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STATEMENT IN THE COURSE OF POLICE INVESTIGATION

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PREFACE

The dissertation is prepared to reflect the statements made to the police during investigation and its admissibility under various provisions of the law. It is hoped that this paper would be beneficial to fellow law-students and those who are directly connected to the subject matter.

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By the wish of Allah the All-Mighty, this humble work is completed. Glory be to Allah, Lord of the Worlds, and praise and peace be on the Prophet Muhammad, his family and companions, and those who follow him till the day of Resurrection. Firstly, I wish to express my profound thankfulness and gratitude to my supervisor, Tan Sri Professor Syed Agil Barakbah for his invaluable assistance and painstaking guidance throughout the preparation of this dissertation. May Allah grace him in due course in the Hereafter.

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LIST OF STATUTES

1. Criminal Justice Act
2. Criminal Procedure Code (F.M.S Cap 6)
3. Singapore Statutes, Rev. Ed 1970
4. The Evidence Act, 1950

CHAPTER ONE

1. INTRODUCTION.

The recent spate of crimes in our country makes one reflects on the effectiveness of our criminal law and the efficacy of the machinery for the enforcement of these laws. There is no doubt that the Royal Malaysian Police Force in particular, is highly effective but perhaps inadequately staffed to meet the rise in the crime rate. The steep rise in the crime rate could in part be attributed to the rising cost of living, an effect of a world-wide inflationary trend, coupled with the reluctance of some elements of our society to channel their energies into an honest hard day's work.

While harsher sentences may or may not be a deterrent to criminals or would be criminals, it is suggested that perhaps another remedy lies in amending some provisions of the **Criminal Procedure Code**[1] and the **Evidence Act,**[2] to allow firstly; greater powers of investigation and detention to the police and secondly; to pose greater difficulty for an accused person to be acquitted on a technicality.

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[1] Criminal Procedure Code (F.M.S Cap 6). Hereinafter referred to as CPC.

[2] The Evidence Act, 1950 hereinafter referred to as EA

Thus many aspects of the law governing procedure and evidence in its application to criminal trials, are based on a compromise between conflicting objectives of policy. On the one hand, effective law enforcement which concerns the security of the community as a whole and on the other, the protection of the rights of the accused. In an area of the law dominated by broad policy considerations, judicial attitudes frequently reflect a divergence of opinion with regard to emphasis and priorities.

2. PRIVILEGE AGAINST COMPULSORY SELF INCRIMINATION.

The origins of the doctrine against self-incrimination in the English Common law are discernible in the pronouncements of the later Stuart judges.[3] At the end of the eighteenth century Blackstone formulated, as an axiom of the common law, that "His fault was not to be wrung out of the prisoner but rather to be discovered by other means and other men".[4]

The entrenchment of the privilege in English law is closely linked with popular attitudes to the procedures of the prerogative courts, especially the Court of Star Chamber. These attitudes brought into

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[3] J.H Wigmore, A treatise on the Anglo-American System of Evidence in Trials at Common Law (3rd edition, 1940) para 2250.

[4] W. Blackstone, Commentaries on the Laws of England (12th edition, 1795) volume iv, chapter 22, p 296.

2.3 The removal of the privilege will be a potent disincentive to the willingness on the part of any individual to participate in an inquiry conducted by the police on the commission of an offence.

2.4 Recognition of the privilege contributes to the preservation of a just equilibrium between the individual and the State in the sphere of detection and punishment of crime.

2.5 The privilege provides a palliative against the enforcement of iniquitous laws and the application of unjust procedures.[5]

3. POSITION IN ENGLAND AND MALAYSIA.

It is an established proposition of English law that silence on the part of the accused, when charged, does not, *per se*, demonstrate the falsity of a defence pleaded by him at the trial or provide corroboration of evidence offered by the prosecution. An isolated authority[6] which departs from this principle, has been disapproved of by a *cursus curiae*.[7]

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5 J.F Stephen, History of the Criminal Law, volume 1 p.342.

6 R v Feigenbaum [1919] 1 K.B 431.

7 R v Leckey [1944] K.B 80.

existence a climate of opinion which was strongly favourable to the acceptance of the privilege as an indispensable prerequisite of the freedom and dignity of an individual.

