, the more recent case of *Dato Hj Azman Mahalan V PP* 2007 3 CLJ 495, V.T, Singham J, expressed the same view that once a witness has taken an active part in the transaction and has exceeded the role of a witness that is intended to be protected under S.44 (1) of the 1997 Act, the witness should be treated as a accomplice and ordinary rule in respect of accomplice evidence is then applicable. In that case His Lordship held as follows :

“In fact, the learned Session Court Judge ought to have found that PW1 had exceeded the role of a witness to be protected under S.44 (1) (a) of the 1997 Act and instead ought to have found PW1 as an accomplice as defined by law.”

In corruption cases it is quite common for parties to raise the issue of accomplice evidence, and in deciding whether a witness is an accomplice, Salleh Abas CJ (Malaya) (as His Lordship then was) in the case of *Ng Kok Lian & Anor V. PP* [1983] 2 CLJ 247; [1983] where His Lordship speaking for the Federal Court said :

“To be an accomplice the witness who received the bribe must be the one who was abetting the offence of giving it committed by the accused, the

giver. Only then would the received be regarded as *particeps criminis*. This means that just as the giver as a principal offender requires *mens rea*, so does an accomplice witness who received the gratification. If he received gratification innocently or without any corrupt motive or if he did not receive it at all, although it was given to him, as far as he is concerned the gift did not change its character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intention. Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his *actus reus*. The whole idea is completely contrary to the basic concept of criminal liability.”

It is also to be noted that under section 44(2) of the 1997 Act, a conviction shall not be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence. It appears that this is a slight modification to the requirement that the court must express the warning in its judgment as enunciated in cases like *Ng Yam Thai v. PP* [1987] MLJ 214 and *Chiu Nang Hong v. PP* [1965] 1 MLJ 40.

[6] Corroboration In Cases Of Sexual Offence

The practice of requiring corroboration in cases of sexual offences is explained in the case of *Din vs. PP* [1964] MLJ 300 as follows ;

“But the desirability for corroboration of the evidence of the prosecutrix in a rape case (which in any event has not yet crystallized into something approaching a rule of law and which is still a rule of practice and of prudence) springs not from the nature of the witness but from the nature of the offence. Never has it been suggested that the evidence of a woman as such invariably calls for corroboration. If a woman says her handbag has been snatched and if she is believed there can be no question of a conviction on such evidence being open to attack for want of corroboration. If, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated.”

As in other cases where corroboration is required as a matter of practice or prudence, a conviction in cases of sexual offence based on uncorroborated evidence is still valid provided that the court has warned itself of the risk in relying on such evidence alone, and in the circumstances of the case it is safe to dispense with the requirement for corroboration. In the case of *Public Prosecutor v Mardai* (1950) MLJ page 33 Spenser - Wilkinson J states as follows:

“Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated, nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant story.”

Medical evidence as corroborative evidence in rape cases.

On a charge of rape, the courts have in a number of decided cases held that medical evidence may amount to corroboration depending on the circumstances of each particular case.

In the case of *Aziz Muhamad v PP* [1997] 1 CLJ SUPP 523 the court referred to the following authorities on the corroborative nature of medical evidence.

“In *James v. The Queen* [1970] 55 Cr App R 299, on a charge of rape, it was held that medical evidence showing that the complainant had sexual intercourse at about a time consistent with her allegation, was incapable of affording corroboration of her evidence of the rape, because it did not confirm any more than an act of sexual intercourse, and in particular did not offer any confirmation of the identity of the man involved or of the alleged lack of consent (see also *R v. Donar* [1985] 82 Cr App R 1973; *R v. West* [1983] 79 Cr App R 45). However, on a charge of rape where consent is irrelevant medical evidence showing any fresh tear in the hymen is sufficient to corroborate the evidence of the victim on the factum of rape (see *Syed Abu Tahir all Mohamed Esmail v. PP* [1988] 3 MLJ 485)”.

In the case of *Zulkifli Ismail V. Public Prosecutor* (1994) 4 CLJ 450, the court adopts a similar view, and stressed the importance of medical evidence as corroborative evidence of rape.

“In this connection practical guidance may be obtained from the case of *Emperor v. Mahdeo Tatya* AIR (29) 1942 Bombay 121 which establish that :

Where rape is denied by the accuse the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other part of her body which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or the places where the offence is alleged to have been committed: and in all cases importance is attached to the subsequent conduct of the complainant.”

Discharge

[1] Introduction

[2] Discharge Under Section 254

[3] Effect Of Section 254(1)

[4] Effect Of Section 254(2)

[5] Discharge Under Section 173(g)

[6] When Then Is A Charge Considered Groundless?

[1] Introduction

The word “discharge” is not defined in the Malaysian Criminal Procedure Code although it crops up in a few sections of the said statute. There are two types of “discharge” that a court has the power to pronounce; one is a discharge amounting to an acquittal and the other is a discharge not amounting to an acquittal(DNAA).

A discharge not amounting to acquittal means that the accused person although released from the charge can be recharged with the same offence again in the future when the prosecution should decide to do so for some particular reason.

A discharge amounting to acquittal has the opposite meaning. The accused person can never ever be recharged for the same offence. The plea of autrefois acquit would come into effect.

The relevant sections pertaining to discharge are found in sections 173(g) and 254 of the Criminal Procedure Code. The two sections relate to different situations and circumstances. Furthermore their conclusions and effects are not identical in nature.

[2] Discharge Under Section 254

Section 254 of Criminal Procedure Code states as follows:

“The Public Prosecutor may decline to prosecute further at any stage

- (1) At any stage of any trial before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused person upon the charge and thereupon all proceedings on such charge against the accused shall be stayed and the accused shall be discharged of and from the same.
- (2) At any stage of any trial before a Sessions Court or the Court of a Magistrate before delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and

thereupon all proceedings on such charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same.

- (3) Such discharge shall not amount to an acquittal unless the Court so directs.”

At any stage of a trial but before the delivery of a judgment the Public Prosecutor may inform the court that he will not further prosecute the charge. The Public Prosecutor draws his authority from Article 145(3) of the Federal Constitution. His power to withdraw the charge cannot be questioned by the court.

There are several differences in phrases and effect that can be found in sub-sections 1 and 2 of Section 254 (*PP v Z* (1995) 4 CLJ 383).

[3] Effect Of Section 254(1)

Upon being informed that the Public Prosecutor will not further prosecute the accused person, the court shall stay all proceedings and the accused shall be discharged. It will be observed that the court has no choice but to accede to the application put in by the Public Prosecutor. There is no discretion on the part of the Court. The court may not question the reasons behind the application nor can the court refuse to grant such an application (*Poh Cho Ching v PP* [1982] 1 MLJ 86).

The discharge given under this sub-section amounts to an acquittal.

[4] Effect Of Section 254(2)

When the prosecuting officer informs the court of his intention to apply for leave to withdraw the charge, the court may stay the proceedings and if so, the accused shall be discharged.

According to sub-section (3), the discharge here refers to a discharge not amounting to an acquittal unless the court so directs. Sub-section 3 seems to give the court the discretion to decide whether to allow the discharge to amount to an acquittal.

