Medical Investigation of Suspects by the Police

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Although medical examinations and samples taken from suspects’ bodies in the course of police inquiries often lead to the discovery of important evidence, Singapore criminal procedure does not appear to empower the police to carry out such medical investigations. Neither does it safeguard the interests of suspects. It is submitted that the Criminal Procedure Code and other statutes should be brought up-to-date with modern science.

I. INTRODUCTION

On 25 October 1994, Jamil Abdul Hamid spotted a three-year-old girl playing alone in a playground. He went up to her, grabbed the gold chain and pendant she was wearing, and ran off. Chased by the girl’s mother and a stranger, he hid under a hawker stall counter, but was reported to the police by the stall owner. When the police arrived, they found that Jamil had swallowed the evidence. He was arrested and sent to Alexandra Hospital where, according to the newspaper report, “they extracted the items from his stomach through his throat. He was hospitalised [sic] two days.” Jamil pleaded guilty and was convicted for theft and drug consumption.” Modern medical

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procedures thus enabled the vital evidence in Jamil’s case to be retrieved without much delay.

Today’s police officer has access to a wide range of investigation methods to fight crime. A doctor can be requested to medically examine a suspect and to analyse samples of his blood, hair, semen and other body fluids and tissues, or scrapings taken from his fingers, nails and skin.\(^1\) Items such as narcotics which have been concealed in body orifices may be probed for,\(^2\) and things which have been swallowed may be retrieved by stomach-pumping (passing a tube down the subject’s throat), or administering emetics to induce vomiting and enemas to cause evacuation of the bowels.

These techniques are all available in Singapore. The police routinely escort suspects to hospitals for medical investigations to be carried out. The Ministry of Health’s Institute of Science and Forensic Medicine (ISFM) was formed on 1 April 1990, and two of its Divisions assist the police. The Forensic Science Division has a Criminalistics Laboratory which examines physical evidence, including blood traces. This Division also has a Forensic Biology/DNA Laboratory which analyses body fluids and stains in police exhibits. It set up a DNA profiling service in 1991.\(^3\) Among other things, the Division’s Narcotics and

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2 *R v Brezack* (1949) 96 CCC 97 (CA, Ontario) (mouth); *Reyzen v Antonenko* (1975) 20 CCC (2d) 342 (SC, Alberta) (rectum). During a debate in the UK House of Commons on the Police and Criminal Evidence Bill, an actual case of a razor blade hidden in the vagina was cited: see David Wolchover, *The Exclusion of Improperly Obtained Evidence: With Special Reference to the Police and Criminal Evidence Act* (1986) at 228.

3 The probability that two unrelated individuals have the same DNA profile is claimed to be tens or even hundreds of millions to one: Andrew Hall, “DNA Fingerprints—Black Box or Black Hole?” (1990) 140 New LJ 203 col 1. On the techniques and shortcomings of DNA profiling, see Tan Ken Hwee, “Developments in Genetics: How Will the Law Cope?” (1993) 14 Sing LR 293 at 313-19; “The Art of Genetic Fingerprinting”, *The Straits Times*, 3 May 1994 at 19; and ST Chow, TL Ng & TC Chao, “Forensic Applications of DNA Profiling” (1996) 25 Ann Acad Med S’pore 103.
Toxicology Laboratories test blood and urine samples for traces of alcohol and drugs. The Clinical Forensic Medicine Division has also used DNA profiling to investigate disputed paternity in alleged rape cases. Forensic biology and science expertise are continually being developed to support police investigations and prosecutions.\(^4\)

The results of medical investigations may have important evidentiary uses.\(^5\) On the other hand, some techniques are not merely embarrassing but highly invasive and painful. They carry risks to suspects’ health. If not performed properly, samples can become contaminated and yield false results. Unfortunately, while many Acts authorise the “search” of persons,\(^6\) none state whether this includes medical investigations. The Criminal Procedure Code\(^7\) itself at best says little about the use of forensic techniques in criminal investigations. Furthermore, even certain penal statutes\(^8\) which explicitly empower police officers to conduct medical examinations and take body samples for

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5 The Law Reform Commission of Canada, *supra*, n 1 at 21-41, lists no less than 11 different ways in which the use of investigative tests may yield incriminating evidence.

6 In particular, the Criminal Law (Temporary Provisions) Act (Cap 67), s 14; the National Registration Act (Cap 201, 1992 Ed), s 16(2)(b); and Singapore Armed Forces Act (Cap 295), s 172(1). See also the Arms and Explosives Act (Cap 13), s 38; Civil Defence Act (Cap 42), s 67; Corrosive and Explosive Substances and Offensive Weapons Act (Cap 65), s 9; Internal Security Act (Cap 143), s 66(1); Intoxicating Substances Act (Cap 146A), s 8(1); Misuse of Drugs Act (Cap 185), ss 24(1)(b) and 26(1)(b); and Women’s Charter (Cap 353), s 173(1). This list is not exhaustive. All Acts are of the 1985 Rev Ed unless otherwise stated.

7 (Cap 68, 1985 Rev Ed); hereinafter referred to as “CPC”.

8 Eg Civil Defence Act (Cap 42, 1985 Rev Ed), s 65 (general physical examination); Intoxicating Substances Act (Cap 146A, 1988 Ed), s 13 (blood sample); Misuse of Drugs Act (Cap 185, 1985 Rev Ed), ss 31 (urine sample) and 37 (medical examination); Road Traffic Act (Cap 276, 1994 Ed), ss 69(1) (blood and urine samples) and 71(1) (breath sample).
specific purposes do not contain sufficient guidelines and safeguards. It is a sobering thought that procedures with scope for abuse by overzealous police officers remain unregulated.

This article highlights the shortcomings of our criminal procedure in this respect. A conceptual framework for the issue is proposed, and the current state of law examined to see if it conforms to it. Finally, basic legislative reforms are proposed to update the law to suit modern circumstances.

II. THE CURRENT LEGAL POSITION

A. A Conceptual Framework

Two interests compete when we consider what the proper scope of police powers to conduct medical investigations should be. To ensure the community’s safety, there is a public interest in promoting the efficient detection of crime by the police and the punishment of offenders. This must be balanced against the public interest in preventing unfair and inhumane treatment of suspects. It is important to recognise that the two interests involved are both public interests. In principle, this is more satisfactory than saying the exercise of police powers depends on a balance between the rights of individuals and the needs of society.

The public interest in protecting suspects involves making sure that their personal interests are only outweighed in defined circumstances and on good grounds. Although these personal interests are neither expressly stated in the Constitution nor in


any Act of Parliament, we cannot conclude that a suspect has no relevant interests that the law should protect. It is submitted that as a matter of common sense the law should recognise at least three distinct personal interests: bodily integrity, dignity and privacy.

In the other pan of the scale lies the public interest in keeping the streets safe. Section 8 of the Police Force Act (Cap 235, 1985 Rev Ed) tells us: “The Police Force shall... be employed in and throughout Singapore for the maintenance of law and order, the preservation of the public peace, the prevention and detection of crime and the apprehension of offenders.” Specific duties of the Police Force are detailed in section 38, which again includes (at sub-section (b)) the taking of lawful measures for “preventing and detecting crimes and offences”. These are uncontroversial provisions. But the concern expressed over the recent Somporn Chinphakdee case shows that the public is disturbed by the possibility of police brutality in the pursuance of these aims. Somporn, a Thai employed in Singapore, was charged with the murder of a fellow worker but acquitted without his defence being called because of insufficient evidence to form a prima facie case against him. The High Court found that there was evidence to support Somporn’s allegations of having been assaulted by the police during interrogation. In particular, Somporn’s allegation that his upper left arm had been pricked with a sharp object was apparently borne out by an X-ray which revealed the presence of a broken sewing needle under the skin.

12 The most relevant provision in the Singapore Constitution is Art 9(1): “No person shall be deprived of... personal liberty save in accordance with law.” Cf the Canadian Charter of Rights and Freedoms, s 8: “Everyone has the right to be secure against unreasonable search or seizure”; United States Constitution, 4th Amendment: “The right of the people to be secure in their persons... against unreasonable searches and seizures, shall not be violated...”