The privilege is not confined in its application to proceedings that takes place in a judicial forum but encompasses the entire course of the police investigation which precedes the framing of a charge or the presentation of an indictment. The recognition of a general duty to answer questions put forward by the police during the investigation of a crime is tailored by an obligation to answer only questions which would not self incriminate the deponent.

It is submitted that, in the context of investigation of crimes by the police, legal recognition of the privilege is supported cogently on several grounds, namely:-

2.1 The privilege is sustained by traditional values built around the inviolability of the human personality and the purity of the machinery established for the administration of criminal justice.

2.2 The use of the fruits of self-incrimination, even at the stage of the preliminary investigation by the police , has a demoralizing effect, at least potentially, on the prosecution.

Emphasis has been placed on the consideration that the accused should not remain silent at his peril and find his silence made a strong point against him at his trial.[8]

As said by Lord Hewart C.J, in **R v Charavanmuttu**[9], that the principle of mere silence of the accused does not amount to corroboration of the case for the prosecution has been applied consistently in England[10] and in most parts of the Commonwealth.[11]

Several comments are warranted by a scrutiny of the English case law, namely:-

3.1 The English common law reflects a distinction between the effect of non-disclosure in the corroborating evidence of an accomplice and the effect of non-disclosure in the repudiation of an alibi set up by the accused at his trial.[12] This distinction, it is submitted, is supported by a cogent rationale. A court which is reluctant to

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8 R v Naylor [1933] 1 K.B 685.

9 (1930) 22 Cr. App. Rep. 1 at p.4.

10 R v Keeling [1942] 1 All E.R 507, R v Hoare [1966] 2 All E.R. 846.

11 Hall v R [1971] 1 All E.R. 322 (PC).

12 R v Tate [1908] 2 K.B 680.

regard the an accused remaining silent on being charged or interrogated as corroborative of an accomplice's evidence may not be disinclined to look on the absence of timely disclosure as a circumstance tending to deprive a purported alibi of credibility.[13] This degree of elasticity is desirable in principle, but the effect of judicial interpretation[14] of a statutory provision[15] enacted in England in 1967 is that the judge should refrain from commenting on the accused's failure to mention an alibi on arrest.

3.2 Nothing turns on the distinction between cases where the accused remains silent after the caution spelt out in the Judges' Rules was administered to him and those in which he was silent although he was not cautioned. The application of a uniform principle, irrespective of whether a caution was in fact administered or not, is supportable on grounds of policy, since it is anomalous that the jeopardy of the accused should be increased because he lacked the benefit of a caution.

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[13] R v Parker [1933] 1 K.B 850.

[14] R v Lewis (1973) 57 CR. App. Rep. 860.

[15] Criminal Justice Act, 1967, Section 11.

3.3 The accused under the English legal system has the assurance not merely that he is entitled to remain silent but that the exercise of this right will cause him no peril whatever[16]. There is room for the submission, however, that this is too rigid an attitude and that, in exceptional circumstances, an adverse inference from the accused's failure to give an explanation or to make a disclaimer should not be precluded.

3.4 It has been suggested, as a proposition of English law, that "although the accused's silence may be treated as something which can support an inference that the story told by him in court is untrue; still less can it amount to corroboration of the evidence given against him."[17] However, the distinction between silence as having a bearing on the probative value of the accused's own evidence, on the one hand, and silence as reinforcing an inference in regard to lack of candour or corroborating evidence led by the prosecution, on the other, is unconvincing, since it is difficult to prevent the former from merging in practice with the latter.

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[16] R v Naylor, supra. per Lord Hewart.

[17] R Cross, Evidence (4th edition, 1974), p 491.

The problem in regard to the consequences of complete or partial silence during a police investigation, followed by the raising of a belated defence in court, must be viewed in somewhat different terms within the framework of the codified Malaysian system. This may be contrasted with the English Common Law in two aspects;-

a. A person who is interrogated by the police in Malaysia is under statutorily obligated to answer all relevant questions other than those which have an incriminating character. English law recognizes no duty to answer questions put by the police.

b. It is clear from the statutory provision[18] which controls the conduct of the a police investigation in Malaysia that a statement at this stage by a person who subsequently becomes the accused, whether made voluntarily or not, can be used at the trial for no other purpose than the impeachment of credit. In England a statement made by the accused to a police officer after has been cautioned properly, represent admissible substantive evidence against him.

