



LAW REFORM COMMISSION

Discussion Paper

Law and Practice relating to Criminal Investigation, Arrest and Bail

[April 2008]

Port Louis, Republic of Mauritius

4th Floor, Cerné House

Tel: (230) 212-3816/212-4102

Fax: (230) 212-2132

E-Mail: lrc@mail.gov.mu

URL <http://lrc.gov.mu>

About the Commission

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (e) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission and taking the minutes of all the proceedings of the Commission.



LAW REFORM COMMISSION

Chairperson : Mr. Guy OLLIVRY, QC, GOSK

Chief Executive Officer : Mr. Pierre Rosario DOMINGUE

Secretary : Mrs. Saroj BUNDHUN

Members : Mr. Satyajit BOOLELL

Mr. Rashad DAUREEAWO

Mr. Pazhany RANGASAMY

Mr. Roland CONSTANTIN

Ms. Odile LIM TUNG

Ms. Juliette FRANÇOIS

**INDEX TO DISCUSSION PAPER ON LAW AND PRACTICE RELATING TO
CRIMINAL INVESTIGATION, ARREST AND BAIL**

| | | Pages |
|-------|--|--------------|
| I. | Introductory Note | 5 |
| II. | Legal and Ethical Background to Criminal Investigation | 5-14 |
| III. | Powers of Arrest – Cases and Conditions for Permissible Deprivation of Liberty | 14-27 |
| IV. | Rights of Arrested or Detained Persons – Treatment of Detainees | 27-51 |
| V. | Right to Liberty and Release on Bail | 52-69 |
| VI. | Prohibition against Departure of a Defendant or Detainee as a Permissible Restriction on the Right to Freedom of Movement | 69-71 |
| VII. | Search and Seizure in the Course of an Investigation as Permissible Restrictions on the Right to Privacy and Right to Enjoyment of Possessions | 71-76 |
| VIII. | Rights of Special Groups in relation to Criminal Investigation | 76-96 |
| IX. | Concluding Remarks | 96-99 |
| X. | Key Issues for Discussion | 100-103 |
| | Annex 1 – Bail Act | 104-111 |
| . | Annex 2- Judges’ Rules and Administrative Directions to the Police (March 1965) | 112-128 |

(I) Introductory Note

1. The Commission is reviewing the law and practice relating to criminal investigation, arrest and bail at the request of the Attorney-General¹, under section 6(1) of the Law Reform Commission Act 2005.
2. This paper highlights some of the issues, which stakeholders and interested parties may wish to discuss. The key issues are summarized in an Annex to this paper.

(II) Legal and Ethical Background to Criminal Investigation

3. The investigation of criminal offences is the first essential step in the administration of justice. It is the means by which those accused of a criminal offence may be brought before the courts. The purpose of investigating a criminal offence is to gather evidence, to identify the presumed author(s) of the offence, and to present evidence before a court so that guilt or innocence may be decided.
4. What will normally trigger a police enquiry into a suspected criminal offence will be a complaint made to the police². Police can, however, initiate action in relation to the suspected commission of an offence although no member of the public has made a

¹ Government had announced in its 2005-2010 Programme that it would review the laws and procedures relating to arrest and bail to ensure a better protection of the constitutional rights of suspects [at paragraph 251].

² A declaration is a recorded complaint made to the Police with a view to instituting Police action. Note that Standing Order 117 of Police Standing Orders deals with declarations and police enquiries. There is a duty on a police officer, when recording a complaint of wounds and blows, to note the apparent injuries sustained by the declarant. Standing Order 118 deals with disposal, classification and prosecution of cases, when an enquiry is complete.

declaration.³ Indeed, enquiring officers can ask any member of the public questions regarding the alleged commission of a criminal offence [Rule I of Judges’ Rules, reproduced as Annexure]. Citizens have a duty to help a police officer to discover and apprehend offenders.

5. During the course of an investigation, police may well exercise powers of arrest. These powers should be exercised only when necessary and when legal authority to do so exists. People suspected of committing an offence under investigation may be detained. When that is the case, such detainees must be treated humanely. It may be necessary to use force to arrest or detain a suspect. Force may be applied only when strictly necessary, and then only to the extent required to achieve the lawful purpose being pursued.
6. For the investigation of a criminal offence to comply with ethical principles, there must be respect for human dignity and human rights, and compliance with the law by investigators. Investigation of a criminal offence in a democratic society entails accountability and responsiveness of the investigators to the community. Investigation must be conducted with due regard to the principle of non-discrimination.
7. The framework for ethical and legal policing is provided by legal norms and standards, both international⁴ and domestic, as well as by administrative guidelines,

³ Paragraph 4 of Standing Order 117.

⁴These are laid down in instruments, such as the UN Code of Conduct for Law Enforcement Officials [Res 34/169 of 17 December 1979], the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment [Res 43/173 of 9 December 1988], the UN Rules for the Protection of Juveniles Deprived of their Liberty [Res 45/113 of 14 December 1990].

and instructions and advice issued to police officials on policing matters⁵. The two guiding principles for ethical police conduct are:

- respect for human dignity, for human rights;
- respect for the legal rule, the principle of legality.

Human rights standards are based on the notion of respect for the dignity and worth of the human person, and that principle is therefore one of the two guiding principles for ethical police conduct. It can be stated as follows: "Enforcing law and maintaining public order must always be compatible with respect for the human person." That basic principle of respect for human rights is offered as a guiding principle of ethical policing, for policing in a democracy must be based on the consent of the population. The starting point for gaining and maintaining that consent is police respect for human dignity.

The other guiding principle for ethical police conduct is the principle of legality. In a society where the rule of law prevails, police role is law-based. A denial of legal rights or an abuse of authority by police would be a distortion of that role. The exercise of police power requires respect for, and careful application of, the relevant rules.

8. The UN Code of Conduct for Law Enforcement Officials provides that "... like all agencies of the criminal justice system, every law enforcement agency should be representative of and responsive and accountable to the community as a whole".

This means that police, as well as other law enforcement agencies, must ensure that their ranks are sufficiently representative of the community they serve. This means enhanced career prospects for women in the police force. It also means that minority

⁵ Vide the Standing Orders of the Mauritius Police Force of the Mauritius Police Force and the Code of Ethics of the Mauritius Police Force.

groups must be adequately represented within police agencies, through fair and non-discriminatory recruitment policies, and through policies designed to enable members of those groups to develop their careers within the agencies.⁶

Police, as well as other law enforcement agencies, have to be aware of, and responsive to, public needs and expectations when preventing and detecting criminal offences.

Accountable policing is achieved through various means: first, the public accountability of police through democratic political processes⁷; secondly, judicial supervision of police activity⁸; thirdly, recourse to disciplinary proceedings.⁹

9. It is the responsibility of police and other law enforcement agencies to ensure there exists in their organization an organizational culture conducive to attitudes and behaviour for humane and law-based investigations. Investigations have to be conducted in an impartial and non-discriminatory manner. This means that all police and law enforcement officials should be familiar with the community they service, its ethnic, religious, cultural, and linguistic diversity. They should not condone ethnic, racial, or sexist stereotyping or slurs in the community, and in the police station. Command officials should sensitize their subordinates to the importance of

⁶ Office of UN High Commissioner for Human Rights, *Human Rights & Law Enforcement* (1997), at para. 217.

⁷ The Police Force is accountable to the public they serve through the democratic political institutions of government. Policies and practices of law enforcement can also come under public scrutiny through institutions such as independent Police Complaints Bureau to look into complaints against the police, Police Community Consultative Groups, etc.

⁸ As in any other democratic society where the rule of law prevails, the Police Force and any other laws enforcement agency is accountable to the law. Vide also the Judges' Rules, which are guidelines about the interrogation and the taking of statements by police.

⁹ Vide regulations made by the Disciplined Forces Service Commission: DFSC Regulations 1997 and the Code of Offences against Discipline.

harmonious ethnic, racial, religious, and gender relations. They should issue clear orders on appropriate attitude, language vis-à-vis various ethnic/racial and religious groups, towards women and other vulnerable groups. They should initiate disciplinary action for discriminatory, insensitive or otherwise inappropriate professional behaviour. Officers' initiatives supportive of better community relations should be rewarded.

10. Three fundamental principles are applicable to the investigative process:

- the presumption of innocence of suspects and accused persons;
- the entitlement to a fair trial of all accused persons;
- respect for the dignity, honour and privacy of all persons.

11. Section 10(2)(a) of the Constitution provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.

Two important points arise out of these provisions:

- Guilt or innocence can be determined only by a competent court, following a properly conducted trial at which the accused person has had all the guarantees necessary for his defence;
- The right to be presumed innocent until guilt is proved is fundamental to securing a fair trial.

All persons under investigation are to be treated as innocent people, whether they have been arrested or detained, or whether they remain at liberty during the investigation.

12. Section 10 of the Constitution guarantees that everyone is entitled in full equality to a fair and public hearing by an independent and impartial court, in the determination of any criminal charge against him. One would therefore expect that in order for a

person to receive a fair hearing of any charges against him or her, the entire investigation into the offences leading to those charges (the gathering of evidence and the interviewing of suspects) must be conducted in an ethical manner and in accordance with the legal rules governing investigations.¹⁰

Key Issue 1

Can there be a fair trial if there has not been a fair enquiry into alleged offence(s)?

Should a prosecution based on an unfair enquiry be regarded as amounting to an abuse of court process likely to bring the administration of justice into disrepute?

13. The minimum guarantees to secure a fair trial are as follows:

- Right to be informed promptly and in detail of the charge against him or her;¹¹
- Right to be tried without undue delay (within a reasonable time);¹²

¹⁰ In *Mamode v. R* (1991) MR 223, it was pointed out that the right to a fair trial guaranteed by section 10 of the Constitution implies fair and impartial inquiries by the police into the allegations of accused parties.

But note that in *R v. Amasimbi* (1991) SCJ 210, the trial judge was of the opinion that

"An unfair enquiry may be followed by an unfair trial and a fair enquiry may in its turn lead to an unfair trial.

The two notions are different and distinct and it would be a wrong proposition in law to say that there cannot be a fair trial without a fair enquiry. If this were to be otherwise, all cases of entrapment would not be brought to court or at least could not lead to a conviction."

¹¹ On arrest he or she must be informed as soon as reasonably practicable, in a language that he or she understands, of the reasons for his or her arrest [section 5(2) of the Constitution]; as soon as possible after arrest, he or she must be informed of the charges being brought: section 10(2)(b) of the Constitution.

¹² Section 10(1) of the Constitution: This right has to be reconciled with that of the accused to be afforded adequate time to prepare his defence, and to be represented by counsel of his own choice [section 10(2)(c) and (d) of the Constitution].

- Right to examine, or have examined, the witnesses against him or her¹³: The accused has the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

During the course of an investigation, police may encounter witnesses to the crime whose evidence do not support the case against the person under investigation. Where such evidence is sufficient to indicate that the person suspected of the crime was not, in fact, the author of the crime, that person would cease to be the subject of investigation.

Where such evidence, however, simply weakens the case against the suspected person without undermining it completely, sufficient evidence may still remain to justify charging the suspect and placing him or her on trial. When such is the case, the prosecution would be expected to make available to the accused person all materials, especially unused materials. Any witness who can give evidence which weakens the case against the accused person is, as a matter of fact, a "witness on his or her behalf", which should be made available to him or her under the same conditions as witnesses against him or her.

Key Issue 2

Should there be a statutory obligation on the prosecution to make available to the defence all materials, including unused materials, gathered in the course of investigation?

In order to ensure equality of arms between parties to proceedings, should the defence also be under a statutory obligation, after prosecution has disclosed materials in its possession, to disclose its case?

¹³ Section 10(2)(e) of the Constitution.

- Right to be free from compulsion to testify against himself or herself, or to confess guilt (Right to remain silent).¹⁴

 - Right to be free from any arbitrary interference with privacy: Searches of individuals, of their homes and other property, as well as interception of communications, must be strictly legal, and necessary for legitimate law enforcement purposes.¹⁵
14. Effective investigation, if it is to be based on respect for human dignity and on the principle of legality, depends largely on the availability and intelligent use of scientific and technical resources, and on basic policing skills on the part of the investigators. There exists a strong link between professional competence and the protection of human rights.

