

Session 11

**Crimes at ATMs and Examination of the
Redress Mechanism for ATM Users**

By

M. Kalavathy

Senior Lecturer, Faculty of Law, University of
Malaya

CRIMES AT ATMs AND EXAMINATION OF THE REDRESS MECHANISM FOR ATM USERS.

Kalavathy Maruthavanar
Senior Lecturer, Law Faculty,
University Malaya

(Note: This paper is an extract of an ongoing research for the Doctorate of Law thesis at the Law Faculty, University Malaya. Therefore it is the property of University Malaya and no person shall use in any manner the information gathered from this paper without the written permission of the writer and University Malaya)

1. Violence at ATM machines

The Automated Teller Machine has provided great convenience to the customer by being available for dispensation of cash 24 hours per day, 7 days per week. The downside to this convenient arrangement is that ATM users are easy prey for robbers especially at night when no security personnel is present, lighting is poor and foliage or surrounding structures obstruct the view. Crime at ATMs has been defined as "any crime of violence or threatened violence in which the perpetrators saw the victim use the ATM or in which the attack occurred 20 feet of an ATM".¹ Therefore the focus of this paper is on the physical crimes perpetrated against ATM users in the vicinity of ATM machines. In Malaysia there are a number of cases about crimes at ATMs, largely unreported or reported only in the local newspapers.

Crimes at ATMs in Malaysia have been regarded as crimes against the state and therefore have been prosecuted by the Attorney General's chamber as criminal offences under the purview of the Penal Code. A sole horrific local case that had been reported is

¹ Bank Admin. Inst. Task Force on ATM Crime, ATM Security Hand book (United States) 28-29 (2d ed. 1988)

*Christopher Khoo Ewe Cheng v Public Prosecutor*². The facts of the case are as follows; On 4th August 1995, the appellant and three others accomplices waited in the vicinity of the Hong Kong & Shanghai Bank (HKSB) at Old Town, Ipoh during the early hours of 2 to 3 a.m. The victim, one Low Siw Won arrived in his Proton car and alighted to withdraw some money from the ATM. Two of the four robbers approached him and forced him back into his car, while the appellant took over the wheel. They robbed the victim of RM1,030 cash, ATM card, credit cards and his hand phone. They also forced the victim to divulge his ATM card's PIN number and the appellant returned to the ATM to check the veracity of the number. Being satisfied that the PIN number was correct, they ferried him to a disused mining pool beside Sungai Kinta and proceeded to inhumanely murder him by suffocating him with a plastic bag over his head, while he laid face down onto the sand with his hands tied to the back by a string. Since he only fainted, they then untied his hands and used the same string to tightly strangle him until he died. They stuffed the body into a gunny sack, placed it the car's boot and drove to another abandoned mining pool at the Industrial Park Sri Pengkalan. There the gunny sack containing the body was dumped into the pool.

The appellant and his accomplices were initially charged with the offence of murder under s302 read with s34 of the Penal Code (FMS Cap 45). Subsequently the charge against the appellant was reduced to culpable homicide not amounting to murder, an offence under s304 (first limb) read with s34 of the Penal Code. He pleaded guilty to the amended charge and the trial judge sentenced him to 14 years imprisonment. He appealed to the Court of Appeal and urged the court to reduce the term of imprisonment as he was a first offender, aged 24 at the time of the offence and had pleaded guilty to the amended charge.

The appellate court dismissed the appeal and confirmed the sentence. Justice Shaik Daud echoed the sentiments of the court when he said,³

“We agreed entirely with his (sic, the trial judge) view that the gruesome killing in this case was entirely senseless and unnecessary. The deceased had acceded to all the demands of the appellant and his gang. Having got what they wanted, they could have

² [1998] 3 MLJ 881

³ *Ibid*, at p 2

dumped him somewhere and taken his car away but instead they killed him, by choking and strangling him. Whatever mitigating factor was available would negate this.”

The above stated case is a tragic tale of violence at the ATM and almost every ATM user in Malaysia has had to brave such a danger lurking within the vicinity of the ATM. Shouldn't the bank that installed the ATM be held responsible for neglecting to implement appropriate security measures to deter crimes? By not safeguarding the ATM terminals, banks have inadvertently made ATMs the easy target of robbers and murderers. The attempt to seek legal redress is not straightforward because the crime had been committed by a third party who is a total stranger to both the bank and customer. Therefore in legal terminology, can a civil action (as opposed to a criminal action) be commenced against a bank for violence committed by a third party at the bank's ATM? The writer has searched almost all jurisdictions for an answer to this query; and the only courts that have delved at length into this issue are the courts in United States. The US courts have resorted to the law of tort in order to grant redress to the ATM victims. Almost all other countries including Malaysia, take the conservative view that crimes are offences against the state and accordingly it is the state's duty to prosecute criminals in order to safeguard society at large.

Let us examine the attempts by ATM victims or their next of kin in commencing civil litigation against banks for violence at ATMs in United States. Most of the cases that have been litigated use the argument that the bank as the occupier of the premises is liable to an invitee (the ATM patron) for criminal acts conducted by third parties. Clearly there is an inviter-invitee relationship between the parties. This relationship should also be extended to customers that use an ATM sharing network system for they have been invited to use an ATM network system at other banks' premises. In Malaysia, this would be the MEPS system that enables a consumer to withdraw moneys from any ATM that is affiliated to the MEPS system.⁴

⁴ MEPS is the acronym for the Malaysian Electronic Payment Systems.

Based on the inviter-invitee relationship, there are three issues to be resolved before the bank can be imputed with an occupier's liability. Firstly, does the bank owe a duty of care to invitees that use ATM machines; secondly, did the bank breach the duty of care; thirdly, was the breach the proximate cause of the invitee's injuries. In order to ascertain if there exists a duty of care to ATM patrons, the law of tort requires the court to examine if the bank could have foreseen criminal acts by third parties. This is the stumbling block to the consumer's case as most courts in United States have divergent views on the issue of foreseeability of third party criminal acts. Three tests have evolved in this area of the law ranging from two narrow tests that deny foreseeability to one broader test that leans positively towards affirming foreseeability.

1.1 The Specific Harm Test

The narrow test applied to resolve the issue on foreseeability is known as the "specific harm test". This test originated from the case of *Cornpropst v Sloan*⁵, a non-banking case that dealt with a vicious assault on a shopper at the parking lot of a mall. The parking lot had been the scene for assaults and various acts of violence but the mall proprietor did not take any precautionary steps to deter such criminal activity. The Tennessee Supreme Court held that the proprietor was not liable as it could not have foreseen any **specific harm** to the shopper. The Court stated:

"There is no duty upon the owners or operators of a shopping center.....whose mode of operation of their premises does not attract or provide a climate for crime, to guard against the criminal acts of a third party, unless they know or have reason to know that acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee; whereupon a duty of reasonable care to protect against such act arises."

The *Cornpropst* test was applied in the ATM case of *Page v American National Bank & Trust Company*⁶. In this case one Mrs. Page, a customer of the aforesaid bank and her son drove to an ATM machine at the Brainerd Road branch at approximately 9.30 p.m.

⁵ 528 S.W.2d 188 (Tenn.1975)

⁶ 850 S.W. 2d 133 , 1991 Tenn. Ct App. LEXIS 529

on 7th December 1988. She held an ATM card that permitted her to withdraw US300 in cash during the day or night. She parked her automobile near the ATM and left her 14 year old son in the car. As she was chatting with another lady, four to six youths approached them. One youth pushed Mrs. Page towards the ATM machine while holding an object to her back (presumably a gun), and demanded that she withdraw US300 from the ATM. Meanwhile another two youths pointed a gun at her son in the car and threatened to kill him if Mrs. Page did not cooperate. As she turned to tell her son to stay in the car, the youth struck her in the face with a solid object that knocked her down and severely injured her face. The Pages sued the bank for personal injuries and averred that the bank was negligent in common law and violated the Code of Federal Regulations (CFR) pertaining to safety features of ATMs.⁷ On the other hand the bank denied the following:⁸

- (i) A duty to protect the plaintiffs from the intentional criminal acts of third parties.
- (ii) Any acts or omissions which constituted negligence.
- (iii) Violated any federal regulations as alleged in the plaintiffs' complaint.

At the conclusion of the trial, the jury found in favour of the plaintiffs and fixed Mrs. Page's damages at US125, 000 and her son's damages at US10, 000. The bank appealed and relied on the *Cornpropst* case that highlighted the reasoning of a private person/corporation having no duty in tort (unlike government agencies) to protect others from third party criminal acts; and it being patently unfair and unjust to impose the vague duty of section 344 Restatement of Torts (Second)⁹ on business owners for the sudden criminal acts of unknown and unidentified persons.

The Court of Appeal in *Page's* case upheld the reasoning in *Cornpropst's* case. A decision favourable to the bank was reached although evidence was tendered that;

- (i) Five similar previous crimes at the very same branch's ATM.¹⁰

⁷ Since the bank's deposits are insured by the Federal Deposit Insurance Corporation, it is subject to the federal regulations in the Code of Federal Regulations (CFR). The regulations relied on were 12CFR21.4(b)(1),(7);21.5(a);21 Appendix A, A(1)(iii),(4)(V).

⁸ *Op Cit*, *Page's* case at pp 137-140.

⁹ Refer to Appendix A attached to this paper.

¹⁰ The crimes occurred from 1984-1988 and three occurred during the day and two during the night.

- (ii) Two letters from the Chattanooga Crime Prevention Bureau specifically addressing the fact that the drive-in adjacent to the Brainerd Branch ATM provided thieves with a 'good place to hide and grab money'.¹¹
- (iii) A previous warning from a customer who assaulted and shot at the exact same ATM about the dangerous situation at that location.
- (iv) The ATM at the Brainerd Branch is on the side of the building, shielded from the line of sight of east-bound traffic by a sharp curve away from the building, and largely obstructed from the west by the large American National Bank sign, a tall retaining wall, and other obstacles.
- (v) On the night of assault, the area in the vicinity of the ATM was not well lighted as required by federal regulations. In fact, the area where the assailants hid was not lighted at all and provided the hiding place warned of by the Chattanooga Crime Prevention Bureau.
- (vi) The ATM was located in a high crime area.