However in exercising its power under sub-section 2 of Section 254 of the Criminal Procedure Code, a court must bear in mind that the power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good reasons shown that the public interest insistently demands that it be used (*Seet Ah Ann v PP* (1950) MLJ 293).

Whether or not a discharge should amount to an acquittal depends on the circumstances in each individual case. It goes without saying that circumstances would vary in each and every case and the court must use its discretion wisely bearing in mind the public interest and the right of the accused person not to be saddled with a charge hanging over his head for an indefinite period of time (*Goh Oon Keow v R* (1949) MLJ 35). The court must inquire into the reasons as to why the charge is being withdrawn and both counsel for the accused and prosecution must be given an opportunity of being heard. The power should be exercised judicially. Normally the charge should amount to an acquittal unless good cause is shown otherwise.

Examples taken from previous cases:-

Koh Teck Chai v PP [1968] 1 MLJ 166: The Prosecuting officer applied for a discharge not amounting to an acquittal giving the reason that a witness was still untraced and subpoena had not been served. The Magistrate granted the application but the High Court varied that decision and ordered that the discharge should amount to an acquittal.

PP v Goh Beng Teck (MD Vol % Para 79: The court granted a discharge amounting to an acquittal as the complainants in a charge of abetment for voluntarily causing hurt and grievous hurt had returned to their home country and were not likely to return.

PP v Hettiarachigae LS Perera [1977] 1 MLJ 12: Numerous postponements had been granted in the past and on this particular occasion an important witness was absent. The Magistrates' Court granted a discharge not amounting to an acquittal. On appeal the High Court set aside the Magistrates' decision and ordered a discharge and acquittal.

[5] Discharge Under Section 173(g)

Section 173(g) of Criminal Procedure Code reads as follows:

“Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless.”

A comparison of Section 254 and Section 173(g) will show the different purposes between the two sections. It is also clear that if invoked the court can only issue an order of a discharge not amounting to an acquittal (*PP v Zainuddin b Sulaiman & Anor* [1986] 1 CLJ 468). Section 173(g) does not empower the court to make an order of discharge amounting to acquittal before the conclusion of the prosecution's case.

[6] When Then Is A Charge Considered Groundless?

In the case of *Muhammad Ibrahim Hj Moula Baksh v TGH Naughton & Ors* (AIR 1941 Sind 198), Davis CJ had this to say:

“I take it, the word “groundless” in sub-section (2) of section 253 Criminal PC, means when there are no good grounds for the charge.”

The particular facts of the case should be looked into before the court should pronounce an order of discharge not amounting to an acquittal under section 173(g) of the Code.

The Magistrate must record his reasons for considering the charge to be groundless as he may have misdirected himself or erred in other ways. (*Chu Chee Peng v PP* [1972] 1 MLJ 262). This must be done at the stage when the magistrate decides to act under Section 173(g) and not afterwards (*PP v Leong Kow Chai* [1968] 2 MLJ 29).

Examples of a groundless charge would be when the prosecution has still not finished investigations into the matter, the charge itself reveals no offence has been committed, the complainant’s name is not included into the charge, the charge is not worded correctly or when the Accused is charged for an offence not provided for by law (*PP v Loo Tee Maw* [1992] 2 MLJ 212).

There have been situations where a case had been postponed several times due to some reason or the other and the Court had refused to grant any further postponements. If the prosecuting officer is still unable to proceed with the case after a final adjournment had been granted, what would be the best possible move that the court should take?

Some guidance can be sought from the words of Salleh Abas L.P in the case of *PP v Zainuddin b Sulaiman* (*supra*) where he advised as follows:-

“there are two options open to the Court – grant the postponement sought for or discharge the Accused. If the Court considers that a mere discharge does not meet with the justice of the case because the offence by reason of numerous postponements has become trivial and lost its potency and that the case should be disposed of quickly the court should make an order leaving the prosecution with no choice except to discontinue. Perhaps a short adjournment or a last adjournment should be granted so as to enable the prosecution to make up its mind one way or the other. It might well be that in the end the prosecution may decide to discontinue. Thus, the co-operation and mutual respect between the bench and the bar in the administration of justice is so important that it should not be undermined.”

The learned Judge cautioned Magistrates not to be ruled by emotions when he said:

“Magistrates must appreciate that the refusal to postpone trials must inevitably result in the discharge of the accused and this power should therefore be used sparingly as a last resort only. It should not be ordered as an expression of anger and exasperation at or as a censure against the conduct of the prosecution. Failure to exercise this power judicially will lead to injustice and inconvenience to the accused – the very purpose for which power is exercisable.

Contempt of Court

- [1] What Is Contempt Of Court?**
- [2] Categories Of Contempt**
- [3] Contempt In The Face Of The Court**
- [4] Procedure**
- [5] Sentence**
- [6] Contempt By Advocates**

[1] What Is Contempt Of Court?

There is no statutory definition. Contempt of court is a common law doctrine which empowers courts to punish summarily those who interfere with the administration of justice: *Attorney-General v Hislop & Anor* (1991) 1 AER 911. The Superior Courts have power by virtue of Article 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 to punish any act of contempt. The Subordinate Courts are empowered by s 99A and para 26 of the Third Schedule to the Subordinates Courts Act 1948 to take cognizance of any contempt of court and to award punishment for the same. The Subordinate Courts may also take cognizance of offences under the Penal Code (ss 175, 178, 179, 180 and 228) committed in the view or presence of the court and pass sentence on the same day of such commission by virtue of s 353 of the Criminal Procedure Code. The common law position, however, is preserved by s 3 of the Civil Law Act 1956 subject to a consideration of the local conditions, see *Attorney-General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167 at 177; and *Attorney-General v Arthur Lee Meng Kwang* [1987] 1 MLJ 206 at 208.

In order to constitute contempt of court, it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice: *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321; *PP v The Straits Times Press Ltd* [1949] MLJ 81; *PP v SRN Palaniappan & Ors* [1949]; and *Re Sin Poh Amalgamated Ltd & Ors* [1954] MLJ 152. Lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict: *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321.

[2] Categories Of Contempt

Contempt can be categorized in a number of ways. The traditional classification is that of civil or criminal contempt. Civil contempt involves the willful disobedience of court orders and decrees or other court processes or breach of

an undertaking given to a court. These are initiated by a litigant who seeks to compel obedience of such orders.

Criminal contempt comprises a wide range of matters such as disrupting the court process by improper behaviour in a courtroom (contempt in the face of the court), acts which are calculated to undermine the authority of the courts and public confidence in the judiciary (scandalizing the court), prejudicing or impeding particular legal proceedings (sub judice contempt) or generally interfering with the course of justice by obstructing court officials, destroying evidence, intimidating witnesses etc. Civil contempt is sometimes referred to as contempt by disobedience and criminal contempt as contempt by interference; Lowe N & Sufrin B, *The Law of Contempt*, (1999) 3rd Edn, London, Butterworths at 2.