Scientific and technical resources include, for example, the means to examine the scene of a crime; items and matter discovered at that scene; other material which may have value as evidence.

Basic policing skills include, for example, the interviewing of witnesses and suspects; searching various locations such as open spaces, buildings and vehicles, and personal searches of individuals.

It is the responsibility of Government, in order to maintain an effective and humane policing system, to adequately equip the Police Force and to ensure police officials are sufficiently trained so as to be capable to carry out their tasks. Lack of technical skills or resources is no excuse for human rights violations.

¹⁴ Section 10(7) of the Constitution.

¹⁵ Section 8(1) and (4)(a)(vii) and section 9 of the Constitution.

Key Issue 3

What could be done in order to better achieve the desired goal of effective investigations?

Do we need to review the legal and regulatory framework in order to operate an effective national criminal intelligence strategy?

15. Information on crime and criminals given to police by confidential informants is extremely vital, and is sometimes the only means by which some criminals, in particular those involved in organized crime, can be brought to justice. The use of confidential informants by individual police investigators can significantly enhance the effectiveness of the investigator and his or her unit. There are, however, considerable dangers in this process. First, confidential informants are often criminals themselves, or closely associated with criminals. Secondly, information is usually traded for money or other favours. Thirdly, transactions between police officials and informants are, of necessity, conducted secretly. It may well happen that an informant may exploit the situation so that he or she can commit crime and avoid detection. An informant may also encourage others to commit crime in order to receive payment for providing information on that crime. A police official may cause an informant to encourage others to commit crime which the official can then detect for the purpose of showing enhanced effectiveness. Moreover, a police official may become corrupted through his or her dealings with a confidential informant. There is thus the need for any law enforcement agency to establish a system for the effective management of confidential informants. It is the responsibility of senior police officials to lay down clear procedures and guidelines to ensure that the benefits to be gained from the receipt of confidential information about crime and criminals be maximized.

Key Issue 4

What can be done in order to better reassure the community that recourse to confidential informants does not undermine ethical policing?

Are there adequate safeguards to ensure an investigator has, in the course of an enquiry, complied with legal and ethical standards? Is there a need for new safeguards? Should the existing safeguards be strengthened in order to make them more effective?

Should law enforcement officials be subjected to the obligation of having to disclose violations of legal and ethical standards to superior officers and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power in respect of alleged violations of human rights by such officials?

(III) Powers of Arrest - Cases and Conditions for Permissible Deprivation of Liberty

16. Article 9 UDHR [Universal Declaration of Human Rights] proclaims that no one shall be subjected to arbitrary arrest. Article 9(1) CCPR [the International Covenant on Civil and Political Rights] is to the effect that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
17. The term "arrest" is defined in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as "the act of apprehending a person for the alleged commission of an offence or by the action of an authority".
18. The purposes of an arrest are:
 - to prevent a person from committing, or continuing to commit, an unlawful act;

- to enable an investigation to be carried out in relation to an alleged unlawful act committed by the person arrested;
 - to present a person before a court for consideration of any charges against him or her.
19. Under our law, an arrest occurs when a police officer states that he is arresting or when he uses force to restrain the individual from moving anywhere beyond the arrestor's control. Section 9(3) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that an arrest shall be made by some actual touching or confining of the body.
20. When by words or conduct a police officer makes it clear that he will, if necessary, use force to prevent the individual from going where he wants to go, an arrest can be considered to have occurred. A person is thus deemed to be arrested not only when taken in custody, but whenever he is deprived of his freedom of action in any significant way.¹⁶
21. Any person requested by the police to accompany them to a police station will only be considered as having been arrested when the impression conveyed by the police to him is that he has no choice and is compelled to go to the police station.
22. It is important to know when an arrest has occurred because the right to personal liberty of the individual is guaranteed by section 5 of the constitution. According to section 5(1) of the Constitution, no person shall be deprived of his personal liberty save as may be authorized by law, inter alia, upon reasonable suspicion of his having committed, or being about to commit, a criminal offence [section 5(1)(e) of the Constitution]; upon reasonable suspicion of his being likely to commit breaches of the peace [section 5(1)(j) of the Constitution]; in execution of the order of the Commissioner of Police, upon reasonable

¹⁶ In *Alderson v. Booth* (1969) 2 QB 216, the Court held that an arrest is effected either by using a form of words that makes it clear to the arrestee that he is no longer free to come and go as he chooses, or by physically seizing or touching his person and telling him as soon as practicable thereafter that he is under arrest.

suspicion of his having engaged in, or being about to engage in, activities likely to cause a serious threat to public safety or public order [section 5(1)(k) of the Constitution].

23. A person arrested has recognized rights, as guaranteed by section 5(2) to (4) of the Constitution. Any person who is unlawfully arrested by any other person shall be entitled to compensation from that other person [section 5(5) of the Constitution]. It is a criminal offence to unlawfully arrest any person [vide sections 258 and 259 of the Criminal Code].

24. It is also important to know when an arrest has occurred, because of the requirements of the 1964 Judges Rules, framed by the Judges in England and adopted in Mauritius in 1965, which operate as a guide to police officers conducting investigation. Paragraph 3(b) of the Introductory Notes to the Judges Rules expressly lay down that police officers, otherwise than by arrest, cannot compel any person against his will to come or remain in any police station.

Cases and Conditions for Permissible Deprivation of Liberty

(1) The Empowering Provisions: Section 5(1) of the Constitution

25. Section 5(1) of the Constitution is to the effect that a person may only be deprived of his liberty if a law so permits on one of the grounds listed down.¹⁷
26. In *Victor v. State* (2000) SCJ 65, the Supreme Court held that it is section 5(1)(a) of the Constitution which permits the legislator to provide, as in section 94(3) and (4) of the District and Intermediate Courts (Criminal Jurisdiction) Act, that a person convicted of an offence may lawfully be remanded in custody pending the determination of his appeal.

¹⁷ Section 5(1) of the Constitution provides that a law may, inter alia, authorise that a person be deprived of his liberty

- (1) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether in Mauritius or elsewhere, in respect of a criminal offence of which he has been convicted [Section 5(1)(a) of the Constitution];
- (2) in execution of the order of a court punishing him for contempt of that court or of another court [Section 5(1)(b) of the Constitution];
- (3) for the purpose of bringing him before a court in execution of the order of a court [section 5(1)(d) of the Constitution];
- (4) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence [section 5(1)(e) of the Constitution];
- (5) upon reasonable suspicion of his being likely to commit breaches of the peace [section 5(1)(j) of the Constitution];
- (6) in execution of the order of the Commissioner of Police, upon reasonable suspicion of his having engaged in, or being about to engage in, activities likely to cause a serious threat to public safety or public order [section 5(1)(k) of the Constitution]. See also section 5(4) and (6) of the Constitution.

(2) Legislative provisions regarding Arrest

27. The legislature has provided, in accordance with section 5(1), the specific circumstances in which a person may be arrested.
28. The principle of individual liberty is one of the essential core principles from which all human rights flow. Deprivation of liberty is an extremely serious matter and can be justified only when it is both lawful and necessary. The three principles of liberty, legality and necessity underlie all the specific provisions on arrest.
29. Deprivation of liberty is subjected to judicial scrutiny. There are judicial safeguards against arbitrary interference with the liberty of the person.

Only in few instances has the legislature provided that a person may be arrested without the prior authorization of a magistrate. These are situations where the legislature has felt, in its wisdom, there is a compelling need to restrain liberty and it is not necessary to have the prior approval of a magistrate. In all other situations a warrant has to be issued by a magistrate before a person can be arrested and the circumstances so require.

Any person arrested must be brought without undue delay before a court of law, whose function is to ascertain - as guardian of the liberty of the individual - that the deprivation of liberty occurred in accordance with law.

Arrest by a Private Person

30. Section 16 of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that a private person who sees a crime¹⁸ committed or attempted to be committed or a dangerous wound given, may immediately, or on fresh pursuit made, without warrant, arrest the offender. This is an illustration of the principle, enshrined in paragraph 3(a) of the Introductory Notes to the Judges Rules, that citizens have a duty to help a police officer to discover and apprehend offenders.

31. By virtue of section 17 of the District and Intermediate Courts (Criminal Jurisdiction) Act, the owner of a property, or his servant or any person authorized by him, can arrest any person found stealing same. Section 18(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act is to the effect that any person to whom property is offered and who has any reasonable cause to suspect that same has been stolen or otherwise obtained unlawfully, he may arrest the party offering same.

¹⁸ Section 4 of the Criminal Code: Crimes

Crimes are offences punishable by –

- (a) penal servitude;
- (b) a fine exceeding 5,000 rupees.

Section 5 of the Criminal Code: Misdemeanours

(1) Misdemeanours are offences punishable by –

- (a) imprisonment for a term exceeding 10 days;
- (b) a fine exceeding 5,000 rupees.

(2) Where the punishment of imprisonment is imposed, the court may inflict that punishment with or without hard labour.

Section 6 of the Criminal Code: Contraventions

Contraventions are offences punishable by –

- (a) imprisonment for a term not exceeding 10 days;
- (b) a fine not exceeding 5,000 rupees.

Section 11 of the Criminal Code: Penal Servitude

(1) The punishment of penal servitude is imposed for life or for a minimum term of three years.

(2) Where in any enactment the punishment of penal servitude is imposed without a term being specified, the maximum term for which the punishment may be imposed is 30 years.

Section 12 of the Criminal Code: Imprisonment: Where in any enactment the punishment of imprisonment is provided for an offence without a term being specified, the term for which imprisonment may be

imposed may exceed 10 days but shall not exceed 5 years.

32. Section 20 of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that a private person who apprehends any other person without a warrant shall, prior to the arrest, notify to the party the cause for which he arrests, and shall require him to submit, except where the party is in the actual commission of any offence, or where fresh pursuit is made after any such party who, being disturbed, makes his escape. Section 21 of the Act is inter alia to the effect that a private person, who arrests another, shall deliver him within the hands of a police officer.
33. Section 30 (2) of the Criminal Code (Supplementary) Act provides that a private person may arrest a rogue and vagabond¹⁹ but shall forthwith deliver him to a police officer.

¹⁹ Section 28 of the Criminal Code (Supplementary) Act: Rogue and Vagabond

- (1) Every person shall be deemed a rogue and vagabond who –
- (a) has in his custody or possession any picklock, key, crow, jack, bit or other implement with intent to break into a dwelling-house, warehouse, store, shop, coach-house, stable or out-building or is armed with any gun, pistol, hanger, cutlass, bludgeon or other offensive weapon or has upon him any instrument with intent to commit any crime or misdemeanour;
 - (b) has in his custody or possession at night, any picklock, key, crow, jack, bit or other implement without giving a satisfactory account for such custody or possession;
 - (c) who is found in or on any private premises, vehicle or boat not belonging to him and without giving a satisfactory explanation for his presence there;
 - (d) being an idle and disorderly person is found carrying arms, or having in his possession any file, crow-bar or other implement adapted for committing a larceny or other crime or misdemeanour or for procuring the means of entering any house;
 - (e) frequents or loiters about or in any enclosed or private land or dwelling or place adjacent to a street, road or highway with intent to commit an offence;
 - (f) in a public place, makes use of obscene, indecent or offensive words or gestures whether or not such words or gestures are addressed to any other person.
- (2) Every person who is a rogue and vagabond shall be liable to a fine not exceeding 5,000 rupees and to imprisonment for a term not exceeding one year.

Arrest without Warrant by a Police Officer

34. According to section 9(1)(c) of the Police Act, it is the duty of the Police Force to take all lawful measures for apprehending persons who have committed, or who are reasonably suspected of having committed offences.

Our legislature has provided in what circumstances the police may arrest, without a warrant issued by a magistrate, persons reasonably suspected of having committed offences.