The Court Of Appeal conceded that the plaintiff proved each of the allegations to the complete satisfaction of the jury but this still did not exclude the Bank from the *Cornpropst* rule. This was because the court in *Cornpropst* said "In our opinion it is a mistake to equate the duty of a shopkeeper with respect to criminal acts with the duty of shopkeepers with respect to careless acts".¹² In addition the federal regulation, 12 CFR Appendix A 4(v) that provided minimum standards for ATM design was drafted to prevent the ATM itself from being burglarized. The legislation was not aimed to protect ATM patrons and therefore the plaintiffs did not fall within the any class of persons the statute was intended to protect.¹³ The Court of Appeal then concluded:¹⁴

" In the case at bar we hold, as the supreme court held in *Cornpropst*, that the sudden intentional criminal acts of the unidentified assailants, which would not have been prevented or deterred by the exercise of reasonable care by the Bank, was the sole proximate cause of harm to the Plaintiffs".

¹¹ The letters were pursuant to the bank's request in 1985 to the Crime Prevention Bureau of Chattanooga to make a survey and recommendations concerning security at all its ATM locations.

¹² *Op.Cit. Page's* case at p 138.

¹³ *Op.Cit. Page's* case at p 140.

¹⁴ *Ibid.* at p 140.

The specific harm test is restricted in its application. This is due to the criteria that the bank has to foresee specific harm to a particular customer. It is almost impossible to foresee specific harm to a customer as most ATMs' are unmanned and therefore it is very unlikely that banks can be held liable using this test.¹⁵ Therefore in order for liability to attach, the crime at the ATM has to occur in the presence of a bank employee and the employee failed to take adequate measures to protect the customer.¹⁶

1.2 Prior Similar Incidents Test

The prior similar incidents test focuses on the existence of prior similar incidents in order to determine whether the particular crime was foreseeable.¹⁷ The three points the court takes into account whilst applying this test are; (a) the similarity of the incident in question to prior incidents, (b) the frequency and recency of the other incidents, and (c) the location where all the incidents occurred.¹⁸ The court on determining the first point on similarity of the incident in question to prior incidents, require a high degree of similarity among the crimes. Therefore a crime such as shoplifting or petty theft will not make an armed robbery or murder foreseeable.¹⁹ Next the second point on frequency and recency of prior crimes also requires a high number of similar crimes that have occurred in a recent time span.

In the earlier discussed *Page's* case, five similar crimes had occurred at the exact same ATM and in *Williams v First Alabama*²⁰, two earlier armed robberies at the same ATM nine days earlier was insufficient to attach foreseeability of the particular crime by the bank. In another more recent case of *Kerry Williams v Citibank N. A.*²¹, an ATM user was assaulted in the vestibule vicinity of an ATM; the defendant bank successfully avoided liability by offering proof that there were **no prior similar incidents** at the ATM

¹⁵ Refer to Chris A. Averitt, Bank Not Liable for Attack on ATM Patron: Boren v Worthen National Bank of Arkansas, 50 Ark.L.Rev 521, at p 536

¹⁶ *Ibid.* at p 537

¹⁷ Gregory W. Hoskins, Violent Crimes at ATMs: Analysis of the Liability of Banks and the Regulation of Protective Measures, 14 N. Ill. U. L. Rev 829 at pp 836-837.

¹⁸ *Ibid.* at p 837

¹⁹ *Ibid.*

²⁰ 545 So 2d 26 (Ala.1989), Supreme Court of Alabama.

²¹ 247 A.D. 2d 49; 1998 N.Y. App.Div. LEXIS 9251.

crime scene. The judge in the aforesaid case relied on the deposition testimony of Citibank personnel and Citibank records that there were no prior similar incidents at the particular ATM and that Citibank had fully complied with the Administrative Code of the City of New York § 10-160 with respect to the security requirement at an ATM.²² He also felt that if the court were to recognize a duty to protect a bank's customers in these circumstances, banks would be exposed to absolute and virtually limitless liability.²³

1.3 Totality Of The Circumstances Test

The third test that has evolved is the "Totality of the Circumstances Test" whereby each and every circumstance surrounding the disputed incident is examined to determine whether the occurrence of the crime was foreseeable.²⁴ The test was first introduced by the California Supreme Court in the 'non-banking' case of *Isaacs v Huntington Memorial Hospital*²⁵. In this case, an anesthesiologist, Dr Mervyn Isaacs who was accompanied by his wife had parked his car at the "research parking lot" of Huntington Memorial Hospital (although he had a card key to park at the adjacent doctors' parking lot). After completing their respective tasks, they left the hospital building at about 10 p.m. At the trunk of his car, he was grabbed from the rear by someone who held a gun to his chest. As he turned around slowly, he was shot. The shot resulted in the loss of Dr Isaacs right kidney. Dr Isaacs and his wife sued the hospital and its insurance carrier, Truck Insurance Exchange. The lawsuit against the hospital was based on its alleged failure to take adequate measures to protect its invitees and licensees against criminal activities by third parties. The action against the hospital's insurance carrier was based on its participation with the hospital's decision (prior to Dr Isaacs's shooting incident) to discontinue the hospital's security guards from carrying firearms.

The trial judge gave a judgment of non suit in favour of the defendant, Huntington Memorial Hospital and summary judgment in favour of the defendant, Truck Insurance Exchange. The decision in favour of the hospital was reached by applying the "prior similar incidents" test. The court decided that the plaintiff's evidence that the hospital

²² *Ibid.* Per Joseph P Sullivan at pp50-51

²³ *Ibid.* p 54

²⁴ *Op.Cit.* Gregory W. Hoskins article at p 840

²⁵ 695 P.2d 653 (Cal. 1985); 1984 Cal. App. LEXIS 2330.

was situated in a high crime area and the fact that several criminal incidents had occurred in the emergency room was not sufficient to satisfy the requirements of the “prior similar incidents” test. Fortunately for the plaintiff that at the appellate level, the California Supreme Court threw out the applicability of the aforesaid test by declaring that “while the prior similar incidents are helpful to determine foreseeability, they are not required to establish it”.²⁶ The court gave several policy reasons that revealed the inherent injustices of applying the “prior similar incidents” test.²⁷ First, the rule leads to results which are contrary to public policy because it discourages landowners from taking adequate measures to protect their premises which they know are dangerous. Second, the rule is unfair because the first victim will always lose, while subsequent victims are permitted to recover. Third, the rule leads to arbitrary results because of the uncertainty as to how “similar” the prior incidents must be to determine foreseeability. Fourth, the rule erroneously equates the foreseeability of a particular act with the previous occurrences of similar acts. Finally, the rule removes too many cases from the consideration of the jury.²⁸

Evidently the *Isaacs* case is more justifiable for the consumer as it does not strait jacket him to the impossible standards imposed by the “prior similar incidents test”. The American courts that have used the “totality of circumstances test” are actually examining the elements set out in the Restatement (Second) of Torts, Comment f to section 344²⁹; which examines the place as well as the character of the business and past experience.³⁰ Many subsequent cases have applied the “totality of circumstances” test to crimes committed by third parties on the proprietor’s premises³¹, however it remains arguable if this test will be used in ATM cases.³² Gregory W. Hoskins argues in his article that one of the circumstances that should be considered to strengthen the

²⁶ *Ibid*, at p 665

²⁷ *Op. Cit* Gregory W. Hoskins article at p 841

²⁸ This last reason will not be relevant to our local legal system since the jury system has been abolished.

²⁹ Refer to Appendix A

³⁰ Mark Budnitz & Margot Saunders, Consumer Banking and Payments Law, National Consumer Law Center, Second Edition,(2002), at p 95.

³¹ *Op. Cit*, Gregory W. Hoskins article at pp 841-842.

³² In *Popp v Cash Station, Inc*, 613 N.E.2d 1150 (111.App. Ct. 1992) – a class action suit against an ATM network; the Illinois appellate court seemed to taken a step backwards by formulating a “future” incidents test in order to establish foreseeability of crime.

applicability of this test to ATM cases is to categorize its operation as creating an “especial temptation” and opportunity for criminal conduct.³³ The term “especial temptation” had been used to characterize businesses that due to their unique nature of operation have a greater likelihood of being victimized by third party criminal acts. In the case of *Cohen v Southland Corp*³⁴, a 24 hour convenience store was categorized as “especial temptation” because its late hour operation made it an attractive target for criminal activity. This case noted that more robberies occurred at night because there are fewer witnesses and darkness conceals the robbers’ escape.³⁵ The above stated author adds that this is parallel to the risks of criminal activity at ATMs; a robber knows there is a high probability that an ATM customer will be carrying cash.³⁶ However in the end, the author dejectedly concedes that American courts have generally been unwilling to categorize banks or ATMs as “especial temptations”.³⁷

The three tests above have been formulated by American case law as a result of civil actions commenced by ATM patrons. Comparatively the third test which is “the totality of circumstances test” (discussed above) appears to be a test which is more favorable and less onerous to the bank customer. Since it takes into account all circumstances that contributed to the criminal incident, there is a fair deliberation of all possible factors that indicate foreseeability of the crime by the premises owner. Although the litigation success rate of the American consumer as against the banks is minimal, it is nevertheless commendable that the American courts have tried to stretch the principles of premises liability by examining if the premises owner is able to foresee physical injury inflicted upon its patrons by third parties. This is an avenue that has yet to be ventured by many other jurisdictions including Malaysia.

³³ *Op.Cit* Gregory W. Hoskins article.

³⁴ 203 Cal. Rptr. 572 (Cal.Ct. App. 1984)

³⁵ *Ibid.* at p 578

³⁶ *Op.Cit.* Gregory W. Hoskins article at p 842.

³⁷ *Ibid.* Refer to footnote 94 in this article for a list of cases that have taken this stance, except the last case on the list which is *Stalzer v European Am. Bank* 448 N.Y.S2d,634(N.Y..Civ.Ct. 1982).