The court held that since his fear of being assaulted had not been sufficiently removed when he made certain statements to the police, these statements were inadmissible. The decision in this case led to calls from the public\textsuperscript{14} and Members of Parliament\textsuperscript{15} for a review of police procedures and the institution of more protection for suspects against police brutality. Although Somporn eventually pleaded guilty to perjury, the needle in his arm apparently a “charm needle” inserted in the belief that it would give him strength or luck,\textsuperscript{16} the case shows that there is

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\item Wilfred Ong Chiew Leng, “Courts Must Be Vigilant Against Ill-Treatment of Accused Persons”; Andrew Mak Yen-Chen, “Probe Thai’s Allegations Against the Police”, \textit{The Straits Times}, 12 August 1994 at 37; Lee Yew Moon, “Police Must Probe Their Own Conduct”, \textit{The Straits Times}, 30 September 1994 at 34.
\item “No Black Sheep Allowed to Tarnish Integrity of Ministry”, \textit{The Straits Times}, 26 August 1994 at 28. NMP Ton Keng Kiat suggested that the Independent Investigation Section, which looks into allegations of police wrongdoing, be made independent of the police. MP Low Thia Kiang (Hougang) proposed that all statements to the police be taped, while NMP Chia Shi Teck felt that taping should at least be carried out in capital cases. NMP Kanwaljit Soin suggested that suspects be medically examined 24 to 48 hours after interrogation as bruises take time to show up. None of these suggestions were taken up. According to the Ministry of Home Affairs, the police reviewed its investigation procedures following the Somporn Chinphakdee case and found “no flaws or inadequacies”. It rejected proposals for independent investigators, stating that the Commissioner of Police should have the power to discipline his own men. Taping of interviews was rejected on the ground that accused persons could still allege they had been threatened before the taping. Lastly, Dr Soin’s suggestion was rejected on the ground that the time lapse between interrogation and medical examination could lead to other allegations against the police. However, the Ministry pointed out that doctors can re-examine accused persons one or two days later if they need to: “Somporn Case: No Need to Revise Probe Procedure”, \textit{The Straits Times}, 2 March 1995 at 18.
\item After his acquittal of murder, Somporn was charged with overstaying in Singapore and with perjury. He pleaded guilty to the first charge and was sentenced to three years’ imprisonment and three strokes of the cane, but claimed trial to the second one: “Acquitted Thai on Fresh Charges”, \textit{The Straits Times}, 6 October 1994 at 3; “Perjury Trial Will Not Affect Thai Worker’s Acquittal”, \textit{The Straits Times}, 8 October 1994 at 28; “He Claims Trial to Giving False Evidence”, \textit{The Straits Times}, 24 November 1994 at
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strong public opinion that the police must not be allowed to ill-treat suspects to obtain evidence to convict them. If the police force disregards such opinion, it may lose legitimacy and suffer a fall in support and co-operation from members of the community. This would certainly be against the public interest.

With this conceptual framework in mind, two principles should guide us as we formulate rules for the conduct of medical investigations:

(1) The law should not unduly hinder the police in their duties of crime detection and prevention. Police officers should therefore have reasonable powers to medically examine suspects and take samples from their bodies.

(2) But to safeguard the public interest in ensuring that suspects are treated fairly and humanely, laws should minimise invasions on bodily integrity, dignity and privacy. The law should also strive to deter the police from extracting evidence from suspects through unsavoury methods.

25. Finally, on 2 February 1995, Somporn pleaded guilty to having lied that police interrogators had stuck a needle into his arm to extract his murder confession. According to forensic experts, the needle was too deeply embedded into his soft tissue to have been recently inserted. It was also too short to have been held between the fingers and poked so deeply into his arm. The straight alignment of the breaks in the needle indicated that the needle had corroded inside the body and had broken due to the movement of arm muscles—this would have taken years to happen. The most telling fact was that Somporn had four needles in his body, one in each limb. Charm needles are usually inserted into the body symmetrically, several at a time: “Thai Worker Jailed Five Years for Making Up False Evidence”, The Straits Times, 3 February 1995 at 3.

Feldman, supra, n 9 at 227 para 9.02: “Most policemen recognise that excessive zeal in conducting personal searches is seen from the other side as insensitive bullying, and leads to a loss of co-operation and loss of support for the police.” See also Lord Scarman’s report in The Brixton Disorders, 10-12 April 1981 (Cmnd 8427, 1981), especially paras 4.1-4.4, 4.55-4.58, 5.76.
Many forensic techniques used today were not available or sufficiently developed until recent times. Because our main source of criminal procedure, the Criminal Procedure Code, was modelled on the Indian Code of Criminal Procedure 1898,\textsuperscript{18} it is not suited to deal with new technologies.

1. Before arrest

The inviolability of a person’s property was jealously guarded by the common law. \textit{Semayne’s Case}\textsuperscript{19} stated: “The house of everyone is to him as his castle and fortress.” This was later rephrased more emphatically by William Pitt, 18th century Prime Minister of England: “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the winds may blow through it—the storm may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.”

A person’s bodily integrity was treated similarly. Chisholm J in \textit{R v Ella Paint}\textsuperscript{20} said: “At common law the dwelling of the subject is held to be immune from intrusion, unless there is express authority to justify the intrusion, and the ‘person’ of the subject is held equally sacred.” In the context of medical investigations, it was specifically declared by the New Zealand Criminal Law Reform Committee in 1978 that “[a]t common law there is no power to compel... a subject who has not been arrested... to provide a sample of his blood, hair, saliva, or other bodily matter. Any use of physical force to obtain such a sample


\textsuperscript{19} (1604) 5 Co Rep 91a, 77 ER 194.

\textsuperscript{20} (1917) 28 CCC 171 at 174 (SC, Nova Scotia).
by the police or by a doctor at their behest would constitute an assault.”

Lord Denning MR affirmed this point in *Ghani v Jones*, stating that, in general, if no one has been arrested or charged, the common law does not permit police officers or anyone else to search a suspect’s person without his consent simply to see if he may have committed some crime or other. But because of the need to balance the freedom of the individual against the interest of society in finding out wrongdoers and repressing crime, he held it was permissible to search suspects and seize articles from them prior to arrest, provided certain requirements are satisfied. Broadly speaking, the police may search and seize if they have reasonable grounds for believing that the suspect has committed a serious offence and that the articles seized are material evidence. While Lord Denning’s requirements were clearly not tailored for medical investigations, it is possible for a court to discover in them certain basic principles which would justify conducting such procedures before the suspect’s arrest.

The position under the CPC differs from common law, as it corresponds to the Indian Code which does not empower police officers to search persons before arrest. In *Ramain Rai v*

21 New Zealand Criminal Law Reform Committee, *Bodily Examination and Samples as a Means of Identification* (1979) at 4 para 9, quoted in J Hannan, “New Zealand Criminal Law Reform Committee on Bodily Samples and Identification” (1980) 4 Crim LJ 210. See also Charles Wegg-Prosser, *The Police and the Law* (2nd ed, 1979) at 59: “At common law there is no general power before arresting a person to search him and to seize his property without his consent or without the authority of a warrant. A police officer searching a person without his consent or without authority may be committing an assault and could be liable in a civil action for damages for trespass to the person.”; and John Bishop, *Criminal Procedure* (1983) at 64: “There is no general power at common law... enabling a policeman to ‘stop and frisk’ a person and seize property in his possession, or to require of the person that he undergo a physical examination, unless the person is first arrested. The exercise of these powers necessarily involves detention which, except where consent is given, is forbidden at common law.”