35. Whenever police officials effect an arrest they must ensure that there are legal grounds for the arrest and that it is effected in a professionally competent manner.
36. Section 22 of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that any police officer may arrest a party without warrant, in all cases where a private person may so arrest, and also on a reasonable charge made of a crime committed or of dangerous wounds inflicted by the party arrested.
37. A police officer may, by virtue of section 30(1) of the Criminal Code (Supplementary) Act arrest any person found to be an idle and disorderly person²⁰ or

²⁰ Section 26 of the Criminal Code (supplementary) Act: Idle and disorderly person

- (1) Every person shall be deemed an idle and disorderly person who –
- (a) being able to work is found wandering abroad or placing himself in any public place to beg or gather alms, or causing any child to do so;
- (b) being a common prostitute, is found wandering in any public place and behaving in a riotous or indecent manner;
- (c) pretends to deal in witchcraft, or pretends or professes to tell fortunes, or uses or pretends to use any subtile craft or device to deceive or impose on any person;
- (d) wanders abroad and lodges in any outhouse or shed or in any deserted or unoccupied building, or in any mill, sugar or other works, watchhouse, trash-house, or other buildings, or within any field, pasture or enclosure, not having any visible means of subsistence, and not giving a good account of himself and satisfactory explanation for his presence in any such place;
- (e) wilfully exposes to view in any public place, or wilfully causes to be exposed to public view in a window or other part of any shop or other building, situated in any public place, any obscene print, picture or other indecent exhibition;

a rogue and vagabond. There are also other specific provisions conferring on police officers the power to arrest without warrant, such as under section 13(2) of the Protection from Domestic Violence Act, section 41(3) Firearms Act 2006, section 133(3) and 134(1) of the Road Traffic Act.

38. Section 12 of the Police Act provides that a police officer may without warrant arrest any person who commits an offence within his view and whose name and address cannot be immediately ascertained; any person so arrested may be detained until his identity has been established.

39. By virtue of section 26 of the District and Intermediate Courts (Criminal Jurisdiction) Act, a police officer may apprehend any person who assaults him while he is in the execution of his duty.

40. Section 13F of the Police Act is to the effect that any police officer, who has reason to suspect that any person has committed or is about to commit an offence which will endanger public safety or public order, may arrest that person and use such force as may be necessary for that purpose.

-
- (f) wilfully and obscenely exposes his person in any public place;
 - (g) wanders abroad and endeavours by the exposure of wounds and deformities to obtain or gather alms;
 - (h) endeavours to procure charitable contributions of any kind under any false or fraudulent pretence;
 - (i) subject to the Gaming Act, plays or bets in any public place at or with any table or instrument of gaming, at any game or pretended game of chance.
- (2) No person shall be convicted of being an idle and disorderly person under subsection (1) (a) unless it is proved that he could by his own labour or other lawful means or from any funds provided for the relief of the poor, have been provided with the necessaries of life.
- (3) Every person who is an idle and disorderly person shall commit an offence and shall, on conviction, be liable to a fine not exceeding 5,000 rupees and to imprisonment for a term not exceeding one month, and where he is again convicted as an idle and disorderly person within 12 months of a conviction for any offence under this section or section 28, he shall commit an offence and shall, on conviction, be liable to a fine not exceeding 2,000 rupees and to imprisonment for a term not exceeding 3 months.

41. According to section 23(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act, any police officer, not below the rank of Assistant Superintendent, who has reasonable ground to suspect that any person has the intention of committing a breach of the peace against any particular person or against any person unknown, or is likely to commit any act which may lead to a breach of the peace or threaten public safety or public order, may cause that person to be arrested.

42. Section 25 of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that a police officer may without warrant between sunset and sunrise arrest any person whom he has just cause to suspect of having committed or of intending to commit a crime, or any idle or disorderly person whom he may find disturbing or being about to disturb the public peace, or lying or loitering in a public place or street, or any yard or other place, and not being able to give a satisfactory account of himself.

43. Any police, forest or customs officer may, by virtue of section 46 of the Dangerous Drugs Act, without warrant arrest any person who has committed or attempted to commit, or is reasonably suspected by such officer of having committed or attempted to commit an offence under that Act, where he has reasonable grounds for believing that person will abscond unless arrested or where the names and address of that person are unknown and cannot be ascertained.

44. In *Sheriff v. District Magistrate of Port Louis* (1989) MR 260, the Supreme Court held that a total neglect of the explanations that a suspect may have to offer may well lead to the conclusion that the suspicion leading to the arrest is not reasonable or based on just cause, and would therefore be in breach of section 5(1)(e) of the Constitution. A police officer who is making an arrest must take into consideration the totality of the circumstances including the explanations of the suspect and the motive of the declarant. Whatever suspicion the police may harbour against the suspect should be weighed against any factors, which tell in favour of the suspect.

45. More recently in *Dahoo v. State & Commissioner of Police* (2007) SCJ 156, the Supreme Court observed that an arrest may be unlawful, even if the arrest was within the powers of the police, if there has been an improper exercise of such powers.²¹ Regarding the alleged practice of the police in Mauritius to arrest as a matter of course when there is a power to arrest given under an enactment, the Court had this to say:

“We indeed feel it appropriate to draw to the attention of the police and of their legal advisers that even where there is a power to arrest, it must not be exercised as a matter of course: the discretion to arrest must be exercised in a reasonable manner.”

Arrest with Warrant by a Police Officer

46. In circumstances other than those expressly laid down by statute, the police may only apprehend a person reasonably suspected of having committed an offence after a warrant has been issued by a Magistrate.

²¹ The Court referred to *Holgate v Duke* (1984) 1 AC 437, where the House of Lords was called upon to decide an issue of wrongful arrest, by a detective constable, of a woman on suspicion that she had stolen jewellery. In that case, the arrest had been effected under section 2(4) of the Criminal Law Act 1967 which conferred a power on the police to arrest a person without a warrant upon reasonable cause to suspect that person to be guilty of an arrestable offence. The House of Lords held (as per the Judgment of *Lord Diplock*, with which the other Lords concurred) that

- (1) whether the constable had reasonable cause to suspect the woman to be guilty of the offence was a condition precedent for the exercise of the power to arrest, and was a question of fact for the Court to determine;
- (2) once that condition precedent had been fulfilled, the arrest could still be unlawful if, and only if, there was an unreasonable exercise of the power under the well known *Wednesbury* principles laid down by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223: those principles are applicable not only in applications for judicial review but also for the purpose of founding a cause of action for damages *in tort*;
- (3) in the case falling under their consideration, it had been established that the constable had reasonable cause to suspect the woman (the appellant), and the constable had been shown not to have unreasonably exercised the power inasmuch as he had arrested her for a purpose which was well established as one of the primary purposes of detention upon arrest: namely, for the purpose of using the period of detention to dispel or confirm his reasonable suspicion by questioning the suspect.

When can a warrant be issued by a Magistrate?

47. According to section 4(1)(a) of the District and Intermediate Courts (Criminal Jurisdiction) Act, where a charge or complaint is made on oath before a Magistrate that a person has committed or is suspected of having committed an offence punishable otherwise than by a fine, the Magistrate may issue a warrant to apprehend such person and to cause such person to be brought before him or any other Magistrate of the district to answer such charge or complaint and to be further dealt with according to law.
48. Section 4(1)(b), however, provides that in all such cases, he may, if he thinks fit, instead of issuing a warrant, issue a summons directed to the person charged to appear before him at a time and place specified.
49. When issuing a warrant to search for stolen goods suspected to be concealed in a dwelling house or other premises, the Magistrate may, by virtue of section 33 of the District and Intermediate Courts (Criminal Jurisdiction) Act, also direct the arrest of the occupier of the dwelling house or of the person having the goods in his custody.
50. Any warrant may be issued on public holidays as well as any other day [section 6 of the District and Intermediate Courts (Criminal Jurisdiction) Act] and for the apprehension of a person suspected of having committed an offence not only in his district but also in any other district [section 5 of the District and Intermediate Courts (Criminal Jurisdiction) Act].
51. According to section 7(2) of the District and Intermediate Courts (Criminal Jurisdiction) Act, the warrant should state shortly the offence on which it is founded and shall name or otherwise describe the offender. By virtue of section 7(3) of the Act, a warrant of arrest remains in force until it is executed.

How is a warrant of arrest to be executed by police?

52. Section 9(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that a warrant of arrest may be executed by any police officer in any district in which the party charged is found, and on any day or at any time of the day or night. According to section 9(2) of the Act, any police officer may require the assistance of every other person for the arrest of a person charged with a crime, the suppression of any affray or the arrest of the affrayers.
53. An officer executing a warrant need not exhibit the warrant unless required to do so by the party arrested [section 10 of the Act].
54. It is to be noted that, by virtue of section 12 of the District and Intermediate Courts (Criminal Jurisdiction) Act, any officer authorized by warrant to arrest any party charged with a crime or misdemeanour may open any door or window of a dwelling house in order to execute such warrant, if after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance.

Key Issue 5

Is the legal framework for arrest satisfactory?

Key Issue 6

Are there sufficient safeguards for ensuring that police and other law enforcement officials exercise their powers of arrest in accordance with law?

Are there sufficient safeguards for ensuring the power to arrest is exercised in a reasonable manner, based on evidence in support thereof?

Are there effective mechanisms of redress against arbitrary arrests or detention?

(IV) Rights of Arrested or Detained Persons – Treatment of Detainees

(A) Rights of Arrested or Detained Persons

55. There are safeguards in international instruments²², as well as in our Constitution, afforded to persons arrested or deprived of their liberty.

56. Deprivation of liberty involves both "arrest" and "detention". Arrest is the actual act of depriving a person of his or her liberty, and "detention" is deprivation of liberty following arrest. Both arrest and detention must be lawful and necessary. There are human provisions in various instruments prohibiting arbitrary arrest and detention. The provisions also set out procedures to be followed on arrest and detention. Besides, there are provisions designed to protect juveniles when arrested or detained, and giving a right to compensation to persons unlawfully arrested or detained.

²² Paragraphs 2 and 3 of Article 9 of the International Covenant on Civil and Political Rights [CCPR] lay down the procedures to be followed on arrest.

57. Four of the principles in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment refer to procedures to be followed on arrest. Principle 2 requires that arrests be carried out in accordance with the law and by competent officials or authorized persons. Principle 10 is to the effect that persons are to be informed, at the time of arrest, of the reason for their arrest; they are to be informed promptly of charges against them. According to principle 12, a record is to be made of the reason for arrest; the time of arrest, arrival at place of custody and first appearance before a judicial or other authority; the identity of law enforcement officials concerned; and precise information concerning place of custody. Principle 13 states that persons arrested are to be provided with information on, and an explanation of, their rights and how to avail themselves of them.

58. There are additional safeguards in the human rights instruments designed to secure supervision of the arrest process. Article 9(4) CCPR provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

Principle 37 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²³ states that "... a detained person shall, when brought before a judicial or other authority, have the right to make a statement on the treatment received by him while in custody".

It is the responsibility of Governments, in order to prevent extralegal, arbitrary and summary executions, to ensure strict control, including a clear chain of command,

²³ It provides inter alia that a person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest.

over all officials responsible for apprehension, arrest, detention, custody and imprisonment.²⁴

59. The procedural safeguards are guaranteed by section 5(2), (3) and (5) of our Constitution. The procedural guarantees provided in section 5(4) of the Constitution would only apply when there has been an exercise by the Commissioner of Police of his powers, as authorized by law under section 5(1)(k).

(1) Right of a person arrested or detained to be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention [Section 5(2) of the Constitution]

60. In *Gordon Gentil & ors v. State of Mauritius* (1995) MR 38, the Supreme Court considered that when the police arrest a suspect without a warrant (for example upon reasonable suspicion of his having committed an offence), the arrested person must be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest. But the Court went on to say that where that could be inferred from the circumstances of the arrest (from example 'en flagrant délit'), then it would not be necessary to inform the person. Similarly, a person who has been arrested cannot complain that he was not informed if he himself produces a situation which makes it practically impossible for the police to inform him.²⁵

²⁴ Principle 2 of the UN Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions.

