CHAPTER II

LAW RELATING TO ARREST

The legal structure within which the criminal process operates will be set out in this chapter. More specifically the law on arrest and the use of the summons will be considered.

Arrest and Summons

It is only in the case where a suspect is arrested without a warrant of arrest that questions of bail and custody arise for the Court's resolution. Where a suspect is summoned to attend at a court on a specified date, the question of bail or custody need not be considered. It is therefore quite evident that a suspect can either be arrested or compelled to appear in court to answer the charge alleged against him[35]. One difference that is often thought to result from the use of the summons as opposed to arrest, is that in the case of the former, the suspect remains at liberty until his guilt has been judicially determined and sentence passed.

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[35]While a warrant of arrest is directed to the Inspector General of Police and all other police officers to arrest the person named therein, a summons is directed to the accused to attend court on a certain date and time.

In comparison it is said that where a suspect is arrested he would be kept in confinement until his case has been disposed of. Strictly speaking, this is an inaccurate statement of the different consequences that may befall an accused according to whether he is arrested or summoned.

A suspect who is arrested is merely held in "ransom", which is to say, he can obtain his freedom if he is able to offer a surety/sureties and be permitted to do so. It can therefore be seen that contrary to belief, a suspect who is arrested need not necessarily spend the interval between arrest and the termination of proceedings in prison.

Arrest Under A Warrant

An arrest may be made either with or without a warrant. To attract the provisions of SS.387 - 388 (both inclusive), the arrest should be without warrant.

Where an arrest is made under a warrant, then the power of the police officer to release on bail under Chapter 38 of the Criminal Procedure Code (hereinafter referred to as the Code) would be controlled by the endorsement, if any, on the warrant. In such a case, the police officer executing it has to act in accordance with any directions as to bail that is endorsed on the warrant.

Under S. 39 of the Code, if there is such an endorsement relating to the taking of security, the police officer can release the suspect provided he can meet the requirement of sufficient sureties. But in the absence of such an endorsement, the police officer will be powerless to act.

An exception to the above rule can however be found in S. 43 (ii) of the Code. This section states the position when a warrant of arrest is executed outside the local limits of the jurisdiction of the issuing court. In such a case, the Magistrate of the nearest court before which the suspect is brought can direct his release on bail (whether or not there is such a direction in the warrant) if the offence is bailable and the person arrested is ready and willing to furnish bail.

Arrest Without A Warrant

The provisions as laid out in S. 23 of the Code will have to be complied with before a police officer can effect an arrest without a warrant. It must be emphasised that SAVE IN SO FAR AS the code authorises a police officer to arrest without a warrant, a police officer does not possess such powers.

S. 23 sets out the various circumstances under which a suspect may be detained without judicial authorization in the form of a warrant of arrest. The most

important powers of arrest are contained in S. 23 (i), which declares that a police officer may arrest, without a warrant, a person concerned in a seizable offence committed in Malaysia if a reasonable complaint has been made or credible information has been received or where reasonable suspicion exists[36].

Rights Of A Suspect Upon Arrest

Upon an arrest being made the provisions of Article 5 (4) of the Federal Constitution and S. 28 of the Code comes into effect. The relevant provisions of the respective statutes enjoin the production of an arrested person before a Magistrate within twenty-four (24) hours of the arrest (excluding any necessary journey). It might be noted however that this 24-hours rule is not permissive. It simply marks out the outer limits of the length of time that a person may be kept in police custody without sanction from a Magistrate. In this respect, it ought to be stressed

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[36] Reference may be made to the following cases which illustrate the scope and content of this section:

a) Shaaban & Ors. v Chong Fook Kam (1969)2 M.L.J. p. 219

b) Tan Kay Teck & Anor. v The Attorney-General (1947) M.L.J. p. 237

that the proper test is:

> "whether, in all the circumstances, the accused person has been brought before a justice of the peace within a reasonable time, it being always remembered that that time should be as short as is reasonably practicable."[37]

However, once Article 5 (4) and S. 28 of the Federal Constitution and the Code respectively, have been complied with, the possibility for a longer period of detention is recognised by the Code. This is implicit in S. 28 (ii) itself. The enabling provision of the Code is S. 117, under which a Magistrate may order the detention of a suspect for a term not exceeding fifteen days in the whole.

By providing for detention after the lapse of 24 hours, this section enables police investigations to go on. In ordering a detention under S. 117, a Magistrate is required by sub-section (iii) of that section to record his reasons for doing so.