23 Ibid at 1705E-G.
a police sub-inspector accosted the applicant whom he suspected of having in his bag some papers “connected with the Congress”. When the applicant refused to be searched, the sub-inspector tried to remove the bag forcibly. The applicant grabbed the sub-inspector’s hand, but the sub-inspector threw him to the ground and beat him up. Despite this, the applicant was charged with using criminal force to deter a public servant from the discharge of his duty. At no time did the sub-inspector try to arrest him. The court held that the police had obviously no authority at law to search the person of the applicant. The only provision which allowed a police officer to search a person was section 51 of the Indian Code (CPC section 29(1)) which applied only after a person had been arrested.

This case aside, several provisions seem capable on their face of authorising medical investigations before arrest. These will now be considered.

(1) **Search of persons: CPC section 26; Criminal Law (Temporary Provisions) Act, section 14(1):** It is convenient to deal with these two provisions together. Section 26 of the CPC, which has no Indian counterpart, empowers any person conducting a lawful search of any house or place in respect of any offence to detain all persons found in it until the search is completed, and if the thing sought is in its nature capable of being concealed on the person, those persons may be searched for it by or in the presence of a Magistrate, Justice of the Peace, or police officer not below the rank of sergeant.\(^{25}\) There is no prerequisite for the

\(^{24}\) AIR 1942 A11424.

\(^{25}\) This changes the common law position. At common law, while people may be found on premises they do not form part of the real estate and so are not subject to a search warrant covering the premises: see James A Fontana, *The Law of Search and Seizure in Canada* (3rd ed, 1992) at 613; William C Hodge, *Doyle and Hodge: Criminal Procedure in New Zealand* (3rd ed, 1991) at 59. Harris J in *R v Ella Paint*, supra, n 20 at 175, said that “In prosecuting his search, the [Canadian] statute enables the constable to break down doors, locks, closets, cupboards, etc. But nothing is said about searching the ‘persons’ of the occupants. If it were contemplated to authorise so unusual a proceeding, one would expect the legislature to say so definitely and precisely; for to search the person of
person to be arrested first. Section 14(1) of the Criminal Law (Temporary Provisions) Act\textsuperscript{26} is wider as a search of premises is not a condition precedent. Under section 14(1), a police officer not below the rank of sergeant may, without warrant and with or without assistance, stop and search any individual, whether in a public place or not, if he suspects that any evidence of the commission of an offence is likely to be found on the individual. The police officer may seize any evidence found.

Unfortunately, both these provisions are silent about the permissible scope of the search. On a plain reading, the police are clearly allowed to frisk the suspect. But are they empowered to order him to strip, to probe his body orifices or retrieve swallowed items? At any rate, it is submitted that the phrases “thing... in its nature capable of being concealed on the person” and “evidence... found on the individual” cannot include tissue and fluid samples from a suspect’s body.\textsuperscript{27}

(2) Search warrants: CPC section 61(1)(c): Section 61(1)(c) of the CPC authorises a court to issue a search warrant if it considers that the purposes of justice or any inquiry, trial or other proceeding under the CPC will be served by a general search or inspection. However, section 61 only contemplates the issue of warrants for the search of premises. This is clear from Form 8 of Schedule B to the CPC, which requires the judge issuing the warrant to “describe the house or part thereof, to which the

the occupant is pushing farther the invasion of one’s privacy than breaking open a door or closet.”

\textsuperscript{26} (Cap 67,1985 Rev Ed); hereinafter referred to as “CLIPA”.

\textsuperscript{27} Tan Yock Lin,\textit{ supra}, n 1 at paras IV [801-2] and VI [801], suggests that notwithstanding the invasion or intrusion of the accused’s body, s 26 of the CPC arguably authorises the police to search the accused to remove objects concealed in body orifices, and to require an accused to disgorge swallowed items. This is because the concealment necessitates the search. However, he says that it cannot be right to argue that the taking of a blood or urine sample is within the ordinary meaning of a search of the person. In such cases, there can be no search since there is no concealment.
search is to be confined”. Section 61(1)(c) cannot, therefore, authorise the police to medically investigate suspects.28

(3) Procedure where seizable offence suspected: CPC section 119(1): This section states:

If from information received or otherwise a police officer has reason to suspect the commission of a seizable offence he shall forthwith proceed in person or shall depute one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and, where not inexpedient, arrest of the offender and shall report the same to the Public Prosecutor. [Emphasis added.]

In Deoman Shamji Patil v The State,29 the accused resisted the police’s attempt to take him to a dispensary for a doctor’s examination. The prosecution argued that a power to submit the accused to a medical examination was impliedly conferred on the police by section 157 of the Indian Code, which is in pari materia with CPC section 119(1). This was rejected by Tarkunde J:

The short answer to this rather specious argument is that section 157 of the Code lays down some of the duties, and none of the rights, of an officer in charge of a police station. That section has no relevance... to the consideration of the extent to which a police officer can act in curtailment of the rights of a subject as regards his person or his property...

The learned judge also pointed out that the legislature had enacted in the Code specific provisions limiting the rights and liberties of suspects where necessary for criminal investigations. If investigating officers had overriding powers under section 157, all these sections would be redundant.

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28 Contrast Tan Yock Lin, ibid at para IV [903]: “[A]n argument could be made that section 61(1)(c)... can be the foundation of a search warrant authorising intimate search.”

29 AIR 1959 Bom 284.
(4) **Summons to produce, and search by police officer during investigation: CPC sections 58(1) and 125(1):** Section 58(1) of the CPC provides:

> Whenever any court or police officer considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that court or police officer, such court may issue a summons or such officer a written order to the person in whose possession or power the document or thing is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order. [Emphasis added.]

It is submitted that this section does not empower the police to have suspects medically investigated. The words “in whose possession or power the … thing is believed to be” are clearly inapt to refer to items which have been swallowed or hidden in body orifices, much less the suspect’s own body or samples from it. Furthermore, the title of Chapter VI, in which section 58 appears, reads: “Processes to compel the production of documents and other movable property…” The legislature could not have had medical investigations in mind.

It might also be contended that the police can rely on section 125 while conducting investigations into seizable offences:

> Whenever a police officer making a police investigation in a seizable case considers that the production of any document or other thing is necessary to the conduct of an investigation into...

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30 Section 2 of the CPC states that “the marginal notes of this Code shall not affect the construction thereof.” Arguably, headings and titles are excluded. Besides, this rule of construction is now inconsistent with and may be considered impliedly repealed by s 9A(3)(a) of the Interpretation Act (Cap 1, 1985 Rev Ed) which permits judges to consider “all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer.” See also *PP v Huntsman* [1966] 1 MLJ 93 at 94 col 21 (HC, Ipoh) and *R v Schildkamp* [1971] AC 1 at 27 (HL). However, due account should be taken of the fact that a heading merely serves as a brief, and therefore necessarily inaccurate, guide to material to which it is attached: FAR Bennion, *Statutory Interpretation: A Code* (2nd ed, 1992) at 510-11 8255.
any offence which he is authorised to investigate and there is reason to believe that a person to whom a summons or order under section 58 has been or might be issued will not or would not produce the document or other thing as directed in the summons or order or when the document or other thing is not known to be in the possession of any person, the officer may search or cause a search for it to be made in any place. [Emphasis added.]