²⁵ Note that the reason given need not be in precise technical language: *Abbassy v. Metropolitan Police Commissioner* (1990) 1 WLR 385

(2) Right of a person arrested or detained to be afforded reasonable facilities to consult a legal representative of his own choice and to be informed of the existence of this right [Section 5(3)(c) of the Constitution]

61. In *State v. Coowar* (1997) MR 123 [SCJ 193], the Full Bench of the Supreme Court held that a suspect has a constitutional right to be informed that he is entitled to have access to counsel; there is thus a duty on the police to inform a suspect of his right to consult a legal representative of his own choice. In *Wadud v. State* (1999) MR 270 [SCJ 187], however, the Full Bench of the Supreme Court approved what the Judicial Committee of the Privy Council had to say in *Mohamed (Allie) v. State* (The Times, Dec 10, 1998), that is that the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, was a somewhat lesser right and that therefore not every breach thereof would therefore result in a confession being excluded. The fact that there has been a breach of a constitutional right was a cogent factor militating in favour of the exclusion of the confession, but the judge has to perform a balancing exercise in the context of the circumstances of the case²⁶.

62. If it is established that an accused has deliberately been denied access to counsel by police during investigation, any confession obtained by police would most probably be held inadmissible by a court: *R v. Beegun* (1988) MR 212.

63. By virtue of section 5(7) of the Constitution²⁷, a law may authorize a police officer not below the rank of superintendent of police to direct that any person arrested upon

²⁶ The Judicial Committee observed that the judge had to weigh the interest of the community in securing relevant evidence bearing on the commission of serious crime so that justice could be done, with the interest of the individual who had been exposed to an illegal invasion of his rights.

²⁷ See section 5(7) and (8) of the Constitution (as amended by section 2 of Act No. 40 of 2000 and by section 2 of Act No. 4 of 2002).

reasonable suspicion of having committed any offence related to terrorism or any drug dealing offence be detained in police custody for a period not exceeding 36 hours from his arrest without having access to any person other than a police officer not below the rank of inspector or a Government Medical Officer. The legislature has enacted to that effect section 31 of the Dangerous Drugs Act No. 41 of 2000, and section 27 of the Prevention of Terrorism Act of 2002.²⁸

Key Issue 7

In order to better secure the rights of a person arrested, should a duty barrister scheme be put in place in all stations so that everyone arrested or detained who does not have the means to retain services of a legal representative of his own choice, is entitled to free legal advice and representation? If so, would free legal advice and representation be made available in respect of all offences or only the more serious ones?

²⁸ In the light of the Supreme Court in *Police v Khoiratty* [(2004) SCJ 138], confirmed on appeal to the Privy Council, the constitutional validity of such law can be questioned.

(3) Right of a person arrested or detained, to be brought without undue delay before a court of law

64. Section 5(3)(c) of the Constitution also provides that any person who is arrested or detained, and who is not released, shall be brought without undue delay before a court.

Challenging the legality of Arrest or Detention: The Writ of Habeas Corpus

65. The writ of *habeas corpus* is intended to be a procedure to secure the release, as a matter of urgency, of a person who is unlawfully detained. In *Kistoo v. Commissioner of Prisons* (1967) MR 1, the court considered *habeas corpus* as “a safeguard for the subject against illegal detention”. It is a safeguard in the sense that it is applicable when there are no other remedies available. It will also ensure that illegal detention is not tolerated.

66. The relevant statutory provisions in connection with the writ of *habeas corpus* are sections 188 to 190 of the Criminal Procedure Act:

188 *Complaint of illegal detention to Judge*

(1) *Where a Judge receives a complaint by or on behalf of a person to the effect that he is illegally committed or restrained of his liberty, he may order all persons whom it may concern to*

(a) *return to him any depositions and commitments;*

(b) *take and return any other evidence or matter necessary for the purpose of ascertaining the cause of such detention and imprisonment; or*

- (c) *issue a writ of habeas corpus directed generally to every gaoler, officer or any other person in whose custody the person committed or restrained may be.*
- (2) *The gaoler, officer or any other person shall, at the return of the writ upon due and convenient notice given to him -*
 - (a) *bring or cause to be brought the person committed or restrained before the Judge who issued the writ, in open court or in Chambers;*
 - (b) *certify the true cause of that person's detention or imprisonment,*
and the Judge or court shall proceed to examine and determine whether the cause of the commitment appearing on the return is just or not, and may thereupon release, bail out or remand that person.

189 Remand where arrest is irregular

Where the Judge finds from the depositions returned under section 188 that -

- (a) *the person claiming to be illegally committed or restrained has been illegally arrested;*
- (b) *his warrant of commitment is defective or informal;*
- (c) *there is reasonable ground for the offence charged against him, he shall not discharge but remand that person or bind him over by recognisance to answer the charge.*

190 *Flouting writ of habeas corpus*

- (1) *Where a person to whom a writ of habeas corpus is directed under this Act wilfully neglects to obey it, he shall commit a contempt of court.*
- (2) *The Court or the Judge may, upon proof made of wilful disobedience of the writ, issue a warrant to apprehend and bring before him any person wilfully disobeying the writ and commit him to prison until the writ is obeyed, and the Court or Judge shall forthwith proceed thereupon and inflict against such person a fine not exceeding 1,000 rupees.*

67. The normal procedure is to apply to the Judge in Chambers; an attorney drafts the application and a close relative of the person detained swears in the affidavit. The Judge will order the “person detaining” to appear at his Chambers with the “person detained”. However, a wrong procedure has been adopted in practice and has been tolerated by the Judges of the Supreme Court. In practice, a summons to show cause why a writ of *habeas*

corpus should not be issued is served on the “person detaining”. And the latter will appear before the Judge in Chambers without bringing the “person detained”. In *Togally v. Commissioner of Police* (1981) MR 230 (*Per* Glover J.), the proper procedure was explained: -

“An *ex parte* application is made (either by or) on behalf of a person who is illegally detained for an order directed to the “person detaining” to bring the detained before the Judge in Chambers for the purpose of ascertaining the cause of such detention and imprisonment.”

68. When hearing evidence of the circumstances of a detention on an application for *habeas corpus*, the Court must ascertain the legality of the detention. *Habeas corpus* is supposed to be used as a last recourse when no other effective remedy is available. Thus, if a person is complaining that he is being kept in custody for an unduly long time and is not being tried within a reasonable time, it would not be appropriate to apply for a writ of *habeas corpus* [*The State v. Annath & Mungroo* (1996) MR]. Such a complaint would be properly dealt with by an application under the Constitution for breach of the right to speedy trial as guaranteed by section 5(3) of the Constitution.
69. Similarly, if a person complains that the police is preventing his relatives from visiting him in the police cell, and of the fact that he is being detained with his hands tied behind his back, these questions cannot be canvassed in an application for *habeas corpus* because they are not complaints of illegal detention but rather illegal conditions of detention. On similar facts the Court in *Togally v. Commissioner of Police* (1981) MR 230 held that those points were irrelevant in an application for *habeas corpus*.

(4) Right of a person arrested or detained, upon reasonable suspicion of his having committed, or being about to commit a criminal offence, if not tried within a reasonable time, to be released either unconditionally or upon reasonable conditions, including, in particular, such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial [Section 5(3)(c) of the Constitution]

70. Courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions, pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and his family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences.

71. In *Noordally v. Attorney-General & anor* (1986) MR 204, the Supreme Court held that section 5 of the Constitution indicates that the suspect remaining at large is the rule; his detention on the ground of suspicion is the exception, and he must be tried

within a reasonable time or released. It is for the Court to determine what a reasonable time is.

72. In *Maloupe v. District Magistrate of Grand Port* (2000) SCJ 223, the view was taken that release on bail at pre-trial stage is the release upon conditions designed to ensure that the suspect (1) appears for trial, if he is eventually prosecuted; (2) in case he happens to be the author of the offence of which he is suspected, does no further harm to society whilst being at large; and (3) does not interfere with the course of justice, should he be so minded. The rationale of the law of bail at pre-trial stage is, accordingly, that a person should normally be released on bail if the imposition of the conditions reduces the risks referred to above - that is risk of absconding, risk to the administration of justice, risk to society - to such an extent that they become negligible having regard to the weight which the presumption of innocence should carry in the balance. When the imposition of the above conditions is considered to be unlikely to make any of the above risks negligible, then bail is to be refused.

73. In *Hurnam v State of Mauritius* (2005) [Appeal No. 53 of 2004], the Judicial Committee of the Privy Council considered the principles which should guide the courts of Mauritius in exercising their discretion to grant or withhold bail. Their Lordships had this to say:

“Sections 5(1) and (3) and section 10(2)(a) of the Constitution bear a very close resemblance to articles 5(1) and (3) and 6(2) of the European Convention on Human Rights ... The jurisprudence on the European Convention, which recognises that the right to personal liberty, although not absolute (*X v United Kingdom* (Application No 8097/77, unreported, E Comm HR)), is nonetheless a right that is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention (*Winterwerp v Netherlands* (1979) 2 EHRR 387, para 37; *Engel v Netherlands (No 1)* (1976) 1 EHRR 647, para 58; *Bozano v France* (1986) 9 EHRR 297, para 54). The European Court has clearly recognised five grounds for refusing bail (the risk of the defendant absconding; the risk of the defendant interfering with the course of justice; preventing crime; preserving public order; and the necessity of detention to protect the defendant): see Clayton and Tomlinson, *The Law of Human Rights* (2000), p 501, para 10.138; *Law Commission of England and Wales, Report on Bail and the Human Rights Act 1998* (Law Com No 269, 2001), para 2.29. But it has insisted that a person must be released unless the state can show that

there are “relevant and sufficient reasons” to justify his continued detention: *Wemhoff v Federal Republic of Germany* (1968) 1 EHRR 55. As put by the Law Commission in its *Report* just cited, para 2.28, “Detention will be found to be justified only if it was necessary in pursuit of a legitimate purpose (or ground)”. The European Court has, realistically, recognised that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending (see, for example, *Ilijkov v Bulgaria* (Application no 33977/96, 26 July 2001, unreported)), para 80, but has consistently insisted that the seriousness of the crime alleged and the severity of the sentence faced are not, without more, compelling grounds for inferring a risk of flight: *Neumeister v Austria (No. 1)* (1968) 1 EHRR 91, para 10; *Yagci and Sargin v Turkey* Series A No 319 (1995) 20 EHRR 505, para 52; *Muller v France* Reports of Judgments and Decisions 1997 – II, 374, para 43; *IA v France* Reports of Judgments and Decisions 1998 – VII, 2951, paras 105, 107. In *Ilijkov v Bulgaria*, above, para 81, the Court repeated

“that the gravity of the charges cannot by itself serve to justify long periods of detention on remand.”

It went on, para 84, to reiterate

“that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is *per se* incompatible with article 5(3) of the Convention ...”

74. Section 5(3A) of the Constitution provides that, notwithstanding subsection (3), where a person is arrested or detained for an offence related to terrorism or a drug offence, he shall not, in relation to such offences related to terrorism, or drug offences, as may be prescribed by an Act of Parliament, be admitted to bail until the final determination of the proceedings brought against him, where (i) he has already been convicted of a drug offence; or (ii) he is arrested or detained for a drug offence during the period that he has been released on bail after he has been charged with having committed a drug offence. Parliament has in this connection enacted section 32 of the Dangerous Drugs Act No. 41 of 2000, and section 3 of the Prevention of Terrorism (Denial of Bail) Act of 2002. In *Police v Khoyratty*²⁹, the view has been taken both by the Judicial Committee of the Privy Council and by the Supreme Court that section 32 of the DDA and section 5(3A) of the

²⁹ (2004) SCJ 138, PC Appeal No 59 of 2004.

Constitution, in so far as regards drug offences, are void since they infringe sections 1 and 47(3) of the Constitution.³⁰

Key Issue 8

Is it necessary for the State to derogate from fundamental rights, through measures such as denying a detainee access to counsel or declining bail, in order to fight crime and protect society?

(5) Right to compensation if unlawfully arrested or detained [Section 5(5) of the Constitution]

75. Article 9(5) CCPR requires victims of unlawful arrest or detention to be given an enforceable right to compensation. Thus section 5(5) of the Constitution provides that any person who is unlawfully arrested or detained by any other person shall be entitled to compensation from that other person.

³⁰ It is a fundamental proposition of our law that bail is a judicial matter so much so that even Parliament cannot by legislation seek to encroach on the power of the judiciary to deny bail to a defendant. Our case-law on this aligns itself with what obtains in developed jurisdictions in the matter: more specifically, the Strasbourg jurisprudence on the European Convention, the text of which is very much similar to Chapter 2 of our Constitution.