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[18] Section 112 of the CPC.

In view of these differences the problem has to be stated in the Malaysian context in a narrower perspective and specifically in relation to the concept of impeachment of credibility of the accused's testimony in court.[19] As a matter of common sense it is certainly conceivable that the accused's silence in court could entail disadvantage to him. The reason is that 'An innocent man who is charged with a crime or with any conduct reflecting on his reputation can be expected to refute the allegation by giving his own version of what happened".[20]

Nevertheless, the contemporary law strictly controls the nature and degree of permissible judicial comment on the accused's election not to give evidence.[21] Although considerable discretion is available to the trial judge[22], the gravamen of a proper direction in these cases consists of the caution that the absence from the witness box is not to be regarded in any circumstances as an admission of guilt.[23]

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19 Section 155 of the Evidence Act.

20 R v Jackson (1953) 37 Cr. App Rep 43 at p.50

21 R v Bathurst [1968] 2 Q.B 99; R v Mutch [1973] 1 All E.R 178.

22 R v Rhodes [1899] 1 Q.B 77 at p. 83-84.

23 Tumahole Bereng v R [1949] A.C 253 at p 270.

An English judge has remarked: "So great is our horror at the idea that a man might be questioned, forced to speak and perhaps to condemn himself out of his mouth that we afford to everyone suspected or accused of a crime, at every stage, and to the very end the right to say: 'Ask me no questions, I shall answer none. Prove your case.'"[24] This idea recurs prominently in the English cases.[25]

4. THE RIGHT TO SILENCE

Before indulging into the topic , it is worth noting the aspect with regard to the need of greater powers of investigation weighing with the rights of the accused.

For the sake of clarity and completeness it might be useful to have in mind the following aspects:-

4.1 the historical reason for the growth of the rule relating to the privilege against self-incrimination, and the rationales for the rule.

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[24] R v Adams (1957) unreported cited by S Bedford, The Best We can Do (1958), p 249.

[25] R v Davison [1972] 3 All E.R 1121; R v Sparrow [1973] 2 All E.R 129.

4.2 the state of the present law in so far as it relates to the right of the suspect not to answer questions at a pre-trial stage, and the right of the accused not to testify at his trial.

5. HISTORICAL PERSPECTIVE AND THE RATIONALES

The privilege of the right to silence (by which is meant the right not to answer police questions during the pre trial stage, and the right not to testify at the trial) is derived from the concept of privilege against self incrimination. Historically, this privilege is traceable to a revulsion against the practise of the Star Chamber, which privilege in turn led to the backlash barring of the accused giving evidence on his own behalf.

Cross[26] writes that the privilege had a profound effect on the drafting of the Criminal Evidence Act, 1898, as can be seen from the preservation in the Act of the accused's right to make unsworn statements from the dock and the provision forbidding the prosecution from commenting on the accused's failure to testify. Perhaps the best summary of the rationale for the privilege can be found in the words of Goldberg J. in **Murphy v Waterfront Commissioner**, where he said;

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[26] "The Right to Silence and the Presumption of Innocence - Sacred Cows or Safeguard of Liberty ?" (1970) 11 J.S.P.T.L 66.

"...the privilege is based on our unwillingness to subject those suspected of crime to the cruel trilemma of self accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self incrimination statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements and our realisation that the privilege while sometimes a shelter to the guilty is often a protection to the innocent".[27]

Along the same line, Wigmore[28] wrote, that the privilege against self incrimination, protects the innocent defendant from convicting himself by a bad performance on the witness stand; avoids burdening the court with false testimony; it encourages third party witnesses to appear and testify for removing the fear that they might be compelled to incriminate themselves; the rule is a recognition of the practical limits of

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[27] 378 U.S, at 55.