This argument is untenable. Firstly, section 125(1) makes reference to section 58 which is probably inapplicable. Secondly, section 125(4) makes provisions relating to search warrants, so far as may be, applicable to a section 125(1) search. We have already seen that a search warrant probably cannot be issued to authorise the search of a person’s body. Finally, the decision of Re Laporte and the Queen\textsuperscript{31} pointed out that in the context of the Canadian Criminal Code a person’s body cannot fall within the word place, which is a geographic and not an anatomical location.\textsuperscript{32} In a strongly-worded judgment, Hugessen J wrote:

Words much plainer than those would be required to convince me that Parliament intended in this section to authorise the breaking open of the human frame by means of a search warrant... [I]f the police are today to be authorised to probe into a man’s shoulder for evidence against him, what is to prevent them tomorrow from opening his brain or other vital organs for the same purpose. The investigation of crime would no doubt be thereby rendered easier, but I do not think that we can, in the name of efficiency, justify the wholesale mutilation of suspected persons.\textsuperscript{33}

\footnotesize{\textsuperscript{31} (1972) 8 CCC (2d) 343 (QB, Quebec).}

\footnotesize{\textsuperscript{32} That the word does not refer to a part of the body is supported by s 2 of the CPC, which defines place as including a house, building, tent and vessel.}

\footnotesize{\textsuperscript{33} Supra, n 31 at 353.}
2. After arrest

The early case of *R v Boulton*[^34] held that a judge or magistrate only had power to order an examination of a prisoner’s person with his or her consent. Once consent was obtained, even if such consent was given only because the prisoner was mistaken about the judge’s power to make such an order, the examination was valid. But if in pursuance of an order an examination was made without consent, those who made the order and those who carried out the examination were guilty of criminal assault. *Boulton* therefore suggests that at the time there was no general right at common law to search an accused person after arrest. However, this rule became hedged with exceptions. Later cases established that arrested persons could be searched (removing clothing if necessary[^35]) for specific items such as weapons which could be used to injure themselves or others[^36], implements which they could use to escape with, or evidence material to the offence they were charged with, if there were reasonable grounds for believing they had such items on them[^37]. In appropriate circumstances items could be removed with reasonable force but without resorting to unnecessary violence[^38].

These exceptions have cumulatively displaced the original rule. Today, at common law there may be a general right to search


[^35]: *Gottschalk v Hutton* (1921) 36 CCC 298 (CA, Alberta).

[^36]: *Leigh v Cole* (1853) 6 Cox CC 329.


[^38]: *Dillon v O'Brien*, ibid
arrested persons. In *Dallison v Caffery*, Lord Denning MR was of the view that:

> When a constable has taken into custody a person reasonably suspected of a felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence... So long as such measures are taken reasonably, they are an important adjunct to the administration of justice; by which I mean, of course, justice not only to the man himself but also to the community at large.

This case establishes that modern police officers possess a power to take reasonable steps to investigate whether persons in their custody have committed offences. It has been suggested that since the common law supposedly embodies common sense and humanity, procedures which are sensible and prudent in the circumstances include conducting a strip search for small items of jewellery which can be hidden on the person, or taking fingernail scrapings if handling explosives is suspected. This is confirmed by Canadian decisions. For instance, *Reynen v Antonenko* affirms that “[t]here is a general power to search on arrest.”

The court found that a non-consensual search of the plaintiff’s rectum for drugs conducted by a doctor did not constitute assault and battery:

> In making this search and seizure the police are clearly authorised to use such force as is reasonable, proper and necessary to carry out their duty, providing that no wanton or unnecessary violence is imposed. It is also clear that what is reasonable and proper in any particular case will depend on all the circumstances of that particular case, it being impossible to

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39 [1964] 2 All ER 610 at 617B-D (CA). Lord Denning MR cited the following examples of reasonable measures taken to investigate crimes: taking the arrested person to his house to search for stolen property, taking the person to a place to confirm or refute an alibi, and putting the person up on an identification parade to see if he is picked out by witnesses.

40 Wolchover, *supra*, n 2 at 230.

41 (1975) 20 CCC (2d) 342 at 346 (SC, Alberta).
lay down any hard and fast rule to be applied to all cases, except the test of reasonableness.\textsuperscript{42}

In \textit{R v Brezack},\textsuperscript{43} the accused was arrested in public on suspicion of illegal possession of narcotics. Several police officers pinned him down while another officer caught his throat to prevent him from swallowing. After applying a great deal of force, the officer inserted his fingers into the accused person’s mouth to search for drugs. None were found, but the officer’s fingers were bitten in the process. The accused was charged with assault. The court found that the attempted mouth search was a justifiable incident of his arrest.

However, there are also arguments that common law does not justify non-consensual invasive procedures. It has been contended that procedures such as orifice searches are so degrading that the common law may prefer to accept the risk of evidence being undetected or destroyed, or the fairly remote chance that a weapon concealed in an orifice may be used, than to subject possibly innocent people to such humiliation. Also, does the common law sanction a procedure which is hazardous to health if done by a layman, but is in breach of medical ethics if performed by a doctor without the patient’s consent?\textsuperscript{44} In \textit{McAneny v Kearney, ex parte Kearney},\textsuperscript{45} Stable J (with whom Sherman J agreed) concluded that section 25.9 of the Queensland Criminal Code, which authorises the examination of persons in custody where there are reasonable grounds for believing that such examination will afford evidence as to the commission of an offence, was, “so far as my research carries me, not an expression of common law”. He thus implied that the common law does not require arrested or suspected persons to submit to medical examination without consent.\textsuperscript{46}

\textsuperscript{42} Ibid at 348 \textit{per} MacDonald J.
\textsuperscript{43} (1949) 96 CCC 97 (CA, Ontario).
\textsuperscript{44} Wolchover, \textit{supra}, n 2 at 231.
\textsuperscript{45} [1966] Qd R 306 at 311 (Full Ct, Queensland).
\textsuperscript{46} Law Reform Commission, \textit{Criminal Investigation} (Report No 2 (Interim), 1975) at para 130 (Australian Commonwealth).
It is evident that different jurisdictions have developed the common law to different extents. Canadian courts have asserted the right of police to conduct even the forced probing of a person’s orifices, while their British counterparts have only made general statements which may or may not imply a right to conduct physical examinations and take body samples from arrested persons. In Australia such procedures were stated to be unauthorised by the common law. But there appears to be a point beyond which the common law will not go. In *Laporte* the police, suspecting that the accused was the perpetrator of a bank robbery in which the robber had been wounded by police gunfire, obtained a search warrant authorising a surgical search of his body for bullets. The accused applied successfully for certiorari to quash the warrant. Hugessen J accepted that there is a common law right of search incidental to arrest, but continued:

> It is not necessary to decide whether the common-law right of search might extend as far as minor medical procedures such as the taking of a blood test or examination by X-rays, but I can find nothing in the cases which would justify a surgical intrusion into the body of a prisoner many months after his arrest for the purpose of obtaining evidence against him on a charge other than that for which he is being held. ... In my view the Justice had no jurisdiction, either by statute or at common law, to issue this warrant, and it is my duty to interfere and prevent what I can only describe as a grotesque perversion of the machinery of justice and an unwarranted invasion upon the basic inviolability of the human person.⁴⁷

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⁴⁷ Supra, n 31 at 350, 354. See also *Rochin v California* (1952) 342 US 165 (stomach-pumping for narcotic capsules). In the Singapore case of *Somporn Chinphakdee*, earlier mentioned in greater detail, the defendant Somporn was charged with having perjured himself by alleging that police interrogators stuck a needle into his arm to extract a murder confession. While X-rays showed that there was indeed a needle in Somporn’s arm, it was apparently one of four “charm needles” inserted into his body to bring him strength or luck. Somporn refused consent for the needles to be surgically removed. The Deputy Public Prosecutor applied to the court to have the refusal verified, stating inter alia that the needles constituted important evidence relating to the charges; therefore, it was in the interests of justice to remove them for use as exhibits. District Judge S
Could our courts choose to follow the liberal Canadian position if they were so minded? In Singapore, the police’s power to search arrested persons is regulated by CPC section 29:

29(1). Whenever a person is arrested... the police officer making the arrest... may search such person and place in custody all articles other than necessary wearing apparel found upon him and any of those articles which there is reason to believe were the instruments or the fruits or other evidences of the crime may be detained until his discharge or acquittal.48

The issue is how widely the word *search* should be interpreted. In the Indian decision *Bhondar v Emperor*49 a 15-year-old boy was accused of raping a girl aged nine. A medical examination, conducted without his consent, revealed that he had suffered injuries to his penis consistent with a rape. The court upheld the jury’s acquittal of the boy on the basis of other evidence. In the course of their decision, the judges stressed that the police had no legal right under section 51 (CPC section 29(1)) to forcibly take hold of the accused and have his body medically examined without his consent. As Lort-Williams J put it:

I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal

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48 It is fairly obvious that CPC ss 29(1) and 30 (which empowers police officers to seize offensive weapons from arrested persons) were modelled on the common law.