76. According to principle 35 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, damage incurred because of acts or omissions by a public official contrary to the rights contained in the Principles is to be compensated for according to the applicable rules on liability under domestic law.

77. In *Dahoo v State of Mauritius & Commissioner of Police* (2007) SCJ 156, the Court considered that in a civil action for ‘faute’, based on alleged unlawful arrest and detention, a decision as to whether the police had a power to arrest the plaintiff could only be reached following an explanation by the police as to the precise powers under which the arrest had been effected and the purpose of the arrest, whether preventative, punitive, protective or as a necessary measure for enquiries. The Court went on to say:

“Those facts are within the sole knowledge of the police and it follows that a plaintiff who alleges unlawful arrest and detention will establish a case for those responsible for his arrest to answer once he establishes that he has been arrested in circumstances which *per se* do not automatically justify an arrest. The burden then shifts to those responsible for his arrest to show that the arrest was lawful. Were it not so, little protection would be afforded to one of our most cherished constitutional rights.”

Key Issue 9

Should legal assistance be afforded to any person claiming compensation for arbitrary arrest and detention by officials and who does not have the means to retain the services of law practitioners?

(B) Treatment of Detainees

78. Persons are kept in police detention following the exercise of lawful powers of arrest by police, or following the decision of a magistrate that they may be detained by police. All persons deprived of their liberty are vulnerable to mistreatment. Some categories of detainee, such as children and women, are particularly vulnerable. Police conduct towards detainees should be humane, and in strict compliance with the law and guidelines governing treatment of persons in custody. This is particularly important when police are interviewing or interrogating persons suspected of committing a crime.
79. Standing Order 120 of the Mauritius Police Force lays down the procedure for dealing with prisoners and accused parties. The manners in which juvenile offenders and female prisoners are to be dealt with are laid down respectively in Standing Order 121 and 122.
80. Detainees benefit from specific forms of protection based on the following principles:
- No one shall be subjected to torture or ill-treatment;
 - All detainees are entitled to humane treatment and to respect for their inherent dignity;
 - All persons are to be presumed innocent until proved guilty according to law.

(1) Prohibition against Torture, Inhuman or Degrading Punishment or other such Treatment [Section 7 of the Constitution] – Humane Treatment of Detainees

81. Torture is understood as acts of public officials that intentionally inflict severe physical or mental pain or suffering in order to fulfill a certain purpose, such as the extortion of information or confessions or the punishment, intimidation or discrimination of a person.
82. Other actions or omissions are not considered to be torture but rather, depending on the kind, purpose and severity, inhuman or degrading treatment. In these cases, a minimum of pain or suffering is imposed, but one or several of the essential elements of torture are lacking: intent, fulfillment of a certain purpose and/or the intensity of severe pain.
83. If one person intentionally mistreats another person severely without thereby pursuing some purpose (for example, purely sadistically), then there is not torture but rather inhuman treatment. The imposition of severe pain for the sole reason of discrimination is, however, torture.
84. The delineation of torture from inhuman treatment according to the degree of the severity of suffering inflicted is not an easy one. Whether physical or mental pain can be termed 'severe' also depends on the victim's subjective feeling. This qualification can be made only in a given case by carefully balancing all circumstances, including the victim's subjective pain tolerance. For instance, in the *Northern Ireland case*, the European Court of Human Rights classified the five techniques used [hooding detainees (putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation); subjecting them to constant and intense noise; depriving them of sleep and sufficient food and drink; making them stand for long periods on their toes against a wall in a painful posture]

as amounting only to inhuman treatment, holding 'they did not constitute a practice of torture since they did not occasion suffering of the particular intensity and cruelty implied by the word 'torture'."

85. The view has been taken in a number of cases by the UN Human Rights Committee that suspects were tortured when they were subjected to the following practices during interrogations in the initial period of detention: systematic beatings; electroshocks; burns; repeated immersion in a mixture of blood, urine, vomit and excrement ('submarino'); insertion of bottles or barrels of automatic rifles into the suspect's anus and forcing him to remain standing, hooded, and hand cuffed with a piece of wood thrust into his mouth, for several nights and days; simulated executions or amputations, etc. In many cases these torture practices caused permanent damage to the health of the victims.
86. Inhuman treatment includes all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements. They also cover those practices imposing suffering that does not reach the necessary intensity. Thus the UN Human Rights Committee has as inhuman treatment the fact that someone is being forced under threat of punishment to stand blindfolded for 35 hours or to sit motionless on a mattress for several days. Should this permanently damage the victim's health, such practices may qualify as torture.
87. Particularly harsh conditions of detention may represent inhuman treatment. This applies, e.g. when a person is bound and blindfolded, detained in a truck garage, subjected to cold, forced to sleep on the ground and given little to eat. Also inhuman is detention in an overfilled cell illuminated constantly by artificial light and where during the rainy season water floods the room up to 10 cm high.
88. Degrading treatment would occur when the severity of the suffering imposed is of less importance. It consists in humiliation of the victim. Degrading treatment is

characterized by 'a gross disregard for the victim as a person that interferes with human dignity'.

89. A State party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT is under the obligation, by virtue of Article 2(1) of the Convention, to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Under Article 4 CAT, each State party is obliged to ensure that acts of torture are offences under its criminal law. The Convention includes provisions for bringing persons accused of torture to justice, regardless of their nationality and of where the crime is alleged to have been committed.
90. Section 78 of the Criminal Code has been enacted in 2003, with a view to give effect to Article 2(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, by introducing into our criminal law the offence of torture as contemplated in Article 1 of the Convention.
91. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) requires States:
- (a) to ensure that education and information regarding the prohibition against torture are included in the training of law enforcement personnel and other persons involved in the custody, interrogation or treatment of detainees (Article 10);
 - (b) to keep under systematic review interrogation rules, instructions methods and practices with a view to preventing torture (Article 11).
92. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:
- (a) it shall be prohibited to take undue advantage of the situation of a detained person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person (principle 21, para. 1);

- (b) no detained person while being interrogated is to be subject to violence, threats or methods of interrogation which impair his capacity of decision or judgment (principle 21, para. 2);
- (c) the duration of an interrogation of a detainee, and of the intervals between interrogations, and the identity of officials conducting interrogations and other persons present are to be recorded and certified in a form prescribed by law (principle 23, para. 1);
- (d) non-compliance with the principles in obtaining evidence is to be taken into account in determining the admissibility of such evidence against a detainee (principle 27);
- (e) a detainee suspected of or charged with a criminal offence is to be presumed innocent until proved guilty before a court (principle 36, para. 1).

93. The purpose of the standards relating to interviewing or interrogation is to secure humane treatment of detainees, to ensure respect for the inherent dignity of the human person, and also to prevent miscarriages of justice occurring (through detainees falsely confessing, as a result of torture or ill-treatment, to crimes they have not committed).

94. False confessions to crime in such circumstances are a real danger, because of the general vulnerability of detainees; the particular vulnerability of some detainees arising out of personal and psychological factors affecting their ability to make free decisions and rational judgments; the understandable tendency of persons being mistreated to take whatever action they consider necessary to avoid further mistreatment, including falsely confessing to crimes which they have not committed.

95. The purpose of interviewing or interrogating detainees is not to compel a person to confess, to incriminate himself, or to testify against any other person; nor is it to subject a person to treatment such that his capacity of decision or judgment is impaired.

96. The interviewer needs to approach his or her task with an open mind (that is not seeking to use the interview to reinforce preconceived ideas), and with the aim of fact-finding or information gathering (that is not solely for the purpose of securing a confession from the person being interviewed). The attitude of the interviewer should be conditioned by respect for the inherent dignity of the human person. It has been shown that people who have falsely confessed to crime have been able to give convincing accounts of their involvement because police officers conducting interviews have unwittingly conveyed sufficient information about the crime for those accounts to be constructed.

Key Issue 10

Would it enhance trust in the integrity of the investigation process if there were video recordings of police interviews of suspects? Which other measures could enhance confidence in police practices and procedures?

Key Issue 11

Deaths in police custody, whether from suicide, illness, or the effects of drinks or drugs, are always of considerable concern to the public. In the event of such a death occurring, which mechanisms could best reassure the public about police practice and procedures for dealing with vulnerable detainees?

Key Issue 12

To ensure greater transparency and professionalism in the conduct of criminal investigations, is it necessary to put in place a system of ‘juge d’instruction’?

(2) Right to Silence [Section 10(7) of the Constitution & Judges’ Rules]

97. In *Ramdeen v. R* (1985) MR 125, the Court held that the right of an accused to silence, whether from the beginning of his arrest at the enquiry stage or throughout the proceedings at the trial stage, is a fundamental principle of our criminal law. The Court considered that:

"This right is founded on the constitutional presumption of innocence. For this reason, an accused person is cautioned at the enquiry stage before he is questioned.³¹ For this reason as well, at the trial stage, he is reminded by the Court, if he is not represented by counsel, that it is his right to remain silent or else to make a statement from the dock or to depone, if he so wishes."

98. Section 15(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that an officer after the arrest of a person shall not offer him any inducement by threat, promise or otherwise to make any disclosure, but shall inform him of the cause of his arrest and leave him free to speak or keep silent.

³¹ Any person arrested must be cautioned in the manner laid down in the Judges Rules before being interrogated by police officers. The Judges Rules relate to interrogation and taking of statements by the police.

99. In *R v. Boyjoo* (1991) MR 284, the Court had this to say on the waiver of the constitutional right to silence:

“Whilst it cannot be denied that confessions play a major role in the enforcement of the criminal law, if given voluntarily, it is equally to be borne in mind that a confession is like no other evidence. A suspect’s “own confession is probably the most probative and damaging evidence that can be admitted against him, the most knowledgeable and unimpeachable source of information about his past conduct.” [*Bruton v. United States* 391 US 123 (1968)].

It is precisely because of this startling nature of a confession that we have it as a fundamental rule of our criminal justice system that the prosecution assume the burden of proving the guilt of an accused person. This principle of the presumption of innocence [section 10(2)(a) of our Constitution] by itself justifies the rule against self-incrimination embodied in section 10(7) of the Constitution and which provides that:-

No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”

The same principle is to be found in section 184 of the Courts Act. Section 184(1) makes an accused competent for himself but he cannot be compelled to give evidence: s. 184(2) (a).

This constitutional principle against self incrimination is not limited to cases where the accused is charged before a court of law. At the stage of the police enquiry, when he has been charged and before he is questioned, the accused must be told of his right of silence, leaving it to him to make the choice whether he wishes to waive the privilege or not. This particular point was formally recognized in the American case of *Miranda v. Arizona* 384 U.S. 436 (1966). The Fifth Amendment to the American Constitution declares: “No person shall be compelled in any criminal case to be a witness against himself.” Elaborating on this principle the United States Supreme had this to say:-

“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any state of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.”

The constitutional principle against self-incrimination itself contains no guidance or test as to how the rule must be given effect in practice. We therefore have to

refer to the numerous decisions of the Courts both here and in common law countries, which have for years interpreted provisions similar to those embodied in section 10(7). Alongside these different pronouncements Judges’ Rules provide a guideline on how the police should act in order not to flout a suspect’s right to silence ...

The rule against self-incrimination would be ineffective if this fact is not brought home to the accused. And bringing that fact to the accused enables him to make a choice about making a statement or not. This would be highly relevant for the purposes of the voluntariness test. Indeed failure to administer the caution may well be construed as a breach of the voluntariness test and will therefore offend against the principle of self-incrimination. This would result in the virtual exclusion of a confession on the ground that a constitutional provision would have been breached in the sense that the rule against self incrimination and the accompanying right to be cautioned are part and parcel of the fair trial requirement which is guaranteed to an accused under the Constitution. Confessions therefore must reflect the standard of fairness laid down in the Constitution.”

100. Professor Carlson Anyangwe [UNDP Consultant] in his 2006 report on ‘Situation Analysis of the Human Rights Landscape in Mauritius’ considered one of the incentives to police brutality appears to be the ease with which courts admit confessions and proceed to convict on them and had this to say (at p. 38):

“The number of confessions improperly obtained by the police and, inexorably the incidence of police brutality, would significantly reduce if courts become much more weary of confessions and develop a practice of requiring extraneous evidence to corroborate a confession even a confession that appears to have been properly obtained. In other words, the court should decline to convict solely on the evidence of a confession even if it is properly obtained. This practice may be modified only in certain exceptional and well-defined cases”

Key Issue 13

The rules governing the interrogation and interviewing of suspects are designed to prevent undue compulsion on suspects to confess guilt. Are the safeguards in our legal system adequate?