A more practical way of classifying contempt is to divide it into three broad categories –

- contempt by publication resulting in sub judice liability or scandalizing the court;
- contempt by disobedience to court orders; and
 - contempt in the face of the court.

[3] Contempt In The Face Of The Court

Contempt in the face of the court generally comprises of the unlawful interruption, disruption or obstruction of court proceedings. Such contempt arises when all the circumstances are in the personal knowledge of the court: *McKeown v King* [1971] 16 DLR (3rd) 390 at 408 and followed in *Re Kumaraendran* [1975] 2 MLJ 45. Lord Denning MR in *Balogh v St Albans Crown Court* [1974] WLR 314 described contempt in the face of the court as contempt in the cognizance of the court or which the court can punish of its own motion; followed in *Re Kumaraendran* [1975] 2 MLJ 45 and *Zainur Zakaria v PP* [2001] 3 MLJ 604 FC.

This power to punish summarily was described by Lord Denning MR in *Balogh v Crown Court at St Albans* [1974] 3 All ER 283 at 288 as follows:

“This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately – so as to maintain the authority of the court – to prevent disorder – to enable witnesses to be free from fear – and jurors, from being influenced – and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt: see *R v Gray* [1900] 2 QB at p 41, [1900-3] All ER at p 62 by Lord Russell of Killowen CJ. But properly exercised, it is a power of the utmost value and importance which should not be curtailed.” (cited with approval in *Zainur bin Zakaria v PP* [2001] 3 MLJ 604 FC at 609)

On the issue of when this power should be employed, Raja Azlan Shah Ag LP (as His Highness then was) in *Jaginder Singh & Ors v Attorney General* [1983] 1 MLJ 71 FC said:

“We have said many a time that the summary contempt procedure not only should be employed most sparingly but should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress or about to commence.” See also *Karam Singh v PP* [1975] 1 MLJ 229, *Re Kumaraendran* [1975] 2 MLJ 45.

[4] Procedure

Paragraph 26 of the Third Schedule, Subordinate Courts Act 1948 gives power to the Sessions and Magistrate’s Courts to take cognizance of any contempt of court and to award punishment for the same. It goes on to provide that if the contempt of court is punishable as an offence under the penal Code, the court may, in lieu of taking cognizance thereof, authorise a prosecution. Chapter XXXIV of the Criminal Procedure Code deals with proceedings in the case of offences affecting the administration of justice. For example, a contempt may also amount to an offence under s 228 of the Penal Code to which the procedure in s 353 of the Criminal Procedure Code will apply. The court therefore has a choice in either proceeding under para 26 of the Third Schedule of the Act or authorising a prosecution: see *PP v Seeralan* [1985] 2 MLJ 30.

The power to take cognizance of any contempt connotes summary disposal of the matter as an offence without the formality of a charge or complaint. However, in order to ensure a fair hearing, the issue of specific charges and opportunity for the person facing contempt charges to answer the same has been discussed in a number of cases. The High Court of Australia in *Coward v Stapleton* (1953) 90 CLR 573 at 579 said:

“Even apart from any such express provision, however, it is a well-recognized principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: *Re Pollard* (1868) LR 2 PC 106; *R v Foster*; *Ex parte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu v Piggot* [1909] AC 312. The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish to consider as bearing upon the charge itself or upon the question of punishment.” (followed in *Zainur bin Zakaria v PP* [2000] 4 MLJ 134 CA; see also *Zainur bin Zakaria v PP* [2001] 3 MLJ 604 FC; *Re Kumaraendran* [1975] 2 MLJ 45; *PP v Lee Ah Keh & Ors* [1968] 1 MLJ 22)

In respect of the same issue, Raja Azlan Shah Ag LP (as His Highness then was) in *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71 at 74 had occasion to emphasize:

“The disturbing aspect, amongst others, in this case is that no specific charges against the appellants were distinctly stated and what is worse they were not given an opportunity to answer and defend themselves. It is unthinkable that they should be sent to prison unless specific were framed and they had an opportunity to answer them. This is because the summary contempt procedure more often involves a denial of many of the principles of natural justice, requiring, as it did in this case, that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon.” (followed in *Zainur bin Zakaria v PP* [2001] 3 MLJ 604 FC where it was also held at p 619 (per Steve Shim CJSS) that the phrase ‘an opportunity of answering the charge’ must necessarily include that a reasonable opportunity be given to the alleged contemnor to prepare his case”

Ali J in *PP v Lee Ah Keh & Ors* [1968] 1 MLJ 22 at 24 recommended the following procedure to be adopted for acting either under s 353 of the Criminal Procedure Code or the then para 24 (now para 26) of the Third Schedule to the then Courts Ordinance (now Subordinates Courts Act 1948):

“When contempt is committed in the view or presence of the court the first thing to do is to order the offender to be detained by the police and at the same time to record the act or statement constituting the contempt. The court can then proceed with its other business for the day. After completing other business but before rising the offender shall be produced again to be dealt with. If the magistrate decides to take cognisance of the contempt the act or statement constituting the contempt already recorded shall be read out to the offender who is then asked to show cause why he should not be punished. If, as in this case, one or more persons who were committed for contempt could satisfy the court that they were not responsible for the shouting and singing which had interrupted court proceedings, they obviously could not be punished for contempt. On the other hand, if the magistrate decides not to take cognisance of the offence he may either order the offender to be released or authorise the prosecution under paragraph 24 of the Third Schedule to the Courts Ordinance.”

[5] Sentence

Paragraph 26, Third Schedule to the Subordinate Courts Act 1948, gives power to award punishment for contempt of court, not exceeding, in the case of a Sessions Court, a fine of RM300.00 or imprisonment of 6 weeks, in the case of a Magistrate’s Court presided over by a First Class Magistrate, a fine of RM150.00 or imprisonment for three weeks, and in the case of a Magistrate’s Court presided over by a Second Class Magistrate, a fine of RM50.00 or imprisonment for one week. Section 353 of the Criminal Procedure Code gives power to a

Magistrate's Court to sentence the offender to a fine not exceeding RM50.00 and, in default of payment, imprisonment for a term which may extend to two months.

In *Re Kumaraendran* [1975] 2 MLJ 45, Abdoolcader J said at 48:

"I would add that the court's power to imprison should only be exercised in serious cases of contempt. In deciding whether a contempt is serious to warrant imprisonment, two factors should be taken into account, first, the likely interference with the due administration of justice and, secondly, the culpability of the offender. Where the imposition of the fine would meet the circumstances an order of committal should be avoided, if at all possible. The English Court of Appeal in the recent case of *Danchevsky v Danchevsky* [1974] 3 WLR 709 no doubt a case of civil contempt for disobedience to an order of court, held that committal orders should only be made when other remedies were unavailable."