49 AIR 1931 Cal 601, approved by *Deoman Shamji Patil v The State*, supra, n 28 (police have no legal right to take an accused person by force to a doctor to examine whether he is intoxicated). See also *Subayya Gounder v Bhoopala Subramanian* AIR 1959 Mad 396 and, generally, SC Sarkar, *The Law of Criminal Procedure* (Prabhas C Sarkar & Kshitis C Ray eds, 5th ed, 1984) at 55-56.
Procedure expressly giving power to order such a medical examination.\textsuperscript{50}

Of course, a medical examination may be lawfully conducted if the arrested person consents to it.\textsuperscript{51}

There is a case which reached the opposite conclusion. In \textit{Re Palani Goundan},\textsuperscript{52} the court examined the privilege against self-incrimination embodied in Article 20(3) of the Indian Constitution and held that while an accused may refuse to volunteer evidence, the police is not prohibited from searching him for it and seizing it. Accordingly, the court concluded that an accused person can be taken to a doctor to be examined for injuries to ascertain whether he has participated in an offence, or to have stolen property which he has swallowed removed. However, the court failed to discuss which provision of the CPC empowers the police to carry out such procedures. It is therefore submitted that this case must be viewed with suspicion.

3. Assessment

The rules of Singapore criminal procedure were not framed with the medical investigation of suspects in mind. The most relevant provisions, sections 26 and 29(1) of the CPC and section 14(1) of the CLTPA, clearly permit the searching of clothing, and possibly an examination of the suspect’s naked body and the taking of residues from the skin. But there is nothing explicit about whether probing of body orifices, retrieval of swallowed objects or the taking of tissue or fluid samples is allowed. It is submitted that to interpret the CPC as authorising such procedures, following the Canadian position, would stretch its

\textsuperscript{50} Ibid at 602. See also 604 per Ghose J. Ghose J was not prepared to go so far as to say that mere absence of consent would constitute a criminal assault under the Penal Code. On the other hand, Lort-Williams J felt that any such examination would amount to an assault, but it is possible that he meant “assault” in the sense of the tort of trespass to the person.

\textsuperscript{51} \textit{Hanuman Sarma v Emperor} AIR 1932 Cal 723. Oral assent suffices (\textit{Hanuman Sarma}, ibid at 725), although consent in writing is preferable (\textit{Bhondar, supra}, n 49 at 604).

\textsuperscript{52} AIR 1957 Mad 546.
wording too far. It is also unwise for the court to widen the scope of the CPC through liberal interpretation since it is extremely difficult for judges to lay down and enforce the detailed safeguards which are needed.

The law today puts the police in a quandary. The police act illegally if they conduct medical procedures on suspects without their consent, or procure consent by force or fraud. The mere fact that the Singapore Police Force may have internal guidelines on how the procedures should be conducted does not legitimise them. If there is no consent, carrying them out remains contrary to general law. Besides, internal guidelines are unsatisfactory because only police officers will know if they are being followed. The possibility of abuse is high. The police may seek to circumvent these difficulties by exercising powers under other legislation in a way not contemplated by Parliament. For instance, they might try to obtain a blood sample from a suspect under the provisions of the Road Traffic Act even though the case does not involve a driving offence. Such action would be ultra vires the Act and unlawful. The Code thus stands in dire need of revision.

III. SUGGESTIONS FOR LEGISLATIVE REFORM

The power of police to carry out medical investigations on suspects has been considered by law reform commissions in

53 Since a lacuna exists in our criminal justice system, it might be argued that s 5 of the CPC mandates the application of English law. The relevant provisions are contained in the UK Police and Criminal Evidence Act 1984 (c 60) as amended by the UK Criminal Justice and Public Order Act 1994 (c 33). Indeed, Tan Yock Lin, supra, n 1 at para VI [853] says that the relevance of English statutory provisions cannot be ruled out. However, public policy must surely militate against the importation of such a detailed scheme without proper consideration by Parliament. On this point, see Jack Lee Tsen-Ta, “The Court of Appeal’s Lack of Jurisdiction to Reopen Appeals” [1994] SJLS 431 at 435-38.

54 The Police Commissioner is empowered by ss 55 and 56 of the Police Force Act (Cap 235, 1985 Rev Ed) to make Police General Orders, Force Orders or Standing Orders which, according to s 57, need not be published in the Government Gazette.
Australia,\textsuperscript{55} Canada,\textsuperscript{56} Hong Kong,\textsuperscript{57} New Zealand,\textsuperscript{58} India\textsuperscript{59} and the United Kingdom.\textsuperscript{60} Several of these jurisdictions have enacted legislation.\textsuperscript{61} These reports give valuable guidance as to how our law might be reformed.


\textsuperscript{57} Law Reform Commission of Hong Kong, \emph{Report on Arrest} (Topic 25, 1992) which generally recommended adoption of provisions of the UK Police and Criminal Evidence Act 1984.

\textsuperscript{58} New Zealand Criminal Law Reform Committee ("CLRC New Zealand"), \emph{Bodily Examination and Samples as a Means of Identification} (1979). See J Hannan, [1980] 4 Crim LJ 210.


\textsuperscript{60} Royal Commission on Criminal Procedure ("RCCP"), \emph{Report} (Cmnd 8092, 1981).

\textsuperscript{61} Australia: Crimes Act 1900 (ACT/NSW), s 353A; Police Administration Act (NT), s 145; Criminal Code 1899 (Qld), s 259; Police Offences Act 1953 (SA), s 81; Criminal Process (Identification and Search Procedures) Act 1976 (Tas), ss 6-8; Criminal Code (WA), s 236. India: Indian Code of Criminal Procedure 1973, ss 53 and 54. United Kingdom: UK Police and Criminal Evidence Act 1984 (c 60) ("PACE"), ss 54-55, 62-64, as amended by the UK Criminal Justice and Public Order Act 1994 (c 33) ("CJPO").
It is submitted that a provision should be inserted into the CPC stating that all searches of suspects prior to arrest which are authorised by written law are limited to a frisk of clothing and personal effects. There is no compelling reason to allow the medical investigation of suspects before arrest as the police have extensive powers under the CPC and other statutes to arrest without warrant. For instance, under the CPC suspects may be apprehended if they are reasonably suspected of having been concerned in any seizable offence, found taking precautions to conceal their presence under circumstances which afford reason to believe that they are taking those precautions with a view to committing seizable offences, or even if they are unable to give satisfactory accounts of themselves.

B. After Arrest: Medical Investigation of Suspects

The medical procedures that may be performed on suspects may conveniently be grouped into categories based on the degree of encroachment into the suspect’s bodily integrity, dignity and privacy. This allows for safeguards designed to suit each category to be enacted in the CPC.


63 PACE s 2(9); RCCP, supra, n 60 at 30 para 3.27; Bevan & Lidstone, ibid at 75 para 3.40. Cf the New Zealand Criminal Law Reform Commission which recommended that the police be allowed to conduct a compulsory examination of a suspect’s body before arrest. This was heavily criticised by Hannan, supra, n 58 at 211, 230.

64 CPC ss 32(1)(a), (g) and (h).

65 LRC Australia, supra, n 55 at 57 para 131; LRC NSW, supra, n 55 at 115 para 39.
1. **Non-intimate non-intrusive procedures**

Procedures which might be classified as non-intimate and non-intrusive include (1) visual inspection and palpation of the body without exposing the genitals or a woman’s breasts, including the taking of X-rays and other images of the body’s interior; and the taking of (2) prints from any part of the body; (3) hair samples other than pubic hair; (4) samples taken from or under the nails; (5) saliva samples; (6) semen and urine samples voluntarily produced by the suspect; and (7) samples from any other part of the body (excluding the body orifices) not involving puncturing of the skin.