Should Courts decline to convict an accused where prosecution evidence is based solely on his confession? Should confessions be treated as admissible only when supported by other corroborative evidence?

101. In *Fullee v. R* (1992) MR 1 [SCJ 77], the Court observed that the Constitution, no doubt, confers on any accused the sacred right to remain silent but the Constitution does not forbid our Courts to draw, in appropriate cases, certain inferences from an accused’s silence when the circumstances are such that one would expect some form of explanation from him.

(3) Securing Rights during the Interviewing Process

The Judges’ Rules as Guidelines to be adhered to by Investigators

102. The Judges’ Rules [reproduced as Annexure] relate to interrogation and taking of statements by the police. The “Judges’ Rules” are a set of six rules. It is important to differentiate between the “administrative directions” contained in Appendix B and the rules contained in Appendix A to the letter conveying the Judges Rules to the Commissioner of Police. The “administrative directions” contained in Appendix B were made by the officers of the Secretary of State for Colonies whilst the rules contained in Appendix A were made by a Committee of Judges of the Queen’s Bench Division. The “administrative directions” and the “Judges’ Rules” can also be differentiated in respect of value and weight. A breach of the “Judges’ Rules” is more serious than a breach of the “administrative directions”.³²

103. The Judges’ Rules do not have the status of law; they are intended to be mere guides to the police officers. They have the status of a code of conduct to regulate police practices in the course of interrogations of suspects. In *Rosin v. R* (1954) MR 23 the Supreme Court held, following *R v. Voisin* (1918) 13 Cr App Rep 89 (CCA) that the Judges’ Rules do not have the force of law but are guidelines for police

³² Though the “Judges’ Rules” and the “administrative directions” are of relatively the same status, in a court of law a breach of the “Judges’ Rules” is considered as more serious than a breach of the “administrative directions”. However, a breach of the “Judges’ Rules” is not as serious as a breach of a statutory or constitutional provision.

authorities, that a statement obtained in contravention of the rules is admissible in evidence, provided it was voluntary.

104. The view has been taken for some time by one Judge of the Supreme Court that Judges Rules have attained constitutional status and breaches thereof would render evidence inadmissible.³³ It is now clear that such a view has been rejected in the light of the rule laid down in *Samserally v State* (1993) MR 94 that Judges' Rules are mere guidelines still holds good.

105. Some of the rules contained in Judges' Rules, however, relate to constitutional rights, such as the right to silence and the privilege against self-incrimination, the right to be informed of right to counsel. In such situations, the issue is not just one of a breach of Judges' Rules having occurred but rather of one of a constitutional right having been infringed.

Key Issue 14

Do Judges' Rules effectively secure rights of suspects during the course of an interview?
Should they be conferred the status of law?

³³ *R v. Boyjoo* (1991) MR 292; *State v. Pandiyan* (1993) MR 169; *State v. Dilmamode* (1995) MR 186.

(V) Right to Liberty and Release on Bail

The Decision to Release on Bail: A Risk Assessment Exercise

106. The Bail Act [reproduced as Annexure] reasserts in section 3 the right of every defendant or detainee to be released on bail. Release on bail, at pre-trial stage, is the release upon conditions designed to ensure that the suspect appears for his trial, if he is eventually prosecuted; in case he happens to be the author of the offence of which he is suspected, does no further harm to society whilst being at large; and does not interfere with the course of justice, should he be so minded.³⁴ The Act lays down the grounds on which bail may be refused: the risk of the defendant absconding; the risk of the defendant interfering with the course of justice; harm to society (preventing crime; preserving public order); and the necessity of detention to protect the defendant.³⁵ A person would be released if the risks involved can be minimized as to render them negligible. Bail would be refused when there are relevant and sufficient reasons to justify continued detention; the imposition of conditions would unlikely render the risks involved negligible.

³⁴ *Maloupe v District Magistrate of Grand Port* (2000) MR 264.

³⁵ Section 4(1)(a) of the Bail Act is to the effect that a Judge or a Magistrate may refuse to release a defendant or a detainee on bail where he is satisfied that there is reasonable ground for believing that the defendant or detainee, if released, is likely to-

- (i) fail to surrender to custody or to appear before a Court as and when required;
- (ii) commit an offence, other than an offence punishable only by a fine not exceeding 1,000 rupees;
- (iii) interfere with witnesses, tamper with evidence or otherwise obstruct the course of justice, in relation to him or to any other person.

Section 4(1)(b) of the Act also provides that a Judge or a Magistrate may refuse to release a defendant or a detainee on bail where he is satisfied that the defendant or detainee should be kept in custody -

- (i) for his own protection; or
- (ii) in the case of a minor, for his own welfare.

107. The Act spells out relevant considerations to be taken into account by a Magistrate or Judge when deciding on an application for bail, when assessing the risks involved. Section 4(2) thus provides that in making a determination as to whether or not a defendant or detainee is to be released, a Judge or Magistrate shall have regard to such considerations as appear to the Judge or Magistrate to be relevant, including -

- (a) the nature of the offence and the penalty applicable thereto;
- (b) the character and antecedents of the defendant or detainee³⁶;
- (c) the nature of the evidence available with regard to the offence.

108. Other considerations laid down in the Act are:

- (1) the defendant or detainee, having been released on bail, has (i) committed an act referred to in section 4(1)(a); or (ii) breached any other condition imposed on him for his release³⁷;
- (2) the defendant or detainee is charged or is likely to be charged with a serious offence³⁸;

³⁶ The mere fact that a person has a criminal record is not by itself sufficient to deny him bail. A person with a criminal record may be denied bail if having regard to his criminal record "his continued detention is necessary. It is incumbent on the prosecution to adduce evidence of facts showing that his continued detention is necessary having regard to his antecedents. For example, the suspect is charged with manslaughter and he has a history of violence: although a person with a criminal record might have been released, it could be argued that this particular person should not be released on bail because of the danger that he may commit other similar offences while on bail. But in a case of wounds and blows, the danger of committing such wounds and blows is a less serious danger so that the criminal record would weigh less heavily in the balance against refusing bail.

³⁷ Section 4(1)(c) of the Bail Act.

³⁸ Section 4(1)(d) of the Bail Act.

- (3) there is reasonable ground for believing that the defendant or detainee has given false or misleading information regarding his names or address³⁹;
- (4) there is reasonable ground for believing that the defendant or detainee has no fixed place of abode⁴⁰;
- (5) a detainee has failed to comply with section 12(2) of the Act, that is upon being released on parole in accordance with the provisions of section 12(1) of the Bail Act he has failed to surrender to the custody of the police, at the police station where he was detained, on the first working day after the weekend.⁴¹
109. In *Hurnam v State of Mauritius* (2005) [Appeal No. 53 of 2004], the Judicial Committee of the Privy Council clarified our law on bail. Their Lordships held that whilst the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending, the seriousness of the offence alleged and the severity of the sentence faced are not, without more, compelling grounds for inferring a risk; the gravity of the charges cannot by itself serve to justify long periods of detention on remand.
110. Section 4(2)(c) of the Bail Act 1999 provides that in deciding on the bail issue, the judge or magistrate shall have regard, among other relevant considerations, to

³⁹ Section 4(1)(e)(i) of the Bail Act.

⁴⁰ Section 4(1)(e)(ii) of the Bail Act.

⁴¹ Section 4(1)(f) of the Bail Act.

“the nature of the evidence available with regard to the offence”. The expression “nature of the evidence available” may have two meanings: it either implies that the Judge or Magistrate should look at the evidence itself; or it either implies that the Judge or Magistrate should look at the type of evidence. In *Maloupe v District Magistrate of Grand Port* (2000) MR 264, the Court had this to say:

“There is yet one further consideration which our courts have been prepared to weigh in the balance: if the evidence is, by its nature, unreliable, the presumption of innocence should weigh more heavily in the balance in favour of the applicant’s release on bail. Thus, in *Omarsaib v D.P.P.* (1994) SCJ 132, the court, in deciding to release on bail an applicant who was suspected of having acquiesced in the selling of one gram of heroin to one Choomka, took into account the “quality” of the evidence available to the prosecution, which consisted solely of the eventual testimony that could be given by Choomka, a self-confessed drug addict and accomplice, who had retracted his allegations against the applicant in a further statement to the police, and who had subsequently stated in court that he was forced to implicate the applicant.

We are accordingly of the view that situations like those in *Omarsaib (supra)* are the ones contemplated by the legislator in the Bail Act 1999 when referring to the “nature of the evidence available with regard to the offence” as a relevant consideration. What may be examined at the stage of an application for bail is the “nature” of the evidence, but this should not be a doorway for looking in detail at the evidence itself as opposed to the surrounding circumstances, which have a bearing upon its quality.

The Court went on to say that:

“It is not appropriate, in our view, for a magistrate, whilst considering an application for bail, to examine the precise evidence available to the police and to conclude as to whether it amounts to a *prima facie* case. This practice would unduly result in protracted hearings of bail applications and would be too convenient a device, for suspects to compel the police to reveal, even at a stage where the police have not completed their investigation, what is to be found in the police file. Witnesses in the course of the hearing of an application for bail should only be allowed to depone as to the “nature” i.e. the kind of evidence available (including external circumstances which have a bearing on its quality) and not as to the actual precise evidence of the police. Thus, in one case, for example, the police officer or counsel representing the interests of the police may wish to elicit from a police enquiring officer testimony to the effect that a

confession has been recorded from the accused or that eyewitness evidence is available, whilst in another case, counsel for the applicant may, by cross-examination, elicit testimony as to the existence of evidence showing that there is only one witness and that he would fall within the category of “accomplices”, whose evidence normally has to be viewed with caution. But, whilst surrounding facts relevant to the assessment of the “nature” of the evidence may be properly canvassed, it would be improper, for a court, on the occasion of a bail application, to receive testimony as to the details of the evidence available to the prosecution and to make an assessment of its sufficiency or weight.”

111. Section 4(3) of the Bail Act provides that where a request for the release on bail of a defendant or detainee is objected to, the Judge or Magistrate shall place on record the written reasons for his determination thereon.

112. When police resists bail, and the case comes for hearing, the prosecutor must ensure that there are good grounds for resisting such a motion. He should be in a position, on request from counsel for the defendant or detainee or on a motion to that effect made in Court, to provide particulars as regards the grounds put forward. He must call evidence to establish facts in support of the grounds given for resisting bail.

The Conditions for Release on Bail

113. Section 5 of the Bail Act provides as follows:

- (1) A defendant or detainee⁴² who is released on bail-

⁴² Section 2 of Bail Act is to the effect that "defendant" means a person who is under arrest and is charged before a Court with having committed an offence; "detainee" means a person who is under arrest upon reasonable suspicion of having committed an offence.

- (a) shall be released on his own recognizance to appear before a court for his trial, for any proceedings preliminary to trial or otherwise as he may be required to do;
 - (b) may, subject to subsection (2), be required to provide such number of sureties as the Judge or Magistrate deems necessary to guarantee his appearance in the manner specified in paragraph (a) and his compliance with any other condition imposed for his release on bail.
- (2) A defendant or detainee shall not be required to provide surety unless -
- (a) the charge or the arrest relates to a serious offence⁴³; or
 - (b) the Judge or Magistrate is satisfied that there is reasonable ground to believe that the defendant or detainee is likely to breach a condition of his recognizance.
- (3) Where a defendant or detainee refuses to enter into a recognizance or to provide surety, he shall be remanded in custody.
- (4) A recognizance shall be in the form set out in the Schedule to the Act.
- (5) No detainee or defendant shall, in respect of the provision of recognizance or security for his release on bail for –
- (a) an offence under section 34 of the Dangerous Drugs Act; or

⁴³ “Serious Offence” is defined in section of the Bail Act as
“(a) an offence punishable by penal servitude;
(b) an offence under any of the provisions of the Dangerous Drugs Act other than section 34”.