[6] Contempt By Advocates

Cases suggest that lawyers are most prone to contempt proceedings. This may in part be due to the delicate relationship between the advocate and the judge/magistrate. In *Re Kumaraendran* [1975] 2 MLJ 45, Abdoolcader J explained this relationship as follows (at 48):

"Presidents and magistrates must accept the fact that it is the duty of counsel appearing before them to act fearlessly and with all the force and vigour at their disposal in the interest of the cause they represent but wholly within the bounds of propriety and courtesy in the discharge of their duties as officers of the court. Counsel appearing before the courts must equally remember that in the discharge of their duties they must judiciously use the right and privilege of appearing as such in these courts and not abuse it, and that their conduct must at all times accord with that decorum and dignity which is absolutely essential to the administration of justice and above all, however frustrated or provoked they may be, they must pay that respect due to the court, which is the embodiment of the institution of justice in the machinery of which both the courts and the Bar are interdependent and vital components."

In *Re Kumaraendran*, *supra*, the advocate was recorded to have been "shouting and behaving in a manner most unexpected". The President of the Sessions Court found that he had committed contempt. Upon revision, the High Court accepted that the "words ascribed to the advocate certainly constitutes insulting and contumacious behaviour in outrageous and provocative language tantamount to a deliberate challenge to the authority of a learned president and clearly a gross contempt in the face of the court. The order of committal was however set aside for other reasons.

In *Karam Singh v PP* [1975] 1 MLJ 229, the record showed that there was a heated argument between the magistrate and counsel in a case involving

impersonation. After adjourning the case for 15 minutes, the magistrate returned to the Bench and found the counsel guilty of contempt and sentenced him to two weeks imprisonment. Upon appeal, it was held that insulting behaviour by counsel, however reprehensible, may or may not be contempt depending on the surrounding circumstances. It was further held, setting aside the conviction and sentence, that the magistrate should have adjourned the case and reported the matter to the local Bar Committee.

In *PP v Seeralan* [1985] 2 MLJ 30 SC, the record revealed that counsel/respondent, who was holding a watching brief in an inquest hearing by a magistrate, made continuous accusations that the court was “biased, unfair and prejudiced” against a particular witness. He was committed for contempt and fined RM150.00 in default one week’s imprisonment. The Supreme Court held that the record clearly revealed the uncompromising attitude of the respondent and his unabashed arrogance and insolence towards the magistrate. His continued accusations that the court was biased, unfair and prejudiced clearly amounted to a contempt of court. Such conduct and behaviour were not just disorderly acts nor a mere use of unbecoming language. They constituted a contempt of court of a serious kind, without any mitigating factor.

In *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299 SC, an advocate and solicitor was committed for contempt for concealing a document which affected the credibility of a witness in a civil case even though it did not directly relate to the issue in the action. He was sentenced to three days’ imprisonment by the High Court. On appeal, the Supreme Court held that the court has power to punish as contempt any misuse of the court’s process, eg forging or altering of court documents or other deceits of the kind or deceiving the court by deliberately suppressing a fact or giving false facts. The penalty was however considered harsh and varied to a fine of RM1,000.00 in default three months’ imprisonment. The Supreme Court made a further observation at 301:

“It is very important for a counsel to remember that whatever may be his duty to his client his duty to the court remains paramount in the administration of justice.”

In *Zainur bin Zakaria v PP* [2001] 3 MLJ 619, the Federal Court (Haidar FCJ at 638) took the view that merely saying in defence that an advocate and solicitor was acting on instructions of his client without anything more is not a defence to an offence of contempt. The case of *MY Shareef & Anor v Hon’ble Judges of the Nagpur High Court* AIR 1955 SC 19 was cited with approval where Mahajan CJ said at 23:

“It cannot be denied that a section of the Bar is under the erroneous impression that when a counsel is acting in the interests of his client, or in accordance with his instructions he is discharging his legitimate duty to his client even when he signs an application or a pleading which contains matter scandalizing the court. They think that when there is a conflict between their obligations to the court and their duty to the client, the latter prevails.

This misconception has to be rooted out by clear and emphatic pronouncement, and we think it should be widely made known that counsel who sign applications or pleadings containing matter scandalizing the court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefore, with a view to prevent or delay the course of justice, are themselves guilty of contempt and that it is no duty of a counsel to his client to take any interest in such applications; on the other hand, his duty is to advise his client for refraining from making allegations of this nature in such applications.”

In *Zainur Zakaria v PP* [2001] 3 MLJ 619, an advocate and solicitor was found guilty of contempt by filing an application to disqualify two prosecutors which was reckless, negligent and an act of bad faith which constituted an abuse of process of court and therefore had the effect of undermining the integrity and or authority of the trial in progress. The Federal Court allowed his appeal and held that he was prima facie justified in filing the said application and that contempt of court had not been proven beyond reasonable doubt. It was further held that the High Court should have allowed the appellant an adjournment he requested so that he could prepare his defence fully, fairly and effectively.

Writing Judgments

- [1] Introduction**
- [2] What is a judgment?**
- [3] Preparation**
- [4] Structure and format of judgments**
- [5] Dealing with issues of fact**
- [6] Dealing with issues of law**
- [7] Speaking judgment, not merely descriptive but analytical**
- [8] Style and language**
- [9] Advice on writing judgments**

[1] Introduction

Public confidence is essential to our system of law. Such public confidence may only arise if there is transparency with respect to every aspect of the judicial process. For this reason, our system of law is perhaps the most transparent when compared to any other institutional authority. Not only do we subscribe to the principle of open justice, judicial officers must also give reasons for their decisions. Writing judgments is part of this reason-giving process.

However, most judges and magistrates find preparing judgments to be the most demanding, challenging and even stressful part of their judicial work. But like advocacy, it is also an art. It can therefore be learned through practice and training. It can be improved and refined. In time, writing judgments can even be most rewarding and satisfying.

[2] What is a judgment?

In civil cases, Order 49 r 2(3) of the Subordinate Court Rules 1980 provides that in the case of an appeal, in the case where no written judgment has been delivered, grounds of decision shall be supplied to the appellant. Elsewhere in Order 49, reference is made to supply of grounds of judgment (See Order 49 r 3(1), Order 49 r 3A(1) and Order 49 r 6(3) Subordinate Court Rules 1980).

In criminal cases, section 307(3) of the Criminal Procedure Code states that when a notice of appeal has been lodged, the court appealed from shall make a signed copy of the grounds of decision in the case and serve it on the appellant or his advocate. Further, section 308 of the Criminal Procedure Code provides that the appeal record to be transmitted to the High Court should include the grounds of the decision. It was held in *Adzhaar bin Ahmad & Anor v PP* [1996] 4 MLJ 85 that the trial court is under a statutory duty under section 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of

decision which convey a reasoned judgment on the facts and the law, and not merely the conclusion arrived at.

Another characterization of a judgment appears in the case of *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 724 CA where Mahadev Shankar JCA stated:

“In ordinary and even legal parlance, a ‘judgment’ is taken to mean both the intellectual process of arriving at a decision for the resolution of a dispute as well as the decision itself.”

[3] Preparation

Ideally, the process of writing a judgment should begin the moment the case starts. In criminal trials, there is already the charge and with usually an opening statement. In civil cases, even before the case begins, there will already be before the court agreed statement of facts, bundle of documents and the bundle of pleadings. As the trial progresses, each party will articulate issues. In a trial where there may be voluminous or complex material, it will be essential as the trial progresses for the judge to take notes for each issue raised. As there may be many issues especially in a complicated criminal trial, it is advisable to set out the issues and the evidence presented on it as well as the judge’s observations in a separate page.