2. **Intimate non-intrusive procedures**

Intimate but non-intrusive procedures might include (1) visual inspection and palpation of the naked body, including seizure of clothing concealing the genitals or a woman’s breasts; and the taking of (2) pubic hair samples; (3) samples from any part of the body (excluding the body orifices) involving puncturing of the skin, such as blood and tissue samples; and (3) dental and bite impressions.

3. **Intimate intrusive procedures**

These procedures are intimate in nature and involve a high degree of intrusion: (1) the taking of semen samples by rectal massage of the prostate gland; (2) the taking of urine samples by catheterisation; (3) with respect to body orifices such as the mouth, rectum and vagina, searching for and removing concealed items, and taking samples; and (4) the removal of objects from the digestive tract by administration of emetics and enemas, or by stomach-pumping.

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66 Cf PACE s 65, now amended by CJPO s 58(3).

67 Cf PACE s 65, now amended by CJPO s 58(2).
4. **Prohibited procedures**

There should be a residual category of procedures which are too inherently intrusive or of doubtful value. These should not be permitted under any circumstances. One example could be the use of surgery under general anaesthesia to remove evidence embedded in the suspect’s body.

5. **General safeguards**

As a general rule, procedures should be carried out only with the suspect’s consent. To encourage suspects to give consent, they should be told why a particular procedure is being conducted and how they will participate in it. They should be informed, preferably by a qualified medical practitioner, of any risks in the procedure so they can properly decide whether or not to consent. Suspects should be told of their right to refuse to consent to any procedure, and to withdraw consent at any time. The giving or withdrawal of consent should be in writing. How a refusal of consent should be dealt with is discussed below.

Suspects should be entitled to the greatest possible privacy during procedures, having regard to the nature of the procedure. The number of persons in the examination room should be kept to the minimum required to ensure the doctor or nurse’s safety, to prevent the suspect from escaping, and to avoid allegations of molest. Procedures involving exposure of the naked body should generally be conducted by persons of the same sex as the suspect, but this should not an absolute requirement when it would be unduly fastidious to so require (eg if the test is conducted by a professional medical practitioner).

All procedures should be conducted in a way that ensures minimum discomfort to the suspect, again having regard to the

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68 LRC Canada (Report 25), *supra*, n 56 at 36-37 recommendation 2.
69 LRC NSW, *supra*, n 55 at 119 para 42.
70 LRC Canada (Report 25), *supra*, n 56 at 43-44 recommendation 11.
71 Singapore: CPC s 28(2): “Whenever it is necessary to cause a woman to be searched the search shall be made by another woman with strict regard to decency.” There is no reason why this safeguard should be restricted to females. United Kingdom: PACE s 55(7).
nature of the procedure and the circumstances. Some procedures naturally involve more discomfort than others, such as the removal of objects from the suspect’s body orifices. The degree of discomfort is also affected by factors such as the extent to which the suspect co-operates in the procedure.\textsuperscript{72} If in a doctor’s opinion any procedure poses a significant risk to the suspect, having regard to his state of health, it should not be carried out.\textsuperscript{73}

6. \textit{Specific safeguards}

Medical investigations should be properly authorised according to the category they fall into. Non-intimate non-invasive procedures can be authorised by a junior police officer, eg one not below the rank of sergeant. On the other hand, intimate non-invasive procedures should be authorised by a senior police officer, eg one of at least the rank of superintendent,\textsuperscript{74} while a court order should be required for intimate invasive procedures and other medical investigations not expressly provided for. To ensure that medical investigations are not used as “fishing expeditions” or methods of intimidating suspects into giving confessions, authorisation should only be given if the offence is a serious one,\textsuperscript{75} if there are reasonable grounds to believe that the procedure will provide reliable evidence relating to the offence that the suspect is charged with, and if there are no less

\begin{flushleft}
\textsuperscript{72} LRC Canada (Report 25), \textit{supra}, n 56 at 44-45 recommendation 13.
\textsuperscript{73} Cf Road Traffic Act, ss 69(1) and 71(2).
\textsuperscript{74} PACE ss 55(1), 62(1), 63(3).
\textsuperscript{75} These can be laid down by Parliament based on the nature of the offences and their penalties. The RCCP, \textit{supra}, n 60 at 24 para 3.7, suggested that the following offences should be covered: serious offences against the person (murder, manslaughter, causing grievous bodily harm, armed robbery, kidnapping, rape), serious offences of damaging property (arson, causing explosions), serious dishonesty offences (counterfeiting, corruption, theft and fraud involving large amounts of money), and others (eg drugs and arms offences).
\end{flushleft}
intrusive means of obtaining the evidence. The suspect should be told the reasons why authorisation has been given.

To promote the health and safety of suspects, it is generally preferable for all medical investigations to be performed by qualified medical practitioners, ie registered dentists, doctors or nurses. However, all non-intrusive procedures (both non-intimate and intimate) can safely be conducted by trained police officers. Intimate intrusive procedures should only be done by medical practitioners. Again, while it is preferable for all procedures to be conducted under clinical conditions such as a sick-bay, clinic or hospital, both categories of non-intrusive procedures may be carried out in other suitable locations such as a private room in a police station.

It is impossible for an article of this length to suggest all the possible safeguards which should be in place. The legislature,

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77 PACE, ss 62(5), 63(6).

78 Australia: LRC NSW, supra, n 55 at 116 para 39, 119 para 42, New Zealand: CLRC New Zealand, see Hannan, supra, n 58 at 223. United Kingdom: PACE ss 55(5), 62(9).

79 United Kingdom: PACE s 55(8). In Huguez v United States (1968) 406 F 2d 366 at 381-82, the court condemned the brutal and painful rectal examination of defendant in the non-antiseptic, non-hygienic surroundings of a border baggage room. Cf Reynen v Antonenko, supra, n 41, where rectal examination of defendant in a hospital of high standards by an eminently qualified medical practitioner was held to be reasonable.

80 For instance, other safeguards might include (1) empowering the police to require a suspect who has been charged but is no longer in police custody (eg out on bail) to report back for medical investigations if none were carried out during custody, or if body samples taken were insufficient or unsuitable: PACE ss 62(1A), 63(3A), 63(4), as inserted by CJPO ss 54-56; (2) allowing suspects a portion of any sample for independent testing: LRC Canada (Working Paper 34), supra, n 56 at 67 para (7); and (3) the destruction in the suspect’s presence of all samples taken from him and all documents relating to tests done on the samples, if he is subsequently acquitted at trial or if the prosecution drops all the charges against him: PACE s 64.
in framing a comprehensive code, will no doubt have to draw upon the experiences of other jurisdictions. However, it is submitted that the safeguards proposed above are minimum requirements which should be present in the CPC.

C. Making the Law Effective

1. Ensuring compliance by the suspect:

What should be done if a suspect refuses to consent to a medical procedure? Three possible methods, applied singly or in combination, have been used by legislatures:81

(1) The suspect can be charged with obstructing a police officer in the discharge of his or her duty,82 or non-compliance can be made a specific criminal offence.83

(2) The use of reasonable force can be sanctioned.

(3) The court can be permitted to draw adverse inferences as appear proper from the suspect’s behaviour.