- (b) an offence punishable by any fine not exceeding 10,000 rupees or any term of imprisonment not exceeding 2 years or by such a fine and term of imprisonment, be liable to pay any sum under any enactment relating to court fees or costs.

114. Section 8 of the Bail Act lays down the qualifications of surety. Section 8(1) is to the effect that no person shall stand as a surety unless he is of age, swears an affidavit as to his means and is, in the opinion of the Magistrate, otherwise a suitable person. According to section 8 (2), in considering the suitability of a proposed surety, the Magistrate shall have regard to -

- (a) his financial resources;
- (b) his character and antecedents;
- (c) whether he appears, or is reputed, to be a professional surety;
- (d) his proximity to or relationship with the person for whom he is to be surety;
- (e) his readiness to comply with the obligations of a surety; and
- (f) his age and the state of his health.

A person may be examined on oath before he is accepted as a surety [section 8(3) of the Bail Act]

Section 21 of the Bail Act prevents sureties from entering in an insurance agreement with another person to be indemnified if the person on bail absconds.

In other words, by providing a special type of conspiracy in this respect, our law discourages the trade of “Professional Sureties”.

Section 9 of the Bail Act deals with the manner with which a surety may be discharged from his obligations as surety.⁴⁴

It is an offence for a surety to fail to take all reasonable steps to ensure that the person for whom he stood as surety –

- a. surrenders to custody;
- b. appears before a Court as and when required; or
- c. complies with any other condition imposed for his release on bail.⁴⁵

115. Section 6(1) of the Bail Act is to the effect that where, in relation to a serious offence, a Judge or Magistrate has reasonable grounds, whether by reason of the magnitude of the financial or other benefit arising from or related to the commission of an offence or otherwise, to believe that a defendant or detainee is likely to fail to surrender to custody or to appear before a Court as and when required, he may order that a recognizance shall be in such amount as he considers reasonable in the circumstances. According to section 6(2) of the Act, an order made under section 6(1) may, on good cause shown, be discharged or varied by a Judge or a Magistrate.

⁴⁴ Section 9 provides that no surety shall be discharged from his obligations unless he (a) brings and surrenders before the court the person for whom he stood surety; or (b) explains to the satisfaction of the Judge or Magistrate his inability to do so.

Where a surety is discharged, the Judge or Magistrate shall order that the person for whom he stood surety shall be arrested, and shall be remanded in custody unless (a) the Judge or Magistrate is satisfied that the discharge was not due to any act of the person arrested that would warrant his not being released on bail; and (b) the person arrested agrees to any condition which the Judge or Magistrate may think fit to impose for his release on bail.

⁴⁵ Section 22 (b) of the Bail Act.

116. Under section 7 of the Bail Act, a Judge or Magistrate may impose such other conditions of a general or specific nature as he thinks fit for the release on bail of a defendant or detainee, requiring him to do or not to do any act, and any recognizance shall apply to any such condition.
117. In *Islam v Senior District Magistrate of Grand Port & anor* (2006) SCJ 282, the Supreme Court made very pertinent observations about our monitoring mechanism in bail administration.

The Court had this to say:

“The only difference our present system makes between one arrested, say, for a driving offence and other more serious ones, lies in the strictness of conditions. Even then the strictness is more apparent than real. For example, a monetary condition of a million rupees to a drug trafficker may mean nothing to him or at most a calculated business risk. On the other hand, a thousand rupees imposed on a driver may mean a lot to him. Likewise, a condition that a drug suspect reports to the nearest police station twice a day is an illusory judicial exercise when for the rest of his 24 hours, he may be free to do all the mischief he is capable of to ‘prejudice the rights and freedoms of others or the public interest.’

That is the constitutional dilemma that our courts have had to grapple with daily when faced with the big question of to bail or not to bail. We have hardly moved from the crude beginnings of a bail system we imported. Our conventional system of bail administration is showing serious cracks unable to meet the new challenges of the age, the legitimate aspirations of a proper criminal justice system and the human rights standards inherent and developed by our constitutional provisions.

Well-advised jurisdictions have addressed the issues with advance research and planning. A modern bail law in a society is becoming more and more complex and impersonal demands modern methods of monitoring. Logistics have combined with organisational structure, tools have vied with technology and means complemented with method. Thus, with all the guarantees of a citizen who is deemed innocent until proved guilty under our Constitution, the new devised system has treated its citizen released on bail in such a way that he is not released as a hazard whether for himself or the public.

Each country has developed its own home-grown system proper to its demography, land mass and other socio-geographical factors. For example, a good many countries as early as the eighties adopted the electronic tagging system. A device which is placed on the person sends a signal to a transmitter in the offender’s home and relays it to a central control. Where appropriate, this system is coupled with other conditions imposed on suspects such as night-time curfew, for example, from 1900 to 0700, a ban on using mobile phones and the internet, obtaining permission from the authorities to meet anyone outside the home etc. etc.

The United Kingdom equally adopted the electronic tagging system, with noted success. If the beneficial effect on the tax-payer is anything to go by in such a case, the following comparison may help. The cost on the citizen of restricting a suspect’s freedom by keeping him on remand is 5 times higher than the cost of restricting him by electronic tagging.

Canada opts for reinforcing the surety system rather than imposing monetary conditions. Thus, its surety system is structured and organized in such a way that lines of responsibility and accountability have been built at every stage. The surety, for example, becomes so to speak the "jailer" of the accused as he or she must provide some measure of supervision over the accused's daily activities. He or she should maintain daily contact with the accused. He is responsible to ensure that the accused attends court as required until the case is over. He or she is also responsible to ensure that the accused abides by the conditions of his release, including any reporting, curfew and non-contact clauses.

There exist clear and transparent criteria of suitability before one may act as a surety and for those who can be or cannot take this responsibility. Because the surety is expected to supervise the accused, he or she should be someone who is able to do so. Relevant factors are how long he or she has known the accused, whether they are related, how frequently they see each other and how close they live to each other.

However, the more interesting feature of the Canadian system is its professionalized system for bail administration. A body of para-legal individuals may seek a license to deliver a professional surety service. This implies that the official surety must not only stand as the accused guarantor for his appearance before court whenever required but shall also require him to abide by the conditions imposed upon him at every stage, advising him as to his conduct and behaviour while the conditions last. Such organizations have their own code of professional conduct. That system has also incorporated only recently the electronic monitoring system as a form of community-based monitoring.

To name but a couple of other jurisdictions emerging in this area, Jamaica has recently joined the ranks of those adopting the electronic tagging system. It has brought in amendments to their Parole Act, the Bail Act, the Alien Act, the Correction Act, the Criminal Justice (Administrative) Act and the Child Care and Protection Act. It deters people from committing crime, keeps them away from certain areas or keeps them in the house. Similarly, Scotland, in an effort to crack

down on an epidemic of youth crime, is considering electronically tagging repeat offenders, possibly as young as eight years old.

In Mauritius, the monitoring mechanism in bail administration has remained old-fashioned. Our primitive tools and techniques are today the greatest obstacles to the promises of our law and to an enhanced promotion of the enshrined guarantees of our constitution. They may also arguably present a serious and real threat to security. The ill-served detainee may be paying for the short-comings of our present system by his inevitable detention and the citizen by a compromise of his other human rights.

Thus, somebody who is admitted to bail, who has been able to purchase – so to speak - his freedom by some monetary condition, walks out of the court-room, free from any type of effective control over his movements or his activities other than presumably reporting to the nearest police station twice a day. In between, where he goes, under whose influence he falls, with whom he associates himself to pursue what design is left to himself.

The gravity of our concern may be gauged when one realizes that in today’s world of globalisation, organized crime groups are, in many ways, profiting most from the opportunities the phenomenon offers. The harm that crime syndicates can do with local complicity demands a revolutionary approach, far removed from our traditional monitoring systems. To require a defendant to report twice a day to the nearest police station or to give a monetary security of whatever sum may have worked at one time in the distant past. There are other types of monitoring that is needed than the primitive ones if we do not want to “*move towards a world in which democracy and human security are undermined by these new threats.*” Effective law enforcement exacts effective monitoring methods.

Raising a human rights construct that satisfies the freedom for all, on an equal basis, under the rule of law demands a public confidence that human rights are not empty aspirations of a political system but the very basis for visible and tangible human achievement. The law-abiding citizen who for his part has not been arrested for any charge and is otherwise peaceably contributing to society is entitled to demand that his constitutional guarantees and his human rights are also ensured along with those of the suspects. That citizen – who has known better – but now lives in constant fear of being mugged, beaten, killed or raped along with the many whose near and dear ones have been actually mugged, beaten, raped or killed in a world growing awry may be excused for ranking courts and counsel with criminals when they hear all talks concerned with the protection of human rights of those arrested and but little of their own rights either as victims or law-abiding citizens. One would excuse them for considering that courts and counsel are out of phase with the day-to-day reality at the grass-roots. When the citizen lives his liberty of movement to walk freely, to enjoy equal protection of the law and to savour a decent life of dignity enshrined in his charter of liberties only in theory whereas he sees the person whom he perceives as a criminal living and abusing it in reality, he considers the justice system gone as wary as the society in which he lives. His confidence in the justice system is tested. And public confidence is the rock-bed of the justice system. In a recent

application before the Supreme Court, for example, the father, the uncle and an employee of a company connected with the deceased applied for judicial review of the decision of the Director of Public Prosecutions for releasing a couple of suspects on bail. The ground set out was, inter alia, that the release of the perpetrators who had engaged in killing a young man in an atrocious manner was “not in line with the sacrosanct principle of guaranteeing law and order and that the decision was unreasonable/untenable/creating a bad precedent.” see *Mir A.R. and Anor v The Director of Public Prosecutions* (2006) SCJ 192.

That is why we thought of sounding the alarm bell so that each component in the justice system is refreshed on its own responsibility in the matter. As has been stated:

“In democratic societies, fundamental human rights and freedoms are more than paper aspirations. ... and it is the special province of judges to ensure that the law’s undertakings are realized in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The Judges bear particular responsibility for ensuring that all branches of government – the legislature and the executive, as well as the judiciary itself – conform to the legal principles of a free society.” See the 6th Judicial Colloquium on Domestic Application of International Human Rights Norms, Bloemfontein, South Africa, 1993, Developing Human Rights Jurisprudence, Commonwealth Secretariat., Vol. 6.

Speaking for the administration of bail, it is only time that we became a little more imaginative in the use of tools and techniques befitting the new era in our endeavour to ensure that the rights and freedoms of any individual does not prejudice the rights and freedoms of others and the public interest.”

Key Issue 15

Are the conditions imposed under the Bail Act for release on bail satisfactory? Are they not too financial in nature? Should legislation be introduced with a view to modernizing the monitoring mechanism for bail administration?

Other Safeguards to Individual Liberty: Release on Parole

118. According to section 12(1) of the Bail Act where a detainee arrested in respect of an offence, other than a serious offence, is likely to spend Saturday and Sunday, or any part thereof, in custody before his first appearance before a Magistrate, he shall be released on parole unless a police officer not below the rank of Assistant Superintendent certifies in writing that he has reasonable ground for believing that the detainee, if released, is likely (i) to fail to surrender to the custody of the police, at the police station where he was detained, on the first working day after the weekend; (ii) or to commit another offence. A detainee who fails to surrender to the custody of the police, at the police station where he was detained, on the first working day after the weekend, may be arrested without a warrant.⁴⁶

Key Issue 16

Is the current framework for release of suspects during week-end satisfactory?

⁴⁶ Section 12(3) of the Bail Act.

Securing Compliance with Conditions of Bail - Sanctions for Breach of Conditions: Estreatment of Recognizance & Other Sanctions

119. When an accused fails to attend Court or surrender himself upon request, he is said to have ‘absconded’ or ‘jumped bail’. “Estreatment of recognizance” deals with a situation whereby steps are taken for the security furnished or the bail bond to be executed. Section 10 of the Bail Act, which deals with estreatment of recognizance, provides as follows:

10. Estreatment of recognizance

- (1) Where a recognizance referred to in section 6 has been taken for the appearance of a person and that person does not surrender to custody or appear before a Court as and when required, the Court shall order the recognizance to be estreated, unless the Court is satisfied that there are reasonable grounds explaining his failure to surrender to custody or to appear before Court in which case the Court may on the day of such failure or the following day, reinstate the recognizance if already estreated.
- (2) Where a recognizance has been estreated pursuant to subsection (1), the amount of the recognizance shall, even if it exceeds the jurisdiction of the court, be recoverable from the person who entered into the recognizance or from any surety in the same manner as if it were a fine lawfully imposed by the Court.
- (3) (a) The Attorney-General may, on good cause shown, remit in whole or in part the amount of an estreated recognizance.
- (c) Where the Attorney-General has received a petition for the remission of an estreated recognizance, he may require the Court to stay the recovery of any amount due thereon for a period which shall not exceed 3 months.