2. The Principles of Occupiers Liability in Malaysia

In Malaysia, the principle of premises liability is known as occupiers' liability. Therefore a bank that occupies a building either as an owner or tenant is an "occupier" because it is in possession of the building (wherein the ATM machine is attached to) and has immediate supervision and control over the building; as well as the power of permitting and prohibiting the entry of other persons.³⁸ Next the term "private premises" in the context of occupiers' liability also includes walls, structures and spaces.³⁹ Accordingly if the bank places ATM terminals at malls, supermarkets or airports, the bank is still the occupier of that particular space since it has possession and control over the terminals.

Firstly, some background on the law relating to occupiers' liability in Malaysia. The principle that governs occupiers' liability is rooted in the tort of negligence by the occupier of premises. This area of law in Malaysia is continued to be governed by English common law. Therefore the landmark English decisions on occupiers' liability have had a strong influence on the local courts' decisions in this area of law. At this juncture it should be noted that England had enacted two statutes on occupiers' liability namely the Occupiers' Liability Act 1957 (covering lawful entrants) and the Occupiers' Liability Act 1984 (covering trespassers). There is no equivalent legislation in Malaysia. According to Rutter, the English textbooks and decisions of the English courts rendered since 1957 must be read with caution, since to the extent they are based on English statutes they are not directly relevant in Singapore and Malaysia.⁴⁰

In the writer's opinion, persons who can sue an occupier cum bank are;

- A. a contractual entrant for an ancillary purpose; an entrant who has paid to be on the land for the primary purpose of some activity⁴¹; and
- B. an invitee (or 'business visitor') who is on the premises for some purpose of commercial benefit to the occupier as well as the entrant ('a common or joint interest').⁴²

³⁸ Per Lord Denning in *Wheat v Lacon & Co* [1966] 1 All ER (HL) at pp 593-594.

³⁹ Michael F Rutter, *Occupiers' Liability In Singapore And Malaysia*, Butterworths (1985).

⁴⁰ *Op.Cit* Rutter at p 6.

⁴¹ Another category of contractual entrants are main purpose contractual entrants whose main purpose is to physically use the premises for dwelling e.g. a tenant or a hotel guest.

The writer will examine the above stated paragraph A. first, which categorizes a bank's customer as a contractual entrant for an ancillary purpose. What is a contractual entrant and does an ATM patron fall within this category of persons who can sue an occupier? A contractual entrant for an ancillary purpose is a person who is on the premises pursuant to a contractual right. He has also given consideration by paying for his right to conduct an activity on the occupier's premises. An ATM patron who is a customer of a bank would fall within this category as there is a banker-customer contractual relationship between the parties⁴³ and the customer has paid his bank a fee for using the ATM machines. The customer would have signed an agreement during the onset of opening an account as well as received a standard form contract upon receipt of the ATM card. The law on occupiers' liability also accepts contracts and any of its terms which are oral, implied or informal (as opposed to written, express and formal)⁴⁴. At this juncture, it should be noted that ATM patrons that use the MEPS system whereby they can withdraw at any banks' terminal, will not be termed as a contractual entrant if they are not account holders/customers at the hosting banks' terminals.

A contractual entrant who is injured on the premises has two causes of action; one in contract for breach of express or implied contractual duty and another in tort for breach of a duty owed in negligence.⁴⁵ Contractually the occupier has a duty to perform the terms of the contract as to the safety of premises. If the contract is silent, the occupier has an implied duty to ensure that the premises are in all respects reasonably safe for the purposes for which the other party contracted to use them.⁴⁶ This is the highest standard of care owed by the occupier to any entrant to his premises. Therefore it is in the Malaysian ATM patron/bank customer's favour to be categorized as a contractual entrant.

⁴² *Ibid* at p 30, Rutter lists a customer at a bank as an invitee.

⁴³ *Joachimson's case* [1921] 3 KB 110 which states the relationship between the bank and its customer is contractual.

⁴⁴ *Op.Cit* Rutter at p 114.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*, at p 258.

Most of the common law cases decided on occupiers' liability, involve the defective condition of the premises or any danger on the premises created by an activity of the occupier or an appointed independent contractor. Therefore the term "safe premises" has connoted the physical condition of the land being in all respects safe to be used for the intended purpose. In the context of the ATM patron, the terminology "safe premises" should be extended to also include the visitor's use of the premises as opposed to its physical condition. This extended terminology was first applied by the Canadian Courts in the case of *Crocker v Sundance Northwest Resorts Ltd*⁴⁷. and subsequently in the case of *Allison v Rank City Wall Canada Ltd*⁴⁸.

Next the writer will examine paragraph B. whereby the ATM patron is an invitee or more specially identified as a "business visitor".⁴⁹ The term "business visitor" is sometimes used, (particularly in the USA) to designate an invitee.⁵⁰ Business visitors are persons who enter the premises for a purpose which is of material, economic benefit both to themselves and the occupier.⁵¹ The common law case of *Indermaur v Dames*⁵², an occupier is liable to an invitee for injuries or property damage suffered by him if:

- (a) the occupier knew or ought to have known of the danger;
- (b) the danger was unusual to that class of plaintiff,⁵³ i.e. not usually found in carrying out the task or fulfilling the function in question, having regard to the nature of the place and the knowledge of the invitee;
- (c) the danger was unknown to the plaintiff invitee;
- (d) the significance of the danger was not appreciated by the plaintiff invitee;⁵⁴
- (e) the occupier failed to use reasonable care to prevent damage from occurring, whether by notice, lighting, guarding or otherwise.

⁴⁷ [1983] 43 OR (2d) 145.

⁴⁸ (1984) 45 OR (2d) 141.

⁴⁹ *Supra* at p 11.

⁵⁰ *Op. Cit.* Rutter at p 126.

⁵¹ *Ibid.*, at p 110 and p 125

⁵² (1886) LRI CP 274; *Ibid.*, at pp129-130

⁵³ *London Graving Dock Co v Horton* [1951] AC 737

⁵⁴ *Smith v Austin Lifts Ltd* [1959] 1 WLR 100

The above stated common law principles governing the legal position of an invitee were first applied by the Malaysian courts in the case of *Lau Tin Sye v Yusuf bin Muhammad*.⁵⁵ In this case, the plaintiff's right foot was accidentally cut by the rotating blade of a cultivator being drawn by a tractor belonging to the defendant. The plaintiff had earlier traveled on the tractor with the permission of the defendant and alighted to assist in some adjustments being made to the blade (without being instructed to do so).

The plaintiff's case against the defendant succeeded at the first instance but was overturned on appeal by the Federal Court. The Federal Court conceded that he was an invitee in accordance with the principles of *Indermaur v Dames*⁵⁶, but his injury was not caused by any dangerous condition of the land. He was injured by the cultivator's blade. The appellate court held that even if the tractor is said to be a structure for the purposes of identifying the defendant-owner as an 'occupier', ".....it would be a misuse of the English Language to say thatthe respondent had entered upon it".

The writer feels this is a very restrictive interpretation of the occupier's duty to an invitee. This case is detrimental to the ATM patrons that have been victimized by third parties since their injury is not a direct result of any physical dangerous condition of the premises. If the ATM machine, blows up on their face, only then may they succeed using the aforesaid analysis of the Federal Court. In this context, the Canadian cases discussed earlier under the topic of contractual entrant seem more progressive since it also examines the entrant's use of the premises.⁵⁷

There are no cases directly on the point of ATM patrons but there are two cases, one Malaysian and another Singaporean on the law relating to bank customers, in general. The Malaysian case of *Takong Tabari v Government of Sarawak & Ors*.⁵⁸ is the first case in Malaysia that categorically places the bank's customer as an "invitee". Another

⁵⁵ [1973] 2 MLJ 186, FC

⁵⁶ *Supra* fn 52

⁵⁷ *Supra* at p 13 of this paper.

⁵⁸ [1996] 5 MLJ 435.

Singaporean case that similarly placed the bank's customer in that class of persons is the case of *Industrial Commercial Bank v Tan Swa Eng & Ors And Another Appeal*.⁵⁹ .

The above stated cases are an example of the narrow test applied to invitees cum bank customers in order to find the occupier cum bank liable for breach of its duty of care. The writer is uncertain why the cases have not referred to the bank customers as contractual entrants since in banking law there is clearly a contractual relationship between the bank and its customers. The occupier's duty to a contractual entrant is wider and the above stated cases could have imposed a higher standard of care on the occupier cum banker.

Limitations of the Law of Tort

The principles of occupiers' liability are very rigid and generally the cases have placed bank customers as invitees, which further weaken their chances of a successful suit. If ATM patrons are invitees, then is the danger posed by third party criminal acts "unusual" so as to render the bank liable. It is difficult to reason that specific third party criminal acts are incidents which the bank ought to know although it may be arguable that such acts are not the norm for ATM banking customers.

Next, the bank can also discharge its duty as an occupier by placing notices either in the form of a warning or as exclusion clauses.⁶⁰ Most banks in Malaysia, place warning messages which appear on the screens of ATM terminals cautioning the customer of any external danger. Exclusion clauses that are inserted in ATM card contracts are dictated by the requirements of contract law on standard form contracts e.g. it has to be brought to the notice of the customer and not be disguised in small print; this being usually the case. Therefore the effectiveness of inserting exclusion clauses is a subjective matter (but keeping in mind that 'negligence' can be expressly excluded if it is stated explicitly in the exemption clause). However, it cannot be denied that the law of negligence as well as the law on occupier liability is too onerous on victims of ATM crimes. The US cases discussed earlier and the cases on occupiers' liability indicate the insurmountable hurdles

⁵⁹ [1995] 2 SLR 716.

⁶⁰ *Ashdown v William Samuels & Sons Ltd* [1957] 1 QB 409

that are placed before banks' customers. As a result, legislators, especially in the US have introduced standards of care to be implemented by the banks in banking codes.