If this is done in a meticulous fashion, the judge will have gathered in his or her notes all the relevant material to make the necessary findings and to then proceed to write the judgment. In many cases, it may even be helpful to start working on a draft judgment during the trial although the written judgment cannot be concluded until the whole trial is over. This is especially helpful when a trial is heard in a staggered fashion and is often adjourned part-heard.

[4] Structure and format of judgments

Although the style in writing judgments may vary, the structure and format is often similar. A suggested format for criminal trials is as follows:

Charge

It may be easier in most cases to set out the charge or charges in full. In some cases, the essence of the charge may be summarized.

Summary of prosecution case

It may then be helpful to set out in summary the prosecution case. This can be gathered from the opening statement and the submissions presented.

Evidence of Prosecution Witnesses

Details of the main and relevant evidence of each prosecution evidence is set out

Discussion of facts and law

Issues of fact and law that are raised must be discussed. In criminal cases, it is sometimes useful to discuss the elements of the charge. Common issues that arise that call for discussion and findings are issues such as inconsistencies of facts adduced, discrepancies in the testimony of witnesses, issues of corroboration, failure to cross-examine, adverse inference, similar fact evidence and so on. Any finding on the relevancy and admissibility of evidence must be explained in the judgment.

If issues of law are raised, these must be discussed by referring to either the statutory provisions or case authorities. These provisions or authorities where they are relevant and applicable call for interpretation and then application or otherwise.

Decision on prima facie case

After discussion of the issues raised, the court must come to a finding as to whether a prima facie case has been proved and the reasons must be set out.

Defence case

If a prima facie case has been made out, a discussion of the defence case may be set out by first setting out a summary of it. The main and relevant evidence of each defence witness can then be discussed. A discussion of the facts or law raised will then have to be discussed in order to decide whether any reasonable doubt has been raised on the prosecution case.

Decision at the end of the case

The judgment must contain a finding as to whether the defence has raised any reasonable doubt in the case of the prosecution. There should also be a finding as to whether the prosecution has succeeded in proving a charge beyond reasonable doubt. If so, a finding of guilty and recording of conviction may be stated in the judgment.

Sentence

In a discussion on the appropriate sentence to be meted out, a discussion of all the mitigating and aggravating factors must be discussed. The paramount consideration of public interest should be considered and set out. The sentence as pronounced should be set out in the judgment. Finally, any decision on whether a stay of execution of sentence was granted should be set out with the reasons.

For civil cases, a suggested format may be as follows:

- Briefly set out the plaintiff's case and the defence or counter-claim if any.
- Discuss the evidence adduced by both the plaintiff and the defendant.

- Set out the issues that arise and call for discussion.
- Analyse the evidence adduced and make findings as to which evidence can be accepted and which can be rejected. It should be recalled that in a civil trial, the standard of proof is on a balance of probabilities. The court has to determine the probability of which version is true. Reasons for such findings must be set out.
- Discuss relevant issues of law that arise. The court must apply the law to the proven or accepted facts. In doing so, interpretation of the law or cases may be involved. The legal consequences that arise, if any, must then be discussed.
- The decision of the court and the orders made by the court must be set out in detail at the end of the judgment.

[5] Dealing with issues of fact

A narrative of the history of the litigation or trial is unnecessary unless there is a delay in the disposal of the case which requires explanation. In civil cases, a laborious recital of the pleadings of the respective parties should be avoided if possible as it makes for heavy reading. Details of interlocutory proceedings or applications need not be included unless necessary. In civil trials, it is helpful to set out at the outset the facts that are agreed or not in dispute. The judgment can then go on to discuss findings on the disputed facts.

It may be sufficient to summarise the areas of dispute and make findings with sufficient reasons. An important part of this fact-finding process usually involves the credibility of the witnesses in the trial. Discrepancies often arise in the evidence of witnesses. In this regard, it may be helpful as guidance to refer to the comments of Raja Azlan Shah FJ (As His Highness then was) in *PP v Datuk Haji Harun Idris (No 2)* [1977] 1 MLJ at page 19 as follows:

“The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the weight to be given to certain evidence in particular circumstances.”

It is imperative that good and cogent reasons are provided when making a finding on credit. However, it is usually unnecessary or undesirable to make a finding that a witness was untruthful unless there is an allegation of fraud or blatant dishonesty which is crucial to the resolution of the facts in issue (*Smith v NSW Bar Association* (1992) 176 CLR 256 at 268). This is because witnesses

may sometimes be honestly mistaken. It may be sufficient in most cases to state that the evidence of a witness was rejected with the reasons for so finding.

[6] Dealing with issues of law

It is important for judgments to refer to the relevant principles of law. This is to avoid any criticism on appeal that the trial judge was unaware or confused as to the principles of law that were applicable in the case. In most cases, there will be no necessity for lengthy or expansive discussion of the statements of law. When citing from a decided case, it may be sufficient to paraphrase rather than reproduce the entire passage unless the whole passage is necessary explain the proposition of law. The manner of citing authorities for legal principles is often a matter of style. The authority may be cited either before or after stating the proposition of law. Some judges use footnotes or endnotes.

[7] Speaking judgment, not merely descriptive but analytical

One of the most common errors made by magistrates is writing judgments which are merely descriptive and not analytical. The law journals are replete with cases that indicate the failure of the trial judge or magistrate to apply their minds to the evidence produced.

In one such case, *Adzhaar bin Ahmad & Anor v PP* [1996], Alauddin J (as he then was) had occasion to hold that “the judgment of the sessions judge was inadequate and far from being a speaking judgment. He failed to discuss the evidence and the probabilities arising from the circumstances of the case. He failed to state the reasons for his findings and at times he made no findings of fact in respect of the evidence of witnesses. He had, in his judgment, failed to indicate that he had applied his mind to the evidence produced.”

The learned judge went further to hold that the trial court had a statutory duty under section 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of decision which convey a reasoned judgment on the facts and the law, not merely the conclusion arrived at. It was held that the absence of reasons indicates the possibility that such vital consideration such as the weight of evidence and the probabilities of the case may not have influenced the mental process of the judge in arriving at the ultimate finding.

[8] Style and language

Judges and magistrates can develop their own style in writing judgments. However, this can only be achieved by repeated practice of writing. Judgments should be written in a style and language which is easy to read and understand. A good test is whether the judgment writer enjoys reading his or her own judgments. The use of plain and everyday language will certainly help

for a start. Using short sentences, a style famously employed by Lord Denning, should be seriously considered.

Importing personal knowledge of facts by the magistrate should be avoided. Any injection of personal views or expression of moral values may colour the objectivity of the judgment writer. Sobriety, moderation and reserve should be foremost in the mind of the writer although there may be some occasions where an inclination towards humour, irony or criticism may not be out of place. However, any strictures or disparaging remarks in judgments should be avoided as an opportunity to defend against such remarks may not be afforded. Sometimes the evidence justifying such remarks may not be there or may be wrongly interpreted. Only in rare and exceptional cases, where it is an integral part of the decision, can such assertions be justified. In a nutshell, the judgment writer should display all the hallmarks of objectivity, be fair, be clear and be interesting.