[28] Wigmore on evidence, vol VIII (McNaughten Revision), p.250-318.

governmental power namely since truthful self incriminating answers cannot be compelled, why try; it prevents procedure of the kinds used by the infamous Star Chamber; the rule reserves respect for the legal process by avoiding situation which is likely to degenerate into undignified, uncivilised and regrettable scenes; it spurs the prosecutor to do a complete and competent independent investigation; it prevents inhumane treatment of the individual and it contributes towards a fair state-individual balance by requiring the government to leave the individual the government in its contest with the individual to shoulder the entire load.

Thus it can be said that the approach of the formulation of legal rules implicit in the sociological analysis of jurisprudence with its consistent emphasis on optimum reconciliation of competing interest[29] is of immediate value in reshaping the dimension of the privilege against self incrimination in keeping with the conditions of modern crime. It is submitted that, although the privilege remains rudimentary in the context of any system of criminal justice based on equity and fair dealing between the individual and the State, the complex character of contemporary crime and the paramount objective of social security necessitate adaptation of the scope and effect of the privilege to suit changing circumstances.

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[29] E. Ehrlich, Fundamental Principles of Sociology of Law (1936).

Viewed from this standpoint, a distinction can be made convincingly between an inference from the accused's silence during a police investigation and an inference from his election not to testify in court. Especially in Malaysia, the quality of popular attitudes to the police invest with validity the reluctance of the law to draw an adverse inference from the silence of the accused in regard to potentially incriminating matters under police questioning. However, a similar attitude is inappropriate in respect of the accused's refusal to give evidence in court, in view of the different environment prevailing at a jury trial where judicial vigilance and discretion ensure adequate protection for the accused.

CHAPTER TWO

5. THE LAW GOVERNING STATEMENTS MADE DURING POLICE INVESTIGATION.

6.1 General.

No subject in the study of criminal procedure and evidence is filled with so much confusion and uncertainty as the admissibility of statements made by witnesses and accused persons to law enforcement officers. Different legal rules appear to apply, under a number of statues, not only to various makers of statements but also to various recorders of statements. Despite the difficulties encountered in the understanding of the admissibility and use of statement made to police officers, the subject has attracted very little academic interest.

The law governing the admissibility of statements made to the police has been subject to changes . The Criminal Procedure Code (amendment and Extension) Act 1976[30] brought about major changes in the Criminal Procedure Code which the writer tends to deal with Section 112 and 113 in the later part of this paper.

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30 Act A324.

The Amendment greatly diminished the right of an accused not to answer police question during the pre trial stage, that is, out of court silence. The rationale for this amendment was that the law should afford greater assistance to the police and the prosecution in their combat against crime. Thus it can be said that determined criminals are not sufficiently deterred by merely enhancing the punishments for various offences. A greater deterrence would be to increase the changes of their conviction when they are apprehended.

The reasons for introducing the new section 113 as set out in the explanatory statement of the Bill to the Act are as follows :

" Section 113 ... The substitute section proposes a major change. Hitherto no statement made by an accused person to a police officer in the course of a police investigation has been admissible in evidence at the trial. But the protection of the accused from self-incrimination has been much eroded by subsequent laws, and now in trials for nearly a hundred different offences under thirteen laws the cautioned statement procedure applies. The object of the proposed amendment is to extend the cautioned statement procedure to all criminal investigations and trials."

Section 1(2) of the Criminal Procedure Code (Amendment and Extension) Act, 1976 gives section 113 a retrospective effect. In **PP v. Datuk Haji Harun bin Haji Idris**[31] Raja Azlan Shah FJ (as he then was) in holding that the new section 113 has retrospective effect said,

"... The change is one in procedure; the amendment to section 113 of the Criminal Procedure Code affected the manner in which such evidence is to be enforced. An amending statute which is purely procedural is to be construed as retrospective in its operation, unless a contrary intention appears. In my opinion, there does not seem to be a contrary intention expressed in section of the Criminal Procedure Code (Amendment and Extension) Act, 1976 that it is to operate prospectively..."

.2 Statement made a police officer under Section 112 of CPC.

Statements which are made in the course of police investigation will be statements taken under section 112 of the Criminal Procedure Code [Amendment and Extension] Act, 1976.

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[31] [1977] 1 MLJ 14