3. Banking Codes on Safety Standards

Commendable banking codes on safety standards at ATMs are the minimum security standards for ATMs in California and New York, USA.⁶¹ The Californian law requires financial institutions to evaluate the safety of all ATM locations, including a consideration of the presence of landscaping and other obstructions in the area of the ATM, the access and parking areas, the incidence of violent crimes in the ATM area and minimum lighting standards. The law also requires that all ATM users be notified of basic safety precautions they should take when using an ATM. The New York Code is more stringent and requires all ATMs to be equipped with a surveillance camera capable of viewing and recording the traffic flow of an ATM facility, reflective mirrors or surfaces to provide users a rearview, and entry doors with locks requiring an ATM card or access code for entry to enclosed ATMs. The financial institutions that do not comply with the code face penalties up to US\$1,000 per day.⁶²

In comparison, Bank Negara has introduced the guidelines on "Security Controls for Electronic Banking Systems" and the "Minimum Standards for ATMs". The aforesaid first mentioned guidelines are dated 1st October 1989 and under the heading "Physical Security" describes the focus of the guidelines as follows:

"Physical security is concerned with physical attack against electronic banking devices particularly Automated Teller Machine (ATM), including theft of cash and deposits, vandalism and **robbery of customers** or service personnel. Crimes against customers can and do occur at ATM sites. Bankers must consider moral, legal and customer relations aspects involved. Therefore, customer safety must be considered in selecting an ATM location."

⁶¹ CAL.FIN.CODE §§ 13000-13070 (West Supp. 1995)

⁶² *Op.Cit* Gregory W. Hoskins article at pp 853-854.

The guidelines do list "customers" as an area of concern for banks to safeguard from the threat of "robbery". However the heading "Physical Security Controls To Be Implemented" in the aforesaid guidelines contain minimal security requirements to be implemented by banks. These guidelines are general in nature and do not exclusively deal with the robbery of customers but also address the physical safety of the ATM machines from theft and vandalism; as well as the safety of bank personnel servicing ATM machines.

Another more recent set of guidelines issued by Bank Negara are the "Guideline on Minimum Standards for ATMs" dated 29 March 2000.

The standards focus on the internal safety measures to be implemented by the bank so that ATM terminals function accordingly. The only clauses that take into account any external physical danger are clauses 14 on Consumer Awareness Programme (which vaguely refers to the DOs and DON'Ts while using the ATM card) and clause 17 on the Availability of Video Camera (which is more intent on capturing a clear image of the consumer conducting the transaction; more for record purposes). These recent guidelines do not address the issue of third party criminal acts at ATMs.

Both the above stated Bank Negara guidelines do not provide any redress to the consumer. The main reason being that these guidelines issued pursuant to Sec 126 of the Banking & Financial Institutions Act 1989 are directed to banks and banks that do not comply with the guidelines are guilty of an offence against the said Act. The customer is neither party nor privy to the Bank Negara guidelines and it does not contain any legal redress for the customer. Instead, can the customer bring his case to the Financial Mediation Bureau which deals with the public grievances against banks? The process of mediation does not handle criminal issues and therefore crimes at ATMs are excluded from its purview. The judicial system in Malaysia has yet to deal with a case of negligence against any local bank; therefore there is no official record of any relief granted to ATM users that have been robbed, assaulted or murdered while using the ATMs.

The writer recommends that the guidelines be revamped to include clear and comprehensive safety standards in favour of consumers and such standards to become foundation stones for any consumer action against the bank for negligence. The bank's customer should be given a legal avenue to commence a civil action against the bank if such customer is dissatisfied with the safety measures implemented by the bank.

The minimum standards set by such revamped guidelines should serve as the standard of care required by financial institutions to meet the duty owed to their customers.⁶³ The guidelines must state the following,⁶⁴

- (a) an ATM user who is the victim of a criminal attack by a third party may bring a negligence action against the financial institution that operates the ATM
- (b) failure by any financial institution to comply with any section of the statute is prima facie evidence of a breach of the standard of care.
- (c) compliance with the entire statute constitutes a rebuttable presumption that the financial institution has not breached the standard of care.
- (d) a financial institution may still be found negligent for the continued operation of an ATM that suffers repeated criminal attacks, even if the ATM complies with the statute.

In conclusion, the guidelines would be more effective in safeguarding the bank customer's physical safety if the above stated clauses be implemented. Such a code would overcome all the rigours of complying with the archaic common law principles on negligence and occupiers' liability.

⁶³ *Op.Cit.* the Californian code at § 13031

⁶⁴ *Op.Cit* Gregory W.Hoskins article at p 858.

ARTICLE 105 AND SEARCH - CRIMINAL LAW AND PROCEDURE UNIVERSITY OF MALAYA AND LISTS NEXT APPENDIX A

The Restatement (Second) of Torts provision on premises liability, section 344, provides:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentional harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

- (a) discover that such acts are being done or are likely to be done, or
- (b) give warning adequate to enable the visitors to avoid harm, otherwise to protect them against it.

Also of relevance is Comment f to section 344:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

APPENDIX A

The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

(a) The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

(b) The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

(c) The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

(d) The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

(e) The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

(f) The Board of Directors of the Corporation shall have the right to elect or remove any officer or director of the Corporation at any time and for any cause, and to fill any vacancy which may occur in the office of any officer or director of the Corporation.

ARTICLE – ARREST AND SEARCH – CRIMINAL LAW AND PROCEDURE –
CONFERENCE ON – UNIVERSITY OF MALAYA AND LEXIS NEXIS.
AUTHOR – Syed Tariq Daud Rafique M.A. Cantab. Barrister-at-law, Senior Fellow
Aikol. UIA.

1. In a relatively short article of a few thousand words I have to exercise a choice of material and omit some. I do not therefore deal with arrest by a private person or arrest with a warrant. Nor do I deal with every aspect of arrest without a warrant but I do hope to cover the most topical and significant aspects of arrest, and the latest amendments to the CPC. Let us first look at S. 15 CPC and contrast it with current English law regarding Arrest.
2. Now **S. 15 (1) of the CPC** on the matter of arrest says
 - (a) “Arrest, how made.” “In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there is a submission to the custody by word or action.” It will be seen from the above, that there certainly has to be physical seizure of some sort and/ or confinement of the body unless, and this is important, there is a submission to custody by word or action. The submission in question refers to the suspect not the police officer and no doubt is meant to apply to cases where a suspect ‘put his hands up’ or otherwise surrenders. Although S. 15 does not say that a police officer must inform the suspect that he is under arrest, this omission is probably deliberate as either it is implicit and obvious that he will do so, or that he must do so under the well-known requirement that a person must be told as soon as may be of the ground of his arrest as stated in Article 5(3) of the Federal Constitution and also in many cases under the common law. It is difficult to envisage a situation where a police officer informs a person of the ground of his arrest without at the same time telling him he is under arrest. Further a seizure of a person by a police officer without any explanation or without informing that person that he was being seized pursuant to the officer’s powers of arrest would almost certainly be unlawful and entitle the person to resist, (unless it was obvious to the suspect that he was being arrested or he made it impossible for the officer to so inform him by running away or struggling).¹
3. The Malaysian CPC was largely modeled on the old Indian CrPC 1898 which in turn was drafted by English lawyers bearing in mind the common law at the time. The English common law being supremely practical has always taken the view that there is no magic formula in determining whether a person is under arrest; it depends on the circumstances of each case². Generally of course it consists of the seizure or touching of a person’s body with a view to his restraint. And words may also amount to an arrest. In 1947 in **Christie’s** case (followed by the Federal Court in **Abdul Rehman v Tan Jo Koh**³) the House of Lords set out 5 propositions to be considered when deciding whether a person was under arrest. All I need say here, for our purposes, is that in

¹ Christie v Leachinsky 1947 1 AER 567

² Inwood 1973 2 AER 645

³ 1968 1 MLJ 205

addition to the requirements I have mentioned above, the 'ground of arrest' must be a true ground and that technical language need not be employed as long as the reason why he is being restrained is clear to the suspect. In other words it is not necessary to quote chapter and verse of the offence in the Penal Code at the time of arrest. The next English case of importance is that of **Alderson v Booth**⁴. The case is interesting inasmuch as it re-states well established common law principles that link up arrest by words only with the submission to custody by the suspect. Lord Parker CJ said "There may be an arrest by mere words, by saying "I arrest you" without any touching, *provided of course that the defendant submits and goes with the police officer*. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and *thereafter he submitted to that compulsion*." (My italics).

4. The italicized words above are a vital part of the definition – a matter strangely forgotten by some Malaysian authors when they criticize and ridicule the idea of arrest taking place by words alone with an example of a man dashing along pursued by an officer shouting after him "Stop Police, I command you". The idea that such a man could be regarded as being under arrest they rightly state to be absurd, applying as they do, their version of the '**Shabaan**' test (a Privy Council case considered below) . Obviously unless a submission to custody takes place an arrest by words alone will be totally ineffectual and no police officer, let alone a Privy Council Judge, would regard that as constituting arrest. This is also probably what is meant, in S. 15 CPC by the words "unless there is a submission to the custody by word or **action**."
5. The case of **Shabaan & ors v Chong Fook Kam & anor**⁵ the Privy Council had to consider, inter alia, at which point in time in the incident a reasonable suspicion arose which allowed a lawful arrest of the accused to take place. (The appeals arose out of an action for false imprisonment). In the course of his judgment, Lord Devlin said "An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries." One should remember, as stated above, that when Lord Devlin delivered these words, the case before the Privy Council was one of false imprisonment, and the 2 men in question had been in the custody of the police from the time of their 'arrest' till when they were charged, and there was no dispute but that they had 'submitted to custody'. His dicta on question of whether a lawful arrest could take place by words alone has to be viewed in the factual context of the case and not extrapolated into fanciful or absurd situations such as the example given of the fleeing offender. Lord Devlin was

⁴ 1969 2 QB 216

⁵ 1969 2 MLJ 219

doing nothing else than stating the common law as it stood then (**viz Alderson v Booth**) and now. His Lordship's definition (also described as being 'much wider than what appears in our section 15(1) of the CPC') is not so in my respectful submission. Section 15 also envisages an arrest by words alone (as distinct to touching or confining the body) when it speaks of the offender "submitting to custody by word or action." The implication is obvious. If one excludes physical touching or confinement, how can an arrest take place unless it is by words alone? And it is in such a case that the submission of the suspect makes it a lawful arrest. His liberty or freedom of movement has been curtailed by his own submission and the arrest is complete. This is exactly the common law position. Incidentally, the Privy Council, dealing with a point raised by the Federal Court about the application or citing of English law in Malaysian Courts, made it clear that "where the Code – i.e. the CPC – is embodying common law principles, decisions of the courts of England and of other Commonwealth countries in which the common law has been expounded, can be helpful in the understanding and application of the Code."