[9] Advice on writing judgments

There are some books and articles on writing judgments. Advice has been given from time to time on what is required from judges and magistrates when preparing judgments for cases on appeal. One such advice was written on 18 April 1979 by the then Lord President of the Federal Court, Tun Mohamed Suffian. The advice, though written long ago, may still be relevant today except where advances in technology may have overcome earlier limitations. The essence of the advice is reproduced as follows:

“Writing Judgments

This letter is addressed to all judges, including presidents and magistrates.

2. I notice that there is a tendency to write protracted judgments. In some cases the evidence of the witnesses is reproduced seriatim. The submissions of counsel whether strictly relevant or not are repeated in extensor.
3. “Judges” are of course entitled to write judgments in any way they think fit but I suggest the following considerations for you to think about. An appellate court must look to “judges for assistance in dealing with their judgments are written in such a way as to direct the attention of the appellate court to the points in issue, the rulings of the trial court on law and its findings on facts. Brevity is not only the soul of wit, it is also the soul of understanding.
4. The pleadings in a civil suit are in the Record and it should not be necessary to reproduce them. It is sufficient merely to identify the cause of action and state the issues in question. In a criminal case, *Ratanlal*, e.g. will show what the prosecution has to prove to establish a prime facie case. A firm control which need not be unduly restrictive, should be imposed by the trial

judge, otherwise witnesses ramble into irrelevancies. It is however not necessary for the “judge” in writing his judgment to refer to their evidence in serial form (the notes of evidence are available), but it should be sufficient if the “judge” were to state briefly the nature of the evidence to establish the points in issue and his findings on the evidence, with his reasons. There is therefore no justification for a judgment to be nearly as long as the evidence itself.

5. If attention is focused on identifying the cause of action and setting out in brief (the shorter the form the clearer it will be) the evidence pertinent to the cause of action, and the conclusions or findings of the Court- the strict limits of a judgment- the appellate court will have a simple task, the “judges” will have a much easier time, their secretaries will have less to type and costs will be greatly reduced.

6. I would urge “judges” to read judgments in the Law Reports to see what I mean.

Yours sincerely,

(Tun Mohamed Suffian)
Lord President,
Malaysia.”

Judicial Discretion

- [1] Introduction**
- [2] Areas where judicial discretion is applied**
- [3] Bail**
- [4] Sentencing**
- [5] Remand**
- [6] Evidence**
- [7] Factors to be considered when exercising judicial discretion**
- [8] Appellate interference**
- [9] Conclusion**

[1] Introduction

Judicial discretion is defined in *Jowitt's The Dictionary of English Law* as matters in the course of a trial which are to be decided summarily by the judge, which cannot be questioned afterwards and includes various other matters provided in statutes which are incidental to the conduct of a cause before trial. Lord Devlin in his book, *The Judge*, likened discretion with wild spaces which a motorist would see on his map with motorways and trunk roads and thin white lines. So a judge or a magistrate, as the case may be, must act according to the state of this map. If the map is unrouted, there is absolute discretion; if there be guidelines, there is a limited discretion.

Raja Azlan Shah Ag LP (as HRH then was) expounded the concept of judicial discretion in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 as follows:

“I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525, 549).”

[2] Areas where judicial discretion is applied

Nowhere is this observation of His Lordship more pertinent than in the realms of sentencing, bail and remand applications where the discretion of the judge or magistrate is very much called for to determine what would be the appropriate punishment for the offence committed, the conditions for granting bail and the necessary period of remand to facilitate an investigation into an alleged offence.

[3] Bail

Where bail is concerned, the discretion of the judge or magistrate is absolute as it is not stipulated in any statutes or case law how much bail sum, how many sureties or what other conditions must be imposed before releasing an accused who has been charged with a particular offence which is bailable.

[4] Sentencing

In respect of sentencing, a judge or magistrate's discretion can be either absolute or limited. It is absolute when the law prescribes the punishment without stating the minimum or maximum penalty and it is limited when the law prescribes the maximum penalty or even minimum penalty, be it fine, imprisonment or whipping. Gengadharan Nair JC (as His Lordship then was) in *Public Prosecutor v Jesicca Lim Lu Ping & Anor.* [2004] 159 MLJU 1 made this pertinent observation:

“Despite decades of sentencing by the Malaysian courts no golden rule has yet evolved in the sentencing of accused persons following a conviction in criminal cases. Neither have the courts evolved a cast iron formula to be followed in sentencing. However, there has always been a general flexible principle that all courts have a flexible and free discretion to be exercised judicially and with a judicial conscience in deciding the period in which a guilty criminal will be incarcerated in prison.”

[5] Remand

For remand applications, the Magistrate's discretion is limited in that statute law, such as section 117 of the Criminal Procedure Code, would stipulate the maximum period in which a suspect can be detained to facilitate an investigation into an alleged offence and it would be left to the Magistrate to determine the appropriate length of remand in a given case.

[6] Evidence

There are of course other areas where judicial discretion plays a role. In evidence, for instance, a Judge or a Magistrate has discretion to reject unlawfully obtained evidence, though relevant, if its prejudicial effect far outweighs its probative value.

[7] Factors to be considered when exercising judicial discretion

Although where judicial discretion is permitted, be it absolute or limited a Judge or Magistrate is at liberty to decide freely on the appropriate sentence or order to make, the exercise of their discretion must be done within the limitation(s) imposed by law and in accordance with established principles of law.

Thus, in sentencing, for example, factors such as public interest, the gravity of the offence, the age of the accused and mitigation are to be considered and given the appropriate weightage before a punishment, commensurate with the offence, is passed. The established principles of law distilled from authoritative decisions governing the exercise of a judicial discretion in sentencing has been said to relieve a Judge or Magistrate from “too close a personal involvement with the case in hand and promotes consistency of approach on the part of individual judges.” (per Street CJ in *R v Rushby* [1977] 1 NSWLR 594 at p.597 as quoted by V.T. Singham, J in *PP v Ahmad Kairul Fa'ais bin Mat Dahlan & Ors.* [2005] MLJU 596.)

Abdul Malik J (as His Lordship then was) in *PP v Ahmad Hussin bin Zamir Hussin* (Myanmar) [1999] 3 CLJ 659 further advised, following *Noor Mohd. v Imtiaz Ahmad* AIR 1942 Qudh 130, 132, that,

“A judicial discretion can never be exercised at gun point, so to speak, but it must be exercised according to the tenets of reasonableness by a Judge with the correct judicial temperament.”

[8] Appellate interference

When a Judge or Magistrate has wrongly exercised a discretion vested upon him, the appellate court is at liberty to interfere with the decision of the said Judge or Magistrate. As Aitken J, succinctly put it in *Daud bin Kalam v Public Prosecutor* [1937] MLJ xlvii,

“It is true, as Mr. Blelloch has pointed out to me, that in doing so I shall be interfering with a Magistrate in the exercise of his discretion; but when a discretion is reposed by law in a judicial officer he is never allowed to exercise it in any way he pleases. Indeed, the expression “judicial discretion” falls very little short of a contradiction in terms, because all judicial discretions must be exercised in accordance with principles which commend themselves to Courts of Appeal and Courts of Appeal do not hesitate to interfere when any such principle is disregarded.”