Method (1) is useless where serious offences are concerned. Suspects would in effect be able to choose the offence under which they would be dealt with—the crime itself, or a lesser offence of non-compliance or obstruction of the police.84 We could provide a disincentive by punishing refusal to co-operate with the same maximum penalty as the substantive offence, but this is only feasible for minor offences like traffic violations.85 For instance, it would be completely out of proportion to punish even a manifestly unreasonable refusal to furnish a blood sample

81 LRC Canada (Working Paper 34), supra, n 56 at 70.
82 Penal Code, s 186.
83 Eg Misuse of Drugs Act (Cap 185, 1985 Rev Ed), s 31(2), where refusal to undergo a urine test results in a maximum fine of $5,000.
84 CLRC New Zealand, supra, n 58 at 21 para 50.
85 Eg Section 69(2) of the Road Traffic Act punishes refusal to provide a blood or urine specimen without reasonable excuse with the same punishment as drunk driving offences.
with the severe penalty of death attaching to the offence of murder.86

On the other hand, method (2) which allows the use offeree on suspects has been criticised as ineffective since it is very difficult to properly conduct a procedure on a person determined to resist,87 and inherently objectionable because it may amount to physical intimidation.88 However, given that serious offences are involved here, it is doubtful that any other method of enforcement would be effective.89

It is submitted that the best compromise is to allow the police to use reasonable force to carry out investigative procedures, but to require them to first obtain a court order authorising the use of such force. A judge or registrar would have to decide whether it is in the best interests of justice to compel the suspect to undergo the procedure. In cases where a delay may mean loss of evidence, a senior police officer can be allowed to authorise the use of force. However, to ensure the suspect’s safety, if the procedure poses a significant health risk to the suspect if he or she resists (eg a body orifice search), then it should not be done. Instead, the trial court should be allowed to apply method (3) and draw proper inferences from the suspect’s non-compliance to corroborate evidence tending to suggest that something incriminating would have been found, had the procedure been carried out.90

86 RCCP, supra, n 60 at 68 para 3.136.
87 Ibid at 67 para 3.135.
88 LRC Canada (Working Paper 34), supra, n 56 at 71. See also the strong objections by Feldman, supra, n 9 at 240 para 9.34.
89 Ibid at 87 recommendation 12 (later omitted from Report 25).
90 PACE s 62(10); Feldman, supra, n 9 at 240 para 9.33.
2. Ensuring compliance by the police: exclusion of illegally-obtained evidence.  

There is little point having rules regulating medical investigations if police officers can breach them with impunity. But according to section 5 of the Evidence Act, evidence is admissible as long as it is declared to be relevant by the Act. No section permits evidence to be excluded simply because it has been obtained by the police in breach of the law. Nevertheless, the courts have repeatedly declared that they retain a residual discretion to exclude illegally-obtained evidence in certain circumstances.

At the outset, there is doubt over the source of this discretion. Tan Yock Lin speculates that the exclusionary discretion is built into certain sections of the Act, such as section 9 dealing with the relevancy of facts which support or rebut an inference suggested by a fact in issue or relevant fact, or sections 14 and 15 which deal with similar fact evidence. Another theory states that since the discretion is a common law principle consistent with the Evidence Act it is applicable under section 2(2). This, however, does not account for section 138(1) of the Act: “When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall

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92 (Cap 97, 1990 Ed).


94 See, eg, Michael Hor, “The Confessions Regime in Singapore” [1991] 3 MLJ Ivii at Ixix. Section 2(2) states: “All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.”
admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.” The word shall suggests that the court has no choice but to admit evidence which it determines to be relevant, thus precluding the application of a common law discretion. Perhaps this is one of those awkward situations where the maxim communis error jus facit—a common mistake sometimes makes law—must come into play. The discretion is already too entrenched to be questioned. The following comment was made in the recent decision Chan Chi Pun v PP.95

Evidence unlawfully obtained, once relevant, is in law admissible, and the court [will] only exercise its judicial discretion to exclude it if its reception would operate unfairly against the accused... We did not think this principle of law to be in doubt, and, indeed, counsel did not seek to query it.

The fact that the discretion sits uncomfortably with present provisions of the Act is one of the reasons why a new provision should be inserted into the Act.

Even though the cases recognise that a judicial discretion exists, they disagree over how it should be applied. Two approaches are evident. In Cheng Swee Tiang v PP,96 a majority of the Court of Criminal Appeal asserted: “It is undisputed law... that while evidence unlawfully obtained is admissible, if relevant, there is a judicial discretion to disallow such evidence, if its reception would operate unfairly against an accused.”97 The court felt that in the exercise of this discretion a judge must consider the conflict between two important interests: on the one hand, there is the individual’s interest in being protected from illegal invasions of his or her liberties by the authorities; on the other, the State’s interest in ensuring that evidence related to the crime which is necessary to enable justice to be done should not be withheld from the courts on any merely technical ground.98 It is clear the court envisaged that the discretion might be

95 [1994] 2 SLR 61 at 65D (CCA).
97 Ibid at 292 col 2D.
98 Ibid at 293 col 1B–C.
exercised to protect the accused from illegal invasions of his liberties by the authorities.\(^9^9\)

The other approach is that of the House of Lords in *R v Sang*,\(^1^0^0\) which has been applied in Singapore by *Ajmer Singh v PP*,\(^1^0^1\) *How Poh Sun v PP*\(^1^0^2\) and *Lai Kim Loy v PP*.\(^1^0^3\) In *Sang*, Lord Diplock held that a court has the discretion to exclude (1) admissible evidence which would probably have a prejudicial influence upon the minds of the jury that would be out of proportion to its true evidential value, and (2) evidence tantamount to a self-incriminating admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect.\(^1^0^4\) *Sang* is narrower than *Cheng Swee Tiang* because the court’s discretion is limited to ensuring that it is fair to use the evidence brought against the accused at the trial:

It is no part of a judge’s function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is to be used by the prosecution at the trial.\(^1^0^5\)

The sole function of a criminal trial is seen as determining the truth of the charge against the accused. It is deemed harmful to

\(^9^9\) Pinsler, *supra*, n 91 at 258.

\(^1^0^0\) [1980] AC 402 at 437C (HL).

\(^1^0^1\) [1987] 2 MLJ 141 at 143 col 21, 144 col 1H (CCA, Singapore).

\(^1^0^2\) [1991] 3 MLJ 216 at 219 col 1D–E (CCA, Singapore).

\(^1^0^3\) [1994] 1 SLR 787 (HC).

\(^1^0^4\) *Sang*, *supra*, n 100 at 436B.

\(^1^0^5\) *Supra*, n 100 at 436. Quoting *Sang*, similar sentiments were expressed locally in *How Poh Sun*, *supra*, n 102 at 219 col 1B–C; and *Lai Kam Loy*, *supra*, n 103 at 794E–G.
the public interest if a guilty person is acquitted just to chastise the police, and unfair to cast suspicion on a police officer in a trial neither equipped nor intended as a full inquiry into his or her conduct.\textsuperscript{106}

It is possible that the broader approach in \textit{Cheng Swee Tiang} results from a misapplication of Lord Goddard’s dicta in \textit{Kuruma v R}:\textsuperscript{107} “No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.” In \textit{Sang}, Lord Diplock clarified that Lord Goddard meant nothing more than unfairness at trial.\textsuperscript{108} But not only has \textit{Cheng Swee Tiang} never been overruled,\textsuperscript{109} it appears to be favoured today. Between 1987 and 1994 Singapore courts routinely applied \textit{Sang}, but recent cases such as \textit{Chan Chi Pun v PP}\textsuperscript{110} and \textit{PP v Sng Siew Ngoh}\textsuperscript{111} have cited only \textit{Cheng Swee Tiang}. This may signal a retreat from \textit{Sang}. It may be that the court is reserving to itself a discretion to exclude evidence obtained by the police in flagrant breach of the rules. In any case, the tussle between \textit{Cheng Swee Tiang} and \textit{Sang} is another reason why a new form of discretion needs to be enacted into the Evidence Act.