6. Today in England & Wales, police powers of arrest without warrant are mostly contained in the **Police and Criminal Evidence Act 1984 (PACE)** Sections 24-33. The Police also have common law powers of arrest without a warrant for breach of the peace, and under various Statutes passed by Parliament. Under PACE a constable may arrest anyone without a warrant for an offence called an "arrestable offence" whom he sees committing it or has reasonable grounds to suspect has committed it or is attempting to do so. An "arrestable" (i.e. seizable) offence is in general an offence for which the sentence is fixed by law e.g. Murder, or any offence carrying a maximum penalty of 5 years or more or certain specified statutory offences. Arrest is constituted by the physical seizure or touching of the suspects's body with a view to his detention – **R v Brosch**⁶ and any form of words can be used so long as the suspect is made aware that he is no longer a free man – there is no magic formula to it – **R v Inwood** supra. An arrest is unlawful unless at the time of the arrest or as soon as practicable after the arrest the arrested person is informed that he is under arrest and of the ground of arrest regardless of whether the fact of arrest is obvious (PACE S. 28). This is subject to an exception in the case of a person who escapes.
7. Again under English law, - PACE, and Codes of Practise made thereunder para C.10.1 "A person whom there are grounds to suspect of an offence must be cautioned before any questions are put about an offence..... but a person need not be cautioned if questions are for other necessary purposes e.g. Solely to establish their identity or ownership of a vehicle, to obtain information in accordance with a relevant statutory requirement, or in furtherance of the proper and effective conduct of a search .." and so on. The absence of a Caution will normally be regarded as a substantial breach of PACE Codes and will lead to the exclusion of evidence. However the duty to Caution only arises where there are 'reasonable grounds' to suspect an offence and not

⁶ 1998 Criml Law Review 743

otherwise. The Court of Appeal in **R. v Shah**⁷ said this was an objective test and there must be grounds for suspicion before the need for caution arose. In this case the Customs Officers had suspicions about a person being a drugs courier and asked him questions (without caution) about his suitcase that seemed unusually heavy. HELD the Customs Officer was only acting on a 'hunch' and not on reasonable suspicion and hence no Caution was required. It was not enough for the Officer to be 'suspicious'. A mere hunch or a sixth sense would not suffice. Again, the test applied by the House of Lords for determining whether or not 'reasonable suspicion' existed as set out in **O'Hara v Chief constable of the Royal Ulster Constabulary**⁸ was partly subjective (Did the arresting officer have a genuine suspicion?) and partly objective (Were there reasonable grounds for such a suspicion howsoever genuine?). Further such reasonable grounds could exist even if the Police Officer has his information from another person (even if it proves false) provided that information would provide reasonable grounds of suspicion to a reasonable man.

8. In almost all the Malaysian cases we shall look at, the question would have been under English law, in respect of the non-delivery of the Caution, whether the Officer had reasonable grounds to suspect an offence. If he had, the Caution was required at that point. Incidentally under English law, another and further Caution is required upon the arrest of the suspect.
9. It follows in these cases, all the decisions where it has been held that a person was under arrest would be examples of unlawful arrest in English law and breaches of S. 28 PACE or cases of False Imprisonment. This is because in each case the suspect was neither informed he/she was under arrest nor told the grounds of the arrest.
10. We should not also confuse the term 'custody' with 'arrest'.⁹ Every arrested person is in custody but not every person in custody is under arrest. E.g. prisoners in jail, or in lawful detention for immigration offences, and many others. Custody means a keeping or guarding, judicial or penal safe-keeping, or a state of being guarded, restrained, or confined. So e.g. custodial punishment means a jail sentence.
11. The relatively straightforward legal issue of Arrest has proved troublesome in the Malaysian Courts unlike in most other common law jurisdictions, at least since **Christie v Leachinsky**.¹⁰ This issue however was of critical importance in many cases – as I am sure my readers will know because it was inextricably connected to the admissibility of evidence, usually confessions or admissions made by the accused. Prior to 1976, statements made to the police by the accused were not admissible in evidence unless they were made in the presence of a Magistrate. After 1976 however under the amended Section 113 of the CPC, and I summarise, where any person was charged with any offence, any statement made by him at any time to a Police Inspector was

⁷ 1994 C.L.R. 125

⁸ 1997 AC. 287 H.L.

⁹ Eng Sin v PP 1974 2 MLJ 168

¹⁰ 1947 AC 973

admissible in evidence at his trial provided that in the case of a statement made after his arrest, it was not so admissible unless he had been cautioned prior to the arrest. The Caution consisted of statutory verbal formula informing the accused of his right not to say anything nor to answer any question. It is also known as the Right of Silence.

11. In numerous criminal investigations (later taken to trial) accused persons had a tendency to blurt out to the police either in answer to a question or otherwise information or comment that could be construed as confessions of guilt. Faced with such damning evidence, defence counsel were at pains to convince the Judge that whatever had been said by their clients was not admissible in evidence as it was said after the accused had been arrested without a caution having at first been delivered to him/her. Prosecuting counsel were equally keen to get such evidence in as without it the case was weakened and their argument predictably was that no Caution was needed as the accused person was not in fact under arrest at the relevant time.
12. I must point out here that much of the case law and comment by lawyers on this topic is now, or will be, irrelevant as several important amendments to the CPC been passed by Parliament and will, soon, become law. I therefore intend to deal with past cases rather more succinctly than I otherwise would have done, and to concentrate more on law as it will/might develop in future. I will also assume (rightly or wrongly) that most readers have a familiarity with the law and sections of the Criminal Procedure Code.
13. The cases on Arrest that I mention in paragraph 8 above covered two decades and exhibited such a display of mental gymnastics by the Judges that it became impossible to know with certainty what constituted 'arrest' or when, if at all, 'arrest' kicked in. In **Jayaraman & others v PP**¹¹ eight persons detained by a Corporal for about 30 minutes in a temple where numerous dead bodies were lying around were held by the Court of Appeal (Suffian LP) relying on **Shabaan & ors v Chong Fook Kam**¹² not to be under arrest, whereas in a drug case of **Tan Seow Chuan**¹³ a learned Judge (relying wrongly on the case of **Meering v Graham-White Co**¹⁴ - which was an authority on false imprisonment not arrest) held that the accused was under arrest the moment the Officer showed him an authority card. In the case of **Salleh bin Saad**¹⁵ another Judge coined an expression of 'constructive arrest' which was not an arrest at all but a precursor to arrest which had to be 'actual' to become an 'arrest'. And in the case of **Krishnan**¹⁶ the learned Judge held that an accused who was pursued (sic) into his house had come under arrest; however in **Tan Chye Joo**¹⁷ the accused, surrounded by searching police and taken upstairs to the first floor in the search for drugs, was held not to be

¹¹ 1982 MLJ 306

¹² 1969 2 MLJ 219

¹³ 1985 1 MLJ 318

¹⁴ 1919 122 L.T. 44

¹⁵ 1983 2 MLJ 164

¹⁶ 1987 1 MLJ 292

¹⁷ 1989 2 MLJ 253

under arrest. In **PP v Lim Kin Ann**¹⁸ Vohrah J. restored some semblance of 'law and order' when he reminded counsel of the police duty to make inquiries during their investigation and the difference between 'custody' and 'arrest' when he held that the accused who was being asked questions during a search of occupied premises was not under arrest.

14. However in **Kang Ho Soh**¹⁹ an accused found later to be in possession of heroin in his car to the value of many millions and with a money bag around his waist containing \$25,000 by police conducting a stop and search on the basis of prior information was held to be under arrest even before any incriminating evidence was found as 'the Inspector had already decided on that he would use physical force to back up his order to the accused to stop the car and to open the boot for the purpose of search since he had formed the intention to compel the accused to move to his orders at that point in time'. In this and indeed other drug cases, one wonders why the powers of the police to prevent and detect crime (S.3 Police Act 1967), Police powers to stop and search vehicles (S. 24 Police Act 1967), S.116 CPC (powers to cause a search to be made in any place for a 'thing' necessary to the conduct of an investigation, and most importantly S. 27(1)-(8) of the Dangerous Drugs Act 1952, which empower the police where there is reasonable cause to suspect concealed drugs in or on any premises to search them and detain persons during such search and also stop and search conveyances for the same reason were not adverted to by either counsel or the learned Judges. Surely when police are acting under such powers, the question of arrest does not arise until either evidence is found to justify an arrest or the accused voluntarily makes admissions? When the courts give such liberal pronouncements on the issue of arrest police may be driven to the expedience of 'arresting first and investigating later'.

15. The recent case (unreported) of **Lim Hock Boon v Pendakwa Raya Court of Appeal. Rayuan Jenayah. No. B-05-70-2004** Gopal Sri Ram JCA presiding, takes this generosity of interpretation to its limit with, it is respectfully submitted, absurd results. A suspect was being watched by police at a petrol station while he circumnavigated the forecourt 3-4 times in his car. When the car stopped, the Chief Inspector went to the car and turned off the ignition and seized the keys. (One might think this was a pre-eminently sensible precaution.) The suspect driver in the car burst out in a sweat and made a number of statements which incriminated him. He was not under Caution at the time. The car was searched and a packet of cannabis found and he was arrested and later charged and yet later convicted. The Court of Appeal agreed with his submission that whatever he said to the Chief Inspector at the time his keys were seized was inadmissible as he was under arrest and had not been cautioned. Quoting from **Kang Ho Soh**, the learned Judge said "So too it is here. It is clear from the evidence that the appellant was under arrest the moment PW8 turned off the engine and took possession of the keys. With his customary frankness, learned Deputy conceded – and

¹⁸ 1988 1 MLJ 401

¹⁹ 1992 1 MLJ 360

rightly – that the appellant was under arrest when he made the statements in question.” But this conclusion, with respect, flies in the face of Police powers under the DDA and CPC to conduct searches and particularly of conveyances. If arrest took place upon the seizing of the car keys, it is difficult to see how any search could be carried out without an arrest first taking place – and that too in the absence of any evidence that would justify it; which might lay the police open to an action for unlawful arrest if no drugs were found at all.