It will also be disturbed if, in the exercise of his discretion, a Judge or Magistrate did not sufficiently give judicial consideration of relevant facts.

Thus, in *Iskandar Abdul Hamid v PP* [2005] CLJ 505, the Magistrate's decision to disallow an officer from the United Nations High Commissioner for Refugees (UNHCR) to attend a hearing involving a child refugee was overturned by the High Court for failing to consider the relevant fact that as an Officer of UNHCR, the said officer was "directly concerned" with the case within the meaning of section 12(3)(b) of the Child Act 2001.

[9] Conclusion

It is obvious that although 'discretion' implies an exercise of free will, judicial discretion means such discretion must be, of necessity, constrained by established judicial principles.

Sentencing

[1] Introduction

[2] What are the judicial principles involved in sentencing?

[3] Mitigating and Aggravating Factors

[4] Concurrent and Consecutive Sentences

[5] Other Sentencing Issues

[1] Introduction

Sentencing is the final process in a criminal trial. It involves punishment. Section 173(b) Criminal Procedure Code (“CPC”) (where the accused pleads guilty) and section 173(m)(ii) (where the accused is found guilty) provide that the court shall pass sentence according to law. Passing a sentence according to law means the sentence imposed must not only be within the ambit of the punishable section but also assessed and passed according to established judicial principles (*PP v Jafa bin Daud* (1981) 1 MLJ 315). Judicial officers must therefore be acutely aware of the court’s own jurisdiction to pass sentence as well as the minimum (if any) and maximum punishments provided in the punishable section. They should also be mindful of the judicial principles set out in the cases.

[2] What are the judicial principles involved in sentencing?

The law does not fix the sentence for a particular crime. A maximum sentence is prescribed for the offence and the court is left to decide the appropriate sentence within the maximum sentence for each criminal taking into account the particular circumstances of each case. In deciding the appropriate sentence, the first and foremost consideration is the public interest (*R v Ball* 35 Cr App R 164). The sentence imposed must strike the right balance between the public interest and the interests of the accused. In striking this balance, certain objectives of such sentence must be considered. Firstly, by punishing the offender, the aim is to reflect society’s disapproval or even revulsion of the crime committed. Secondly, as stated in *R v Ball*, supra, public interest is best served by deterring not only the offender from committing the crime again but also to deter others who may be similarly tempted to do so. In *R v Ball*, supra, it was held also that public interest is best served by inducing the offender to turn from criminal ways to honest living. However, in *New Tuck Shen v PP* (1982) 1 MLJ 27, the court held that public interest varies according to the time, place and circumstances of each case including its nature and prevalence.

[3] Mitigating and Aggravating Factors

A sentencing court should also have the following principles in mind. First, a balance must be struck between the public interest and the interests of the accused.

In *Loo Choon Fatt v PP* [1976] 2 MLJ 276, Hashim Yeop A Sani J (later CJ(M)) said this :

“Presidents [session judges] and Magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard L.C.J in *Rex v Grondkowski* [1946] 1 All ER 560, 561 offered some good advice when he said :-

“The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interest of justice means only the interests of the prisoners.”

Second, a plea of guilt does not always entitle an accused to a discount as a matter of right. As Karthigesu JA said in *Fu Foo Tong v PP* [1995] 1 SLR 448 :

“It is generally recognized principle of sentencing that factors peculiar to the offender may either aggravate or mitigate the commission of an offence which will justify the imposition of a sentence above or below what might otherwise be considered an appropriate sentence for that particular offence. What are aggravating factors and what are mitigating factors in relation to a particular type of offence are matters for the sentencer. It was evident to us that the learned judge weighed the factors in mitigation espoused against the aggravating factors of the appellants being armed with parangs and threatening fear to their victims and came to the conclusion that the latter far outweighed the former. We did not find it surprising that the learned judge was not moved by the mitigation pleas of ‘social and economic hardships in life’ in the context of our society of today ‘with the prospects of employment and other opportunities’ it offers. In our judgment it was difficult to imagine what mitigation there can be for gang and armed robber in our present day society.

The mitigation of a plea of guilt is another matter. However there is a misconception that must be dispelled. It is not axiomatic that every plea of guilt ‘entitles’, as it was contended by counsel to a discount of between one-quarter

to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction.”

In passing sentence, the court must take into account the mitigating and aggravating factors in order to ensure that the sentence passed is in accordance with the law. The common factors are as follows.

(a) The guilty plea

Accused persons who plead guilty should generally be given credit or discount. The rationale is that the great expense of a lengthy trial is avoided. Witnesses are saved the inconvenience. If there is no discount, accused persons would not be induced to plead guilty as they would rather try their luck in a trial (*Sau Soon Kim v PP* [1975] 2 MLJ 134; *PP v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116; *PP v Ravindran & Ors* [1993] 1 MLJ 45). There is no fixed rule as to the discount or reduction but it is usually a reduction by a third of what would have been imposed (*Mohamed Abdullah Ang v PP* [1988] 1 MLJ 167; *PP v Christopher Khoo Ewe Cheng* [1998] 3 MLJ 881)

In some cases, however, the court may refuse to give a discount. For example in cases where a serious offence is committed (*PP v Leo Say v Ors* [1985] 2 CLJ 155) or where there is effectively no defence to the charge (*PP v Low Kok Wai* [1988] 3 MLJ 123).

(b) Age

Youthful offenders should in most cases be given non-custodial sentences. A first offender between the ages of 17 and 21 years should be kept out of prison (*Tukiran bin Taib v PP* [1955] MLJ 24). However, where public interest calls for a severe sentence or where the offence is a serious one, age may not operate as a mitigating factor (*Tan Bok Yeng v PP* [1972] 1 MLJ 214; *PP v Safian bin Abdullah & Anor* [1983] 1 CLJ 324; *PP v Yap Huat Heng* [1985] 2 MLJ 414).

(c) Clean Record

A clean record is certainly a mitigating factor (*Abdul Karim v R* [1954] MLJ 86). However, if the offence committed is too serious or a grave offence, the clean record may have no influence in favour of the accused (*PP v Yap Chong Fatt* [1936] MLJ 136).

(d) Benefit or loss from the crime

Where an accused has not derived any monetary gain from the offence, the sentence may be reduced (*PP v Gabriel* [1992] 1 MLJ 593). The making of restitution may be a mitigating factor as it is an indicator of remorse (*Mohamad Abdullah Ang*, *supra*; *R v Mickelberg* (1984) 13 A Crim R 365).

(d) Conduct of accused after commission of offence

Evidence of remorse or repentance after the commission of the offence is a mitigating factor. This could be in the form of some restitution to the victim of his crime or family or it could be cooperation with the authorities or an immediate confession to the crime (*Raja Izzuddin Shah v PP* [1979] 1 MLJ 270; *PP v Tan Koon Swan* [1987] 1 MLJ 18).