\textsuperscript{106} Wolchover, \textit{supra}, n 2 at 1–2.
\textsuperscript{107} [1955] AC 197 at 204 (PC on appeal from Kenya).
\textsuperscript{108} Tan Yock Lin, \textit{supra}, n 1 at para VI [954], comments: “There are some differences in formulation between the House of Lords decision [\textit{Sang}] and the Privy Council decision [\textit{Kuruma}]. But any attempt to make a dogma of the differences would seem futile.”
\textsuperscript{109} In \textit{Ajmer Singh, supra}, n 101 at 144 col 1H, it was held that the rule in \textit{Sang} applies in Singapore and that “the actual decision of the Court of Criminal Appeal in \textit{Cheng Swee Tiang v Public Prosecutor} does not conflict with \textit{R v Sang}.” With respect, \textit{Cheng Swee Tiang} envisages a broad and flexible judicial discretion while the \textit{Sang} approach is clearly narrower. See Chin Tet Yung, \textit{Evidence} (1988) at 21: “A recent decision of the House of Lords, \textit{R v Sang}, approved of a narrower discretion to exclude evidence, that is, where the prejudicial effect of the evidence outweighs its probative value.”
\textsuperscript{110} \textit{Supra}, n 95.
\textsuperscript{111} [1996] 1 SLR 143 at 155 A (HC).
A further reason is that neither approach gives proper weight to the “judicial integrity principle”. Zuckerman\textsuperscript{112} argues convincingly that the best justification for the judicial discretion is that it exists to protect the administration of justice from being brought into disrepute. But as the law stands, illegally-obtained evidence is not likely to be excluded either under the Cheng Swee Tiang or the Sang approach. Sang clearly emphasises that it is not the business of judges to control the police; hence, illegally-obtained evidence is admissible unless it falls within the narrow exceptions to the rule. Even in Cheng Swee Tiang, where protection of individual rights was purportedly balanced against society’s interests in fighting crime, the court came down heavily in favour of the latter. It held that illegally-obtained evidence will only be excluded if its admission is likely to cause “substantially incontestable” harm to the public.\textsuperscript{113} These approaches are perilous because ordinary people in the street are likely to feel that the courts are biased towards the police:

\textquote{H}owever strongly judges may try to dissociate propriety from admissibility, the reception of improperly obtained evidence is inevitably perceived as condonation. The judiciary may be seen as being hypocritical in punishing the suspect of crime but excusing the police of theirs. This severely weakens the integrity of the judiciary and the moral strength of its judgments.\textsuperscript{114}

Lastly, amending the Evidence Act is desirable because the present exclusionary discretion places too much faith in current methods of dealing with police lapses. In theory, suspects who have had medical tests conducted on them in contravention of the law may sue the police in tort for assault and battery or breach of statutory duty, rely on the criminal law, or complain to police authorities\textsuperscript{115} so that disciplinary action can be taken.

\textsuperscript{113} Supra, n 94 at 293 col ID.
\textsuperscript{114} Hor, supra, n 94 at Iviii.
\textsuperscript{115} According to the Ministry of Home Affairs, an accused person in police custody can complain of ill-treatment at any time. The police officer who
Such remedies are often illusory. Although it is technically possible for accused persons to obtain substantial damages in tort even though no physical injury has been caused, legal costs are discouraging. Also, as Michael Hor points out, “It is entirely against basic human psychology for the person aggrieved to muster enough determination to pursue these matters himself. The natural reaction would be to stay as far away as possible from the police and the courts. Embarking on a civil claim or a disciplinary or criminal complaint is potentially time consuming and emotionally taxing.” Where criminal prosecutions are concerned, the Public Prosecutor may exercise his discretion not to institute a prosecution. Even if the receives the complaint must report it to his superiors. An accused person can also request medical attention and report any abuse to the attending doctor. Allegations of police assault and ill-treatment are investigated by the Internal Investigation Section (IIS) of Police Headquarters. The IIS, which is independent of police ground units, reports the results of its investigations to the Director of Manpower, Police Headquarters. Police officers found to have abused their powers in any way when conducting investigations face disciplinary action and even prosecution where appropriate: “Police Officers Face Disciplinary Action If They Abuse Power”, The Straits Times, 17 August 1994 at 29; “No Black Sheep Allowed to Tarnish Integrity of Ministry”, The Straits Times, 26 August 1994 at 28.

Where the police have interfered with the liberty of a person, damages are given to vindicate his or her rights even though no pecuniary damage has been suffered: Rookes v Barnard [1964] AC 1129 at 1221–33 (HL), applied in Shaaban v Chong Fook Kam [1969] 2 MLJ 219 (PC on appeal from Malaysia); Cassel & Co v Broome [1972] AC 1027. The police’s conduct need not be malicious or violent: unconstitutional conduct will suffice for an award of exemplary damages. However, not every act done by a police officer which is beyond the scope of duty can automatically be classified as “unconstitutional”: Rookes v Barnard, ibid See Clerk & Lindsell on Torts (16th ed, 1989) at 1009–10 para 17–58.


Art 35(8) of the Constitution declares that the Attorney-General (who is the Public Prosecutor) has power exercisable at his discretion to institute, conduct or discontinue proceedings. See also s 336(1) of the CPC which reiterates that the Attorney-General has control and direction of all criminal prosecutions and proceedings.
accused takes out a private summons, it has been suggested that such proceedings may be impeded by the tendency of the police to protect “one of their own” and by the possibility that their conduct may be consistent with normal departmental practice.\(^{119}\) A Canadian study has shown that few aggrieved persons lodge complaints with police authorities because they either do not know how to do so, fear police retaliation, or feel that to complain would be ineffective as wrongdoing would be covered up.\(^{120}\) These fears may well be unfounded; however, a criminal justice system which seems to unduly favour the police does nothing to correct public misconceptions. Justice should not only be done but should manifestly and clearly be seen to be done.

A proposal by the Australian Law Reform Commission,\(^{121}\) based on Scottish and Irish law, has much to commend it. The Commission suggested that any evidence obtained in contravention of any law should be inadmissible unless the court decides in the exercise of its discretion that its admission would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual. We might add an overriding test: that the administration of justice must not be brought into disrepute.\(^{122}\) The burden of satisfying the court that illegally-obtained evidence should be admitted should rest with the prosecution. The court can consider factors such as (1) how serious the crime is; (2) how urgent or difficult it is to detect the crime and to preserve real evidence of it; (3) whether the misconduct was serious, trivial or accidental; (4) whether the illegality harmed the suspect or

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\(^{119}\) LRC Canada (Working Paper 30), *supra*, n 56 at 300 para 446.

\(^{120}\) Ibid at 301 para 448.

\(^{121}\) LRC Australia, *supra*, n 55 at 141 para 298, praised as “admirable” by Hannan, *supra*, n 58 at 226–27.

\(^{122}\) This phrase is from s 24(2) of the Canadian Charter of Rights and Freedoms. See LRC Canada (Report 25), *supra*, n 56 at 45 recommendation 14.
affected the reliability of the evidence; and (5) how easy it
would have been to comply with the law.\textsuperscript{123}

Placing such an inclusionary discretion in the Evidence Act
would give the court flexibility to admit reliable evidence where
appropriate while emphasising that it disapproves of indifference
towards procedural safeguards. The court’s scrutiny of police
practices would uphold its impartiality by demonstrating to the
public that the police are not above the law.

IV. CONCLUSION

The Criminal Procedure Code purports to be comprehensive, but
falls short of its target. It does not regulate the use of new
technology for analysing evidence which impinges on the bodily
integrity, dignity and privacy of suspects. It is submitted that
legislative safeguards need to be built into our criminal
procedure to protect individual interests while not unduly
impeding the police. Certain procedures deemed too invasive
should be prohibited, while others should be allowed if
performed by qualified persons under conditions respectful of
health risks, hygiene and privacy. The use of force should be
carefully regulated. Above all, to ensure that these new
safeguards are not mere window-dressing, the Evidence Act
should be amended to exclude evidence tainted by illegality
unless the exercise of judicial discretion to admit it does not
bring the administration of justice into disrepute.

The law inevitably lags behind current developments, but
through inaction we have given science too much of a headway.
This outdated area of the law requires urgent legislative
correction if it is not to be overwhelmed by new scientific
techniques. Given that individuals’ interests are at risk, it is
hoped that the wait will not be too long.

\textsuperscript{123} Cf Lawrie v Muir [1950] SLT 37 (HC of Justiciary, Scotland); Burning v
Cross (1977) 141 CLR 54 at 78–80 (HC, Australia); R v Cohen (1983) 5
CCC (3d) 156 (CA, British Columbia); Heydon, “Illegally Obtained
Evidence” [1973] Crim LR 603 at 608–10; LRC Australia, supra, n 55 at
142 para 298.