16. As long ago as 1969 the Privy Council in **Shabaan’s**²⁰ case had said “Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to the next stage. *It is desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give the power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case.*” (*Emphasis added*). It follows therefore that a police officer may choose not to arrest someone who has committed an offence if he thinks an arrest is not justified or needed (perhaps in view of the petty nature of the offence.)

17. So far as ‘confessional’ evidence is concerned, a new Section 113 has been substituted for the old S. 113 which makes the issue of whether an accused has been cautioned or is under arrest or not irrelevant- (except for the application of the new Search provisions under the new **Section 20A** - which only kick in **after a person is arrested**.) The amendment reads “The Code is amended by substituting for section 113 the following section. **“ADMISSION OF STATEMENTS IN EVIDENCE.**

113 (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.

(2) When any witness is called for the prosecution or for the defence, other than the accused the court shall, on the request of the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks fit in the interest of justice, direct the accused to be furnished with a copy of it and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act 1950 [Act 56].

- (2) Where the accused had made a statement during the course of a police investigation such statement may be admitted in evidence in support of his defence during the course of the trial.
- (3) Nothing in this section shall be deemed to apply to any statement made in the course of an identification parade or falling within section 27 or paragraph 32(a) of the Evidence Act 1950.
- (4) When any person is charged with any offence in relation to

²⁰ per Lord Devlin at page 221

(a) the making; or

(b) the contents

of any statement made by him to a police officer in the course of a police investigation made under this Chapter, that statement may be used as evidence in the prosecution's case.

AMENDMENT TO SECTION 114

15. The Code is amended in Section 114 by deleting the words "by any caution or otherwise."

DELETION OF SECTION 115.

16. The Code is amended by deleting section 115.

18. We shall now look at the significance and possible consequences of these amendments. We know the underlying reasons for this and other amendments was the public's and government's dissatisfaction with, I quote, "wide spread concerns regarding the high incidence of crime, perception of corruption in the Royal Malaysia Police, general dissatisfaction with the conduct and performance of police personnel...." and which led to an inquiry and Report by a Royal Commission headed by former Chief Justice Tun Dzaidin, published in 2005²¹. In the Report Chapter 10 makes compelling reading as well as its Recommendations 9 and Appendix 10D.²²
19. The deletion of the old S. 113 may have stemmed both from a realization that the Courts were throwing out many confessions of guilt as having been improperly obtained with the result that persons were being acquitted as no other incriminating evidence was made available by the Police/prosecution, as well as a determination to force the police investigators to do their job thoroughly without relying on short-cut 'confessions' of guilt. It is a sad commentary on methods of the RMP that although confessions to Police Inspectors have been admissible since 1976 (and as every practising lawyer knows are often the best evidence) that the Courts and indeed the public had grown to distrust them to the extent that they are now ruled inadmissible by Parliament.
20. But not entirely inadmissible as we shall see. S. 27 of the Evidence Act – *inter alia* – has been expressly preserved (new S. 113(4)) and hence S. 24, 25 and 26 of the same Act become very relevant. To save space I shall summarise these sections.
21. Section 24 Evidence Act 1950 makes inadmissible any confession if it has been elicited by any inducement, threat or promise, connected to the charge pending against the accused, made to him by a person in authority and sufficient in the Court's opinion to give the accused hope of gaining some advantage or avoiding some evil of a temporal nature in relation to the charge.
22. Section 25 of the same Act prevents the proving in the trial against the accused any admission made by him to a police officer below the rank of Inspector. This is subject to any other written law.

²¹ Page 3 of the report of the Royal Commission to enhance the operation and management of the Royal Malaysian Police 2005.

²² *Ibidem* pages 301 et sequitur

23. Section 26 goes further than S. 25 and prevents the prosecutor from proving any confession made by the accused whilst in the custody of a police officer unless it was made in the presence of Sessions Court Judge or a Magistrate.
24. Section 27 allows in evidence so much of any information given by the accused even whilst in the custody of a police officer, as relates distinctly to a fact thereby discovered, even if amounts to a confession.
25. All decided cases relevant to these sections 24-27²³ will of course assume importance again particularly since police/prosecutors will seek to rely on confessions which relate to the discovery of e.g. drugs or guns or some other 'fact' – S. 27. Points of law will arise again as to whether a person is in the 'custody' of a police officer so that what he said may become admissible – S. 26. And over arching all this, issues will again be raised as to whether S. 24 operates to prevent confessions under S. 27 being adduced in evidence which have been obtained as a result of inducements, threats or promises.²⁴
26. In **Sambu's** case Brown J. gave his definition of 'custody' (wrongly used by later Malaysian Judges as a definition of 'arrest'), and in **Tan Shu En** the Court of Appeal Willan C.J. Bostok-Hill and Briggs J. decided that a Chandu Officer and a Senior Customs Officer were 'police officers' within the meaning of S. 25 and 26 of the Evidence Ordinance and hence excluded verbal admissions of the accused. One can anticipate that similar questions will be argued before courts in cases involving drugs, immigration offences and 'custody'.
27. We note also that S. 113(3) allows the use by an accused of his own statement made in the course of police investigation in support of his defence. We can anticipate arguments turning on the use of the statement. If the accused does so use it, can the prosecution insist on the whole of the statement going in evidence particularly the incriminatory parts or can the accused pick and choose the bits that he thinks will help his defence? Is he not entitled to argue that the provision allows the use of statements that support his defence and not otherwise?
28. Further, now that statements made by the accused to a police officer are irrelevant /inadmissible by the deletion of S. 113, the police will be deprived of 'confession evidence' but may resort to other means or even subterfuge to obtain statements/confessions leading to the discovery of a fact – see 2. 27 Evidence Act. If this is obtained before the arrival of/consultation with a solicitor, what view will the Courts take on admissibility of such evidence? Unfortunately or fortunately in the absence of a Code of Practice applying to the Police (as admirably set out in the Report on the RMP and very similar to the UK PACE) and the lack of transparency of any other police regulations or guidelines, the development of rules and law in this field will depend greatly on judicial creativity. The Malaysian Courts have not always shown a zealous desire to protect the citizen from the excesses of the executive or police so it is difficult to prognosticate the future

²³ *Sambu v Rex* 1947 MLJ 18 and

Tan Shu En 1948 14 MLJ 196 and *PP v Salamah b. Abdullah & PP v Ong Eng Kiat* 1947 13 MLJ 178

²⁴ *Gopal Sri Ram JCA's* decision in *Md Desa Hasim v PP* 1995 3 MLJ 350 which decided that S. 27 was subject to S. 24 was held to be contrary to a long line of Malaysian cases which stated the opposite. See *Goi Ching Ang v PP* 1999 1 MLJ 507 and *Francis Antonysamy v PP* 2005 3 MLJ 389.

29. All criminal practitioners are familiar with **S. 23 of the CPC** which allows “any police officer or penghuluwithout a warrant....to arrest any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned:..” An offence is seizable if it is described as such in the first Schedule of the CPC or if not if punishable by more than 3 years imprisonment and also powers of arrest without warrant can be given by a Statute e.g. Police Act S. 27.
30. As to “reasonable suspicion”, ‘reasonable complaint’ or ‘credible information’, numerous decisions have been reported on the meaning of these terms and the law is pretty well settled and it would serve no useful purpose here to set them out.
31. Previous case law had already established the right of the accused to have the grounds of arrest given to him, a right to access counsel and the police right to deny such access where it may impede investigation. These well known cases are
Abdul Rehman v Tan Jo Koh 1968 1 MLJ 205.
Ramli bin Salleh v Inspector Yahya 1973 1 MLJ 54
Ooi Ah Phua 1975 2 MLJ 198
Hashim bin Saud 1977 2 MLJ 116
Saul Hamid 1987 2 MLJ 736
Abdul Ghani Haroon 2001 2 MLJ 689
Mohd Ezam 2002 4 MLJ 449.
32. The issue however now that will be before the Courts is whether, in the light of the new amendments and especially the Report of the Royal Commission on the Royal Malaysian Police, the Courts will take a more positive supportive attitude towards the rights of accused persons particularly where allegations surface of police misconduct, brutality or high-handedness. Will the police, for example, where they deny access to counsel, have to explain the necessity of doing so by accounting for each hour of deprivation of access to a lawyer to the Court bearing in mind the supreme importance the common law has always given to the liberty of the subject? Will the Courts in interpreting the new provisions be more inclined to look to English law and practise bearing in mind the words of Lord Diplock “In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to ‘law’ in such contexts as in ‘in accordance with law’, ‘equality before the law’, ‘protection of the law and the like....refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England.”²⁵
33. Article 5(3) of the Federal Constitution states that ‘where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.’ Article 5(4) confers upon the arrested person a right to be brought before a Magistrate without unreasonable delay and in any case within 24 hours. So far as 5(4) Article

²⁵ Ong Ah Chuan v PP & Koh Chai Cheng v PP 1981 1 MLJ 64 PC

is concerned it can, and I expect will be, more appropriately be dealt with in a paper upon Detention and to that extent is beyond the scope of this essay, except to mention that it does exist and is as an important protection against the considerable powers the police have to hold and keep persons in their custody.

34. Now the new Section 28A is a long one but in view of its importance and novelty (although not unlike some of the recommendations made by the Royal Commission supra – see Appendix 10D) I propose to set it out in extenso. En passant I regret that the creation of a Custody Officer – independent of the investigating officer and one who has control of and responsibility for of all detainees in the police station - so excellently suggested by the said Commission has not been implemented.

35. **28A** (1) A person arrested without a warrant, shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.

(2) A police officer shall before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may

(a) communicate or attempt to communicate with a relative or friend to inform of his whereabouts; and

(b) communicate or attempt to communicate and consult with a legal practitioner of his choice

(3) (a) Where the person arrested wishes to communicate or attempt to communicate with the persons referred to in paragraph (2)(a) and (b) the police officer shall, as soon as may be, allow the person arrested to do so.