(e) Health of accused

The health of the accused at the time of the commission of the offence can be a factor to reduce sentence (*PP v Chot Saik Kim* [1981] 1 MLJ 193 where accused was suffering from depression at the time of offence).

(f) Effect of conviction or sentence

The effect of a conviction or sentence can affect the accused or his family. Personal factors such as hardship to family of the offender is not considered as a mitigating factor as this is a consequence of his own acts (*PP v Teh Ah Cheng* [1976] 2 MLJ 186) and should have been thought of before embarking on the criminal enterprise (*PP v Leo Say & Ors*, supra). However, loss of job or humiliation suffered as a result of conviction may by itself form a substantial part of the offender's punishment (*PP v Vijaya Raj* [1981] 1 MLJ 43). In another case, however (*Datuk Harun Hj Idris & Ors v PP* [1978] 1 MLJ 240), the Federal Court in enhancing the sentences was not influenced by the fact that the three accused persons would lose their jobs.

(g) Time lapse

Sometimes there is a long delay in the disposal of a trial. The long interval between the time the offence is committed and eventual conviction is a factor to reduce sentence (*Ch'ng Lian Eng v PP* [1983] 1 MLJ 424; *Mark Koding v PP* [1983] 1 MLJ 111; *Mohd Jalani bin Saliman & Anor* [1997] 5 MLJ 551). The rationale is that the accused has been placed in a situation of intense anxiety with the charge hanging over his head.

(h) Previous convictions

The existence of previous convictions will negate any claim of prior good character on the part of the offender. Prior criminality is also used as a ground to show that the accused is unwilling or is incapable of complying with the law or has utter contempt for the law. In such case, the court may impose a heavier sentence. However, the court should be careful not to impose a penalty which is disproportionate to the gravity of the current offence as otherwise it may be

considered that a fresh penalty is being imposed for a past offence. A long gap between a previous conviction and the current offence should be viewed less seriously and may even operate as a mitigating factor (*Zaidon Shariff v PP* [1994] 4 CLJ 441).

(i) Prevalence of offence

The courts recognize the prevalence of certain types of offences at a particular location or at a particular time. The prevalence of such offences will warrant deterrent sentences with the hope that it will reduce the incidence of such crime. Examples of such cases are *Lee Chow Meng v PP* [1976] 1 MLJ 287 – rampancy of armed robberies; *Cheong Ah Chow v PP* [1985] 2 MLJ 257 – bookmaking in football matches; *PP v Rajandran & Anor* [1985] 2 MLJ 260 – housebreaking; *PP v Tan Eng Hock* [1970] 2 MLJ 15 – car theft; *Ong Lai Kim & Ors v PP* [1991] 3 MLJ 111 – rape; *PP v Mustapha bin Abdullah* [1997] 2 MLJ 424 – road rage.

(j) Status of offender

A more deterrent sentence may be justified in the case of an accused person who occupied a higher status in society or held a position of great trust (*Datuk Harun Hj Idris & Ors v PP* [1978] 1 MLJ 240) or who wielded considerable influence over public opinion (*Lim Guan Eng v PP* [1988] 3 MLJ 14). It has also been held that for persons of previous good character, the closing of the prison gates behind them is substantial punishment and it does not necessarily mean that the prison gates should be closed for a long time (*R v Sargeant* (1974) 60 Cr App R 74). In sexual offences, the fact that the offender is related to the victim, or in a position of trust towards the victim, is an aggravating factor (*PP v Emran bin Nasir* [1987] 1 MLJ 166).

(k) Use of violence

Where violence is used in the commission of an offence, a more severe sentence will be justified even where the offenders were very young (*PP v Safian bin Abdullah & Anor* [1983] 1 CLJ 324).

(l) Degree of deliberation and role played by offender

Where offences are carefully planned and executed, a deterrent sentence may be appropriate (*Joginder Singh v PP* [1984] 2 MLJ 133; *PP v Khairuddin* [1982] 1 MLJ 331). The role played by an accused person jointly with others may be considered when sentence is imposed (*PP v Amir bin Mahmood & Ors* [1996] 5 MLJ 159).

[4] Concurrent and consecutive Sentences

An offender may be convicted of different offences in the same trial. The court will then have to decide whether to impose concurrent or consecutive sentences. A concurrent sentence operates at the same time as another sentence whilst a consecutive sentence is one that commences at the expiry of another sentence.

Where offences are committed in one transaction with regards to proximity of time, place or continuity of action, purpose or design, a concurrent sentence should be ordered. Where, on the other hand, separate or distinct offences were committed, consecutive sentences are appropriate (*Abu Seman v PP* [1982] 2 MLJ 338; *Hashim bin Pawanchee & Anor v PP* [1988] 2 MLJ 66; *PP v Yap Huat Heng* [1985] 2 MLJ 414). Apart from this one transaction principle, the court is also guided by the totality principle. This means the court looks at the totality of the sentences passed and consider if they are not overall excessive (*Sau Soon Kim v PP* [1975] 2 MLJ 134 FC; *R v Faulkner* (1972) 56 Cr App R 594) or a crushing sentence (*Kanagasuntharam v PP* (1982) SLR 85).

[5] Other Sentencing Issues

Maximum sentence: The maximum sentence prescribed by statute is reserved for the worst type of cases or the worst cases of the sort falling within the prohibition. This would involve a consideration of both the nature of the crime and the circumstances of the criminal (*PP v Tia Ah Leng* [2000] 5 MLJ 401; *Mohd Jalani bin Saliman v PP* [1997] 5 MLJ 583; *R v Ambler* (1976) Crim LR 266; *Sim Gek Yong v PP* (1995) 1 SLR 537; *PP v Mustapha bin Abdullah*, supra).

Effective date of sentence: Unless the court otherwise directs, the date which the sentence takes effect is the date the sentence was passed (section 282(d) CPC). The court may order the imprisonment term to commence from the date of arrest if the offender has been in remand from the time of arrest until conviction. The court can also take into account the period an accused person was placed in custody and give a discount on the imprisonment term but in such a case, the sentence should not be backdated to the date of arrest (*Muharam bin Anson v PP* [1981] 1 MLJ 222 FC; *PP v Dato' Seri Anwar bin Ibrahim (No3)* [1999] 2 MLJ 1)

Mandatory custodial sentence: Penal statutes set out the various modes and extent of punishment. Certain offences may also carry a mandatory imprisonment term. The phrase “shall be punished with” as opposed to “shall be liable to” indicates that there should be a mandatory custodial sentence. However, there are conflicting interpretations. An issue that arises is whether in such a case where the offence has been proved, provisions under section 294 of

the CPC for a binding over bond can still be applied (For example, see *PP v Mohamed Nor & Ors* [1985] 2 MLJ 200; *Phillip Lau Chee Heng v PP* [1988] 3 MLJ 107 compared with *PP v Leonard Glenn Francis* [1989] 2 MLJ 158). It would appear that in such cases, the legislature had intended that the provisions under section 294 of the CPC are inapplicable.