The Summons

Instead of an arrest, a police officer may decide that a summons will serve just as well as an arrest. Generally, where a summons is required, the officer concerned would make a complaint under S. 133 (i) of the Code. It is

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[37] per Lord Porter in Lewis v Tims, (1952) A.C. p. 676 at p. 691-92.

Also see Article 5 (4) of the Federal Constitution which speaks of being produced before a Magistrate without unreasonable delay.

however clear from sub-section (ii) of S. 133 that the first mentioned section (S. 133 (i)) does not apply in the case of an offence falling under the 4th Column of Schedule A of the Code - that is, "offences for which a summons shall ordinarily issue in the firs instance."

The ramifications of S. 133 (2) is that sub-section (i) of S. 133 applies only to cases where a warrant is ordinarily issued. Or, put in another way, it means that in respect of summons cases[38], s 133 (2) does not apply.

Upon receipt of a complaint under S. 133 (i) of the Code, the complainant must appear before the Magistrate to be examined on oath. The Magistrate is obliged to reduce the substance of the examination to writing. It must then be signed by the Magistrate and the complainant.

Mallal at p. 182[39] states that "the accused person need not be present when the Magistrate examines the complaint." "The complaint," it is stated, "should contain the name and address of the person charged and the offence and act alleged, together with the time and place where it was committed."

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[38]S.2 of the Code clarifies that a "summons case means a case relating to an offence and not being a warrant case."

[39]Mallal's Criminal Procedure
4th Edn. (Singapore) M.L.J. 1957

In Appendix A and B is set out the various offences for which a summons was applied for under S. 133 (i) of the Code. In respect of offences under the Penal Code[40], the decision to summon or arrest seem to be dependent upon the gravity of the offence. One pertinent point is that most of the offences for which the summons is used belong to the category of so-called "statutory offences" It is very rare indeed that offences under the Penal Code are proceeded with by the use of a summons.

An analysis of the 343 summons cases heard by the Magistrates Court revealed that the summons were used in only 53 cases of offences under the Penal Code. This works out to only 15.5% of the total number of summons cases[41].

Over 79 per cent of the cases tried summarily in the subordinate Courts were offences under the Penal Code in which the accused had been arrested rather than summoned. In view of the data, it is submitted that where possible, police officers should be encouraged to use more frequently the summons for offences under the Penal Code. Its use should not be confined to "statutory offences" only. The

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[40]Penal Code (F.M.S. Cap. 45)

[41]These were cases of summons issued by the Police Authorities. Summons for traffic offences and summons issued by non-Police Authorities were likewise excluded.

process of arrest should be limited to those cases in which it is necessary to do so.

The summons should be used more liberally where it is compatible with the enforcement of the law. With advances being made in the forensic sciences and with the rapid development of more effective means to bring offenders to justice, it would have been thought that such advances would militate against the indiscriminate use of the power of arrest. That this is not so can be gathered from the study conducted by Friedland[42] in the Toronto Magistrates' Courts where it was found that of the 6,000 cases examined, slightly over 92 per cent of the accused persons were arrested.

Among some of the reasons that Friedland[43] puts forward in suggesting that the use of the summons should be extended are: "the harmful effects of custody pending trial are automatically eliminated." Also it is said "that personal considerations, such as loss of employment, decreased income and protection for the accused's family, and anxiety of relatives and friends," would be negatived if the summons were used more frequently.

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[42]Friedland loc cit p. 9

[43]ibid p. 16

Another reason for a wider use of the summons is the indignity of being physically taken away. This is implied when Mallal observes that:

> "as a warrant always implies personal arrest and restraint, it should not be issued where a summons is sufficient."[44]

Under S. 136 (ii) of the Code, Magistrates can in their discretion issue summons even for a case in which a warrant is ordinarily issued. This section should therefore be made use of more frequently so as to increase the extent of the use of the summons.

From a reading of the sections relating to the manner of application for a summons together with the form and service of the summons,[45] it is not difficult to see that from the stand-point of the police, the arrest process is more convenient. Perhaps, if the summons procedure can be simplified, the police would not feel too inhibited about resorting to the use of the summons in appropriate cases. A more extended use of the summons would undoubtedly minimise the disadvantages and adverse effects that would result from any period of pre-trial detention following an inability to find sureties of the required amount to qualify for bail.

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[44] op. cit. Mallal n.39 p. 66

[45] provisions relating to the form and service of the summons are contained in ss.34-37 of the Code.