(b) Where the person arrested has requested for a legal practitioner to be consulted the police officer shall allow a reasonable time-

(i) for the legal practitioner to be present to meet the person arrested at his place of detention; and

(ii) for the consultation to take place.

(c) The consultation under paragraph (b) shall be within the sight of a police officer and in circumstances, in so far as practicable, where their communication will not be overheard;

(d) The police officer shall defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or attempted communication under paragraph 2(b) or the consultation under paragraph (b) has been made;

(e) The police officer shall provide reasonable facilities for the communication and consultation under this section and all facilities provided shall be free of charge.

(4) The requirements under sub-sections (2) and (3) shall

not apply where the police officer reasonably believes that

- (a) compliance with any of the requirements is likely to result in
 - (i) an accomplice of the person arrested taking steps to avoid apprehension; or
 - (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
- (b) having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed.
- (5) (a) Subsection (4) shall only apply upon authorization by a police officer not below the rank of Deputy Superintendent of Police.
 - (b) the police officer giving the authorization under paragraph (a) shall record the grounds of belief of the police officer that the conditions specified under subsection (4) will arise and such record shall be made as soon as practicable.
- (6) the investigating officer shall comply with the requirements under subsections (2) and (3) as soon as possible after conditions under subsection (4) have ceased to apply where the person arrested is still under detention under this section or under section 117.

36. The questions or issues likely to arise in the future as to the legal effect of the various clauses in Section 28A are likely to be these, in my view 'Shall be informed as soon as may be' and the consequences of its non-compliance on the fairness of the trial. See **Goi Ching Ang** and **Antony samy** supra on the application of the 'fairness' discretion by the Court.

Whether, after such grounds have been applied by the Officer, a Caution ought to be delivered despite the deletion of the old Section 113 and the contents of the new Section 113 – again on the grounds of fairness together with the old principle of the Common Law of the privilege against self-incrimination – See cases that deal with Sections 24 and 27 of the Evidence Act of **Md Desa bin. Hashim**, and **Goi Ching & Francis Antony samy** supra at Footnote 24.

'Attempt to communicate'. How many such attempts should be allowed before the police officer proceeds to the next stage?

'Reasonable time' for the legal representative to be present and for the 'consultation'. Are the Courts likely to take a restrictive view on its application or the reverse. Subjective or objective test?

The 'reasonable belief' of the police officer in non-compliance with requirements in sub-sections (2) and (3), that safety of others or the

investigation will be impeded – S. 4(a)(i) and (ii) and 4(b). This may lead to controversy.

When do the conditions under Sub-section (4) "cease to apply"?

In respect of all the above operative clauses, who has the burden of proof and what will be the standard of proof?

I now turn to the topic of Search.

SEARCH.

There are 2 types of Search, that of the person and that of premises. In considering this we again must bear in mind the detailed amendments made to the CPC in respect of the search of the person, following the notorious case of the nude squat recently. The requirements in the amendments in S.20A and the Third Schedule Parts I to VI contain a great deal of detail (perhaps too much) and they are set out at the end of this paper. However I shall commence by summarizing first the powers of the Police in conducting Search of Premises without a Warrant.

36. S. 116 CPC gives a police officer very wide powers of search without a warrant. Although there are certain conditions that have to be met with before this power can be used, anecdotal evidence suggests that the police often resort to using S. 116 without advertent to the prior conditions. For example, this section only permits search 'in any place' where the *police officer has reason to believe* that a summons or order to produce a document or thing necessary to his investigation under S. 51 CPC (which provides for this procedure) would not be complied with. (My italics). In practise police often go ahead with their search without carefully advertent to the above requirement. In actual fact almost anything can be said to be necessary to an investigation and hence there is much scope for abuse of this power. Also this power is increased by sub-section (4) which says that the provisions of the code that apply to search warrants shall, so far as may be, apply to a search under this section.
37. This brings into play S.59 CPC which itself refers to S. 16(2) and which permits the police officer in certain circumstances to break into premises when he is denied admittance or ingress. With regard to other powers of search contained in S. 62-65 CPC these for the most part deal with searches for stolen property by Police Inspectors upon information given to them in that regard.
38. Provision is also made in S. 62 A & B for search and seizure of counterfeit coins and currency, and S. 63 permits any police officer with prior authority from the Chief Police Officer to enter any place and search and seize any property which he reasonably believes to be stolen as if he had a warrant to do so. The authority is only to be given in the following circumstances
 - (a) where the place to be searched is or has been within the last 12 months in use or occupation of a person convicted of receiving stolen property or harbouring thieves
 - (b) or when the said place is in the occupation or use of any person who has been convicted of an offence involving fraud or dishonesty and punishable with imprisonment.
 - (c) This last clause appears to give extremely wide powers to police on the authority of a Chief Officer of Police to enter premises occupied by

anyone with a previous conviction for dishonesty (e.g. any petty thief or shoplifter or breach of trustee) with no limit on time at all on such search. A great deal therefore hangs upon the honesty and good sense of the Chief Officer, especially since (4) says that he does not even need to specify particular property.

39. In my respectful submission these sections should be revised in the light of modern thinking. No doubt 50-60 years ago these powers were used circumspectly and in genuine cases where receivers of stolen property were well-known to the police, and petty theft and dishonesty was not as middle-class as it has now alas become. As the sections now stand police can enter houses where any occupant has fallen foul of the law (as above) in the past and search the premises with impunity.
40. I now turn to the matter of search of the person. The new Section 20A states that any search of a person shall comply with the procedure on body search as specified in the Third Schedule of the Code. The said Schedule also applies to any search conducted by an officer of an enforcement agency who has the power of arrest. The provisions of this amendment are laudable and also so detailed that it is impossible to summarise it all without becoming either repetitious or obscure and hence I have to re-produce the Schedule intact.
41. The first point to note is that it only applies where a person has been **arrested, or is in lawful custody after his arrest**, and not to anyone on a Stop & Search by police. The question hence arises whether the Police must follow it where they stop someone under the powers of the DDA 1952 S. 27(4) and (8) and under S. 20(3) of the Police Act 1967 and if so to what extent? If not, what provisions governing search of persons will have to be followed by the Police on a lawful Stop & Search? Next, what view are the Courts going to take of breaches of the search provisions? Will this lead to an exercise of discretion to exclude evidence (see **Goi Ching & Francis Antonymsamy** - supra) or will such evidence be admissible even if obtained unfairly or illegally (see **In re Kah Wai Videos**)²⁶. It also brings us back to the vexed issue of arrest. Bearing in mind the frequent practise of the police to apprehend persons without telling them of the grounds of arrest at the time or as soon as may be, are such persons not entitled to the protection of the Third Schedule? And are the Courts going to continue along their present line of reasoning where someone detained even for a short time is regarded as under 'arrest'? Yet again, is it practical to expect a police officer to bear in mind such details as are set out by the law when conducting a search of a person who is also likely to be obstructive and unruly? It can be said that in most cases common sense will prevail in decision making; indeed if this is not the case then there will be as many contradictory decisions as one can find on the topic of arrest.
42. I set out below the Third Schedule in full as being so recent it is unlikely to be in general circulation and readers can the more easily study and assess it.

THIRD SCHEDULE

²⁶ 1987 2 MLJ 459

PROCEDURE ON BODY SEARCH

Part 1.

OBJECTIVE.

Objective of Search

1. (1) A body search may be conducted on a person arrested only if it complies with any of the following objectives:
 - (a) to obtain incriminating evidence of the commission of the offence for which he has been arrested;
 - (b) to seize contraband, the proceeds of crime or other things criminally possessed or used in conjunction with the offence for which he has been arrested; or
 - (c) for the discovery of evidence related to the reason of the arrest or to preserve the evidence or to prevent disposal of such evidence by the person arrested.

- (2) For the purposes of this Schedule, "person arrested" means a person who is arrested or a person who is in lawful custody after his arrest.

Part II

TYPES AND CONDUCT OF BODY SEARCH

Types of body search

2. There shall be four types of body search -
 - (a) pat down search;
 - (b) strip search;
 - (c) intimate search; and
 - (d) intrusive search

General Conduct of officer during search

3. (1) An officer conducting a body search shall do so in a professional manner and have the highest regard for the dignity of the person arrested.

- (2) The officer shall comply strictly with the following procedure -
 - (a) before any search is commenced, the officer shall introduce himself to the person arrested and shall be courteous, professional and shall not use unnecessary or demeaning language or remarks against the person arrested and shall cause minimal embarrassment to the person;
 - (b) the search shall not be more extensive than necessary to ascertain the existence of harmful or unlawful articles believed to be concealed on the person arrested;
 - (c) the officer conducting the search shall be of the same sex as the person arrested with strict regard to decency;
 - (d) where the gender of the person arrested is in doubt, his gender shall be determined by way of an interview or through his identification card or birth certificate before a search is conducted by an appropriate officer with strict regard to decency;

- (e) for strip, intimate and intrusive search, a second officer who is of the same sex of the person arrested shall be present during the search;
- (f) no officer shall disclose to the public any blemish, flaw or defect of body parts found on the body of the person arrested during the course of the search;
- (g) in the course of a search, the officer shall respect –
 - (i) the religious and cultural sensitivities;
 - (ii) physical, psychological, medical and mental characteristics,

of a person arrested. In cases involving the removal of a female's scarf or male headdress, religious and cultural sensitivity approach shall be adopted;

(h) when a person arrested is pregnant, elderly or a person with disabilities, the search shall be conducted in a proper manner taking into consideration the state of the person's medical and physical condition.

Part III

PAT DOWN SEARCH

Pat down search

- 4. (1) Pat down search means the act of searching the outer clothing of a person arrested which is to be conducted by quickly running the hands over the outer garments of the person arrested.
- (2) Pat down search may be conducted when there is a reasonable suspicion that a weapon, object, evidence or contraband is being concealed on a person arrested, and the search may be conducted in the following circumstances:
 - (a) at the time of arrest, or
 - (b) before the arrested person is put into custody in a lock-up or detention centre.

Authorization is not required to conduct pat down search

- 5. No authorization is required for an officer to conduct a pat down search.

Procedure on pat down search.

- 6. Whenever any officer of any enforcement agency conferred with the power of arrest or search of a person under any law conducts a pat down search on a person arrested, the following procedure shall be complied with:
 - (a) the officer shall first ask the person arrested to declare any item, object, evidence or contraband on his body or clothing that is harmful or unlawful;
 - (b) the officer shall then ask the person arrested to remove any personal items from his pockets or other parts of his clothing, to turn pocket linings out and to place the personal items in a place where they can be seen by the officer;
 - (c) the officer may ask the person arrested to remove from his body any jewellery, watch, footwear, sock, belt, headwear, bag, pouch and prosthetic device and place the items where they can be seen by the officer;
 - (d) the officer may instruct the person arrested to face his back towards him with his arms raised in such position that his palms are resting on the head and the legs are spread wide enough to a reasonable distance for the search to be conducted;

- (e) if there is a wall or vehicle nearby, the person arrested may be asked to face or lean on the said wall or vehicle and the officer shall position himself slightly to one side at the rear of the person arrested;
 - (f) the officer may either run his fingers through the arrested person's hair or squeeze it, without pulling the hair and he may also ask the person arrested to run his fingers vigorously through his own hair;
 - (g) the officer may start off the pat down search beginning with one side of the person arrested and later proceeding to the centre back, and then the other side and upon completion of the back of the person arrested, the officer may instruct him to turn around and proceed to check the front the person arrested in a similar manner.;
 - (h) the officer may proceed to search the person arrested in a manner from top to bottom, running the hand over the neck and collar, should and down the arm to the hand, under the armpit and down the trunk of the body, checking the pockets, seams and hems and other recesses in the clothing and ending at the waistline and for female, the officer may pass the hand over and under the person's breast;
 - (i) the officer may instruct the person arrested to loosen his waistbands, if any, and check the bands or waistlines seams and belt tops, then the officer may run the hands around the person arrested's waist and proceed down the buttocks and legs and the officer may use both hands when searching the legs, paying particular attention to seams and cuffs;
 - (ii) (j) the officer shall not pass the hands over the person arrested's genital area when searching the trunk and legs of the person arrested; (k) the search shall where ever possible be done out of public view, and the officer shall -
 - (i) conduct the search having due regard to the security of the situation and evidence to be recovered and, as reasonably practical, cause minimal embarrassment and take reasonable care to protect the dignity of the person; and
 - (ii) prepare a list of all things seized in the course of the search and signed by the person arrested and he shall be given a copy thereof;
- (1) any pat down search conducted in a lock up or a detention centre shall be recorded in a station diary or a proper book of record as the case may be.

Part IV STRIP SEARCH

Strip search

7. (1) A strip search means a search involving the removal of some part of outer clothings or removal of all the arrested person's clothing and during the search, the person arrested may be allowed to remain partly clothed by allowing him to dress his upper body before removing items from his lower body.
- (2) The strip search may only be conducted in the following circumstances:
- (a) an arrest has been made; and
 - (b) when there is reasonable suspicion that the person is concealing an object, evidence, contraband or weapon on him.

(3) A strip search may be conducted before a person arrested is detained in a lockup or a detention centre or may also be conducted whenever he re-enters the lockup or a detention centre where there is reasonable suspicion that the person is concealing an object, evidence, contraband or weapon on him.

Authorization to conduct strip search

8. (1) A strip search shall not be conducted, without the prior approval of a police officer not below the rank of Inspector or in the case of any other enforcement agency, by an officer whose rank or authority is equivalent to the rank or authority of Inspector.
- (2) The approval under subparagraph (1), if given orally shall be reduced in writing by the officer conducting a search, in the case of a police officer, into the station diary and in the case of any other enforcement agency, such approval shall be recorded in a proper book of record.

Procedure on strip search

9. Whenever any officer of any enforcement agency conferred with the power of arrest or search of a person under any law conducts a strip search on a person arrested, the following procedure shall be complied with:
- (a) the search shall be conducted in a private room out of the view of anyone outside the room and no recording or communicating devices shall be allowed in this room, including phones and cameras and the only the officer conducting a search, the second officer and the person arrested shall be present in the room during the entire search;
 - (b) the officer conducting a search shall first explain in a language that the person arrested understands that the person arrested shall be required to take off his clothes and to declare any item, object, evidence or contraband on his body or clothing that is harmful or unlawful;
 - (c) the strip search does not require that the person arrested removes all his clothes at the same time;
 - (d) the search shall be divided into the search of the upper torso, arms and head, and the search of the lower torso from the navel downwards and in conducting the search a male person shall be allowed to put on his shirt before removing his trousers and a female person shall be allowed to put on her blouse and upper garments before removing her pants or skirt;
 - (e) all the removed clothes and personal items shall be thoroughly inspected, in the full view of the person arrested, to ensure that there are no incriminating weapons, objects, evidence or contraband concealed;
 - (f) to check the person arrested's hair the officer conducting a search may comb through the person's hair and if the hair is dreadlocked or matted, the officer will have to use his fingers to squeeze the person's hair without pulling it;
 - (g) to search the ears, the officer may -
 - (i) check the crevice behind the ears and have the person arrested lift his hair away from his neck; and
 - (ii) inspect the ear canals of the person by looking into the ear canal and for this purpose, a flashlight may be used;
 - (h) in conducting a search of the nasal passage, the officer conducting a search may instruct the person arrested to tilt the head back to observe and

inspect the nasal canal and nostrils, and for this purpose, a flashlight may be used;

(i) to search the mouth, the officer may-

(i) instruct the person arrested to roll back his tongue to observe under the tongue;

(ii) instruct the person arrested to stick his tongue out to observe the back of the throat;

(iii) instruct the person arrested to pull his upper and lower lip from the gums to inspect the gum lines; or

(iv) instruct the person arrested to remove his dentures or false plates, if any, for inspection;

(j) for an inspection of the person's torso from the navel upwards, the person arrested is allowed to wear his lower garments and the officer may -

(i) instruct the person arrested to stand in a position with his arms raised and palms resting on the head;

(ii) conduct a visual inspection of the person arrested may be conducted either by asking the person to turn 360 degrees slowly, or the officer may walk around the person;

(iii) inspect both armpits, entire torso and belly button and if the person is obese, he may be instructed to lift any skin to inspect any crevice that may not be visible;

(iv) instruct a female person to lift and separate her breasts to inspect all sides;

(v) inspect the whole arm and all fingers;

(k) for an inspection of the lower torso below the navel and the legs, the person arrested shall be allowed to wear his upper garments and the officer may-

(i) instruct the person arrested to remove all clothes covering the bottom half from the navel downwards;

(ii) conduct a visual inspection of the person arrested either by asking the person to turn 360 degrees slowly, or the officer may walk around the person;

(l) the officer shall have minimum contact with the person arrested during the search involving his intimate parts of the body;

(m) after the search is completed the person shall be allowed to put on his clothes;

(n) a list of all things seized in the course of the search shall be prepared by the officer conducting the search and signed by the person arrested and he shall be given a copy thereof.

Part V INTIMATE SEARCH

10. (1) An intimate search means a search which consists of the physical examination of a person arrested's body orifices other than the mouth, nose and ears.

(2) The intimate search may only be conducted in the following circumstances:

- (a) an arrest has been made; and
- (b) the officer has reasonable suspicion, whether or not the pat down search or strip search is conducted, that the person arrested is concealing a weapon, object, evidence or contraband in his body orifices.

Authorization to conduct intimate search

11. An intimate search shall not be conducted, without the prior approval of a police officer not below the rank of Assistant Superintendent of Police or in the case of any other enforcement agency, by the officer whose rank or authority is equivalent to the rank of Assistant Superintendent of Police.

Procedure on intimate search

12. Whenever any officer of any enforcement agency conferred with the power of arrest or search of a person under any law conducts an intimate search on a person arrested, the following procedure shall be complied with:

- (a) if necessary, the person arrested may be instructed to remove all clothes covering the bottom half, from the navel downwards;
- (b) if necessary, the person arrested may be instructed to squat over a mirror placed on the floor and made to cough deeply not more than ten times;
- (c) when nothing is recovered after the squat and coughing deeply until ten times the intimate search shall stop and the person arrested shall be allowed to put on his clothes;
- (d) where the officer considers that the person arrested is incapable of doing the squat due to the health, physical conditions or appears to be or claims to be pregnant, the squat shall not be performed;
- (e) the officer shall not attempt or conduct any external intervention in discharging the article from the body orifices of the person arrested;
- (f) the procedure on strip search as specified in subparagraphs 9(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n) shall apply for the purpose of intimate search."

Part VI

INTRUSIVE SEARCH

Intrusive search

13. (1) An intrusive search means a search involving the examination of a person arrested to determine the existence of any object, evidence, weapon or contraband inside the body or body orifices of the person and includes the removal of such object, evidence, weapon or contraband -

(2) The intrusive search shall only be conducted by a Government Medical Officer or a Medical Officer, or by any hospital assistant or a registered nurse acting under the Government Medical Officer or a Medical Officer's direction.

Authorization to conduct an intrusive search

14. (1) An intrusive search shall not be conducted, without the prior approval of an Officer in charge of the Police District or in the case of any other enforcement agency, by the officer whose authority is equivalent to the authority of an Officer in charge of the Police District.

(2) The approval under subparagraph (1) shall be recorded in the station diary and in the case of other enforcement agencies, such approval shall be recorded in a proper book of record.

(3) A Government Medical Officer or a Medical Officer after being served a copy of the request for an intrusive search containing particulars of the approval of the officer under subsection (1) shall, as soon as possible, conduct the intrusive search or direct any hospital assistant or a registered nurse to conduct the search.

Procedure on intrusive search

15. Whenever an intrusive search on a person arrested is conducted, the following procedure shall be complied with:

- (a) the person arrested may be taken to the nearest hospital as soon as practicable for the search to be conducted accompanied by an officer;
- (b) the accompanying officer, who is of the same sex as the person arrested, shall witness the search and shall take into custody of any weapon, object, evidence or contraband recovered pursuant to the search;
- (c) a list of all things seized in the course of the search shall be prepared by the officer conducting the search and signed by the person arrested and he shall be given a copy thereof."

PRE-TRIAL, TRIAL AND PROCEDURAL ISSUES