120. It is an offence, punishable on conviction by a fine not exceeding Rs 5,000 and imprisonment for a term not exceeding two years, for any person having been released on bail to (i) fail to surrender to custody or to appear before a court as and when required; (ii) commit an offence other than an offence punishable only by a fine not exceeding 1,000 rupees; (iii) interferes with a witness,

tampers with evidence or otherwise obstructs the course of justice, in relation to him or to any other person⁴⁷

Key Issue 17

Are the sanctions for breaches of conditions of bail adequate?

Procedural Facilities: The Bail and Remand Court

121. The Bail and Remand Court is established under section 18(1) of the Bail Act, which provides that it shall be a court of record and have an official seal. According to section 19 of the Bail Act, the question whether a defendant or a detainee shall be released on bail or remanded in custody shall, except where the question arises in the course of proceedings before another court or it is otherwise impractical to do so, lie within the exclusive jurisdiction of the Bail and Remand Court. Section 55 of District and Intermediate Courts (Criminal Jurisdiction) Act thus provides that a District magistrate may at any time pending a preliminary inquiry discharge the accused and permit him to remain at large, on his entering into a recognizance with or without sureties for such sum as the Magistrate shall fix.
122. By virtue of section 20 of the Bail Act, a defendant or detainee, who is in custody, may be ordered to appear before the Bail and Remand Court through such live video

⁴⁷ Section 22(a) of the Bail Act.

or live television link system as may be approved in writing for the purpose of any proceedings by the Chief Justice in relation to an application for his release on bail or an extension of his remand in custody. The Court may determine (a) who may or may not be present at the place where the defendant or the detainee is appearing; (b) who, in the Courtroom, shall or shall not be able to be heard, or seen and heard, by the defendant or the detainee; (c) who, in the Courtroom, shall or shall not be able to hear, or to see and hear, the defendant or the detainee.

Procedural Safeguards: Challenge of the decision of the Magistrate to release the defendant or detainee

123. According to section 4(4)(a) of the Bail Act, where a Magistrate has ordered the release on bail of a defendant or a detainee notwithstanding an objection by the Commissioner of Police or the Director of Public Prosecutions, the Commissioner of Police or the Director of Public Prosecutions, as the case may be, may, within 7 days of the determination of the Magistrate, apply to the Supreme Court for an order setting aside the decision of the Magistrate to release the defendant or detainee.
124. Section 4(4)(b) of the Bail Act provides that where, immediately after ordering the release of the defendant or detainee, the Magistrate is notified by the Director of Public Prosecutions that an application under section 4(4)(a) is being made and that a stay of execution is required, the Magistrate shall stay execution of the order and remand the defendant or detainee until the Supreme Court determines the application.

125. Section 4(5) of the Bail Act is to the effect that pending the determination of an application made under subsection (4)(a), the Supreme Court may, where the defendant or detainee has been released on bail and no stay of execution has been sought under subsection (4)(b), on motion made by the Director of Public Prosecutions, order that the decision of the Magistrate be stayed and that the defendant be apprehended and remanded in custody.
126. By virtue of section 4(6) of the Bail Act, a defendant or a detainee whose release on bail is refused shall be remanded in custody for a period not exceeding 21 days, after which the defendant or detainee shall be brought again before the Court. Section 4(7) of the Act however provides that where a defendant or detainee has been remanded by the Magistrate under section 4(4)(b) and the Commissioner of Police or the Director of Public Prosecutions fails to apply to the Supreme Court within 7 days as provided in section 4(4)(a), the defendant shall forthwith be brought before the Magistrate who shall thereupon release him on bail as originally ordered by him.

Key Issue 18

Does our legal system provide sufficient safeguards against unduly prolonged pre-trial detention?

Key Issue 19

Should the law determine in what circumstances a person charged should be released unconditionally?

(VI) Prohibition against Departure of a Defendant or Detainee as a Permissible Restriction on the Right to Freedom of Movement

127. According to section 13(1) of the Bail Act, where a police officer not below the rank of Assistant Superintendent certifies in writing that a defendant or a detainee should be prevented from leaving Mauritius, he may require the Immigration Officer to prohibit the departure of that person, and the Immigration Officer shall take all necessary steps to comply with the request. This is an interim restriction on departure, which unless otherwise ordered by a Judge or a Magistrate, lapses 72 hours after it has been notified to the defendant or detainee.⁴⁸

⁴⁸ Section 13(2) of the Bail Act.

128. Section 14(1) of the Bail Act is to the effect that a Judge or a Magistrate may, upon application made by the Commissioner of Police and being satisfied that an order should be made preventing defendant or detainee from leaving Mauritius, make an order to that effect. Such an order shall (a) remain in force until the disposal of the charge against the defendant or detainee; (b) be inserted in the record of the court before which the defendant is charged or the detainee is brought.⁴⁹
129. The person against whom an order has been made under section 14 may apply to the court before which his case is pending for a variation of the order. The court may vary the order if it is satisfied it is necessary to do so [to avoid loss or prejudice to the applicant; to avoid damage or loss to the applicant's property; because of the health of the applicant or his next of kin; or in such other cases as the Court thinks fit.] On an application, the Court may, on being satisfied that there are sufficient reasons for so doing, allow the applicant multiple departures from, and returns to, the country within a period it may specify. It may impose such terms and conditions as it thinks fit.
130. The above provisions fall within the permissible restrictions on the right to freedom of movement, as guaranteed by section 15 of the Constitution.⁵⁰ Section 15(3)(c) of the Constitution provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of

⁴⁹ Section 14(2) of the Bail Act. Note that section 14(3) of the Act provides that the clerk of the court shall immediately after an order is made under the section, inform the Immigration Officer in writing.

⁵⁰ According to section 15(1) of the Constitution, no person shall be deprived of his freedom of movement - this freedom means the right to move freely throughout Mauritius, the right to reside in any part of Mauritius, the right to enter Mauritius, the right to leave Mauritius and immunity from expulsion from Mauritius.

this section to the extent that the law in question makes provision for the imposition of restrictions, by order of a court, on the movement or residence within Mauritius of any person either in consequence of his having been found guilty of a criminal offence under the law of Mauritius or for the purpose of ensuring that he appears before a court at a later date for trial in respect of such a criminal offence or for proceedings preliminary to trial, except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society. In *Dookhy v. Passport and Immigration Officer* (1987) MR 75 (applicant under police enquiry), it was observed that if the action of the police objecting to departure, while permissible by law, was shown not to be reasonably justifiable in a democratic society or an abusive or unreasonable use of their power, the court could order alternative measures. The view was taken in *Mattarooa v. Chief Passport and Immigration Officer & anor* (1998) MR 131 [SCJ 451] that where no restriction has been imposed, any refusal by the Passport Officer to grant applicant his passport would be in contravention of section 15(1) of the Constitution.

(VII) Search and Seizure in the Course of an Investigation as Permissible Restrictions on the Right to Privacy and Right to Enjoyment of Possessions

131. In the course of an investigation police officers may have to search persons or premises and, if need be, seize incriminating materials, which can be produced as exhibit in court proceedings. Police may also have to carry out covert activities. In addition, it may have to take intimate samples from a suspect. Such activities will constitute an interference with the right to privacy and the right to protection against deprivation of property, as guaranteed by sections 8 and 9 of the Constitution, and must be carried out within the permissible limits.

Lawful Restrictions on the Right to Privacy

132. Section 9(1) of the Constitution, which affords protection for privacy of home and other property, provides inter alia that, except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises. Section 9(2)(a), however, is to the effect that a law shall contravene this section where it may make provision for the search of any person or property or entry on premises in the interests of defence, public safety, public order, public morality, except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.
133. According to section 30(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act, a Magistrate may, upon sufficient grounds for suspecting that goods charged in any information as having been stolen are concealed or are supposed to be concealed in any dwelling house or other premises, grant a warrant to search for same. The search warrant must specify the goods, which are the object of search, and the dwelling house or other premises where they are concealed or suspected to be concealed [section 33 of the Act]. Such warrant shall be, however, limited to a search in the daytime [section 30(2)(a) of the Act]. But in case of great emergency, and where the information is positive, and not on suspicion only, the warrant may be executed at any time. Where it appears, as a result of the execution of a search warrant, that the goods found were stolen, they shall be seized so that the offender may be prosecuted [section 35(2) of the Act].
134. Section 39(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that a Magistrate may authorize in writing premises to be searched for stolen goods where (a) they are, or within the preceding 12 months have been, in the occupation of any person who has been convicted of having been in possession of

- stolen property, or of receiving stolen property, or of harbouring thieves, or (b) are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty. It is not necessary for the Magistrate, on giving such authority, to specify any particular property; it is sufficient for him, on giving such authority, to have reason to believe generally that such premises are being made a receptacle for stolen goods [section 39(2) of the Act]. Any police officer authorized by a magistrate under section 39 of the Act may enter any house, shop, warehouse, yard, or other premises, in search of stolen property, and search for and seize and secure any property he believes to have been stolen.
135. Section 36 of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that where a credible witness proves, on oath before a Magistrate, reasonable cause to suspect that any person has in his possession any property which has been obtained by means of a crime or misdemeanour or any arm or instrument used in the commission of a crime or misdemeanour, the Magistrate may grant a warrant to search for such property, arm or instrument.
136. According to section 44 of the Dangerous Drugs Act, where a Magistrate is satisfied by information on oath that there is reasonable ground for suspecting that an offence has been or may be committed against this Act, he may grant a search warrant authorizing any police officer named in the warrant, at any time, within one month from the date of the warrant, to enter, if need be by force, the premises named in the warrant and to search them and any person found there and, if there is reasonable ground for suspecting that an offence against this Act has been committed, to seize any drug, pipe, utensil, article or thing found on the premises or in the possession of any such person.

137. Under section 14(1)(a) of the Police Act, where in a case of urgency communication with a Magistrate would cause delay that would defeat the ends of justice, any police officer, not below the rank of Assistant Superintendent of Police, may, on sworn information that a person has unlawfully in his possession any dangerous drugs, any property obtained by means of an offence, or any article used or likely to be used in the commission of an offence, issue a warrant to search for the dangerous drugs, property or article.
138. Section 50(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that a Magistrate may cause to be made any examination of the person of the accused as circumstances may require. Section 14(1)(b) of the Police Act is to the effect that where, in a case of urgency, communication with a Magistrate would cause delay that would defeat the ends of justice, a police officer, not below the rank of Assistant Superintendent, may call upon a Government medical officer, or other medical practitioner, to make such examination of the person of an alleged offender as the circumstances of the case may require.

Key Issue 20

Are there sufficient legal safeguards against arbitrary interference with privacy during a criminal investigation?

Should the law provide in what circumstances a person shall be presumed not to have consented to the search of his person or his property or the entry by others on his premises?

Lawful Restrictions on the Right to Enjoyment of Possessions

139. Section 8(1) of the Constitution provides that no property of any description shall be compulsorily taken possession of. Section 8(4)(a)(vii) lays down that a law may make provision for the taking of possession of property for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry, except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.
140. Section 15(2) of Police Act is to the effect that where it appears an article was obtained by means of an offence or used in the commission of an offence, the article shall, on the prosecution of the alleged offender, be produced to the court and shall be dealt with as the court may direct. Section 15(1) of that Act lays down that the article should be restored to the person from whom it was taken if it is found that it was not obtained by means of an offence or used in the commission of an offence.
141. In *Tangaree v. Government of Mauritius* [1991] MR 203, it was pointed that police action to seize and detain an article must be shown to be lawful.

One can add that the legality of the taking possession thereof will much depend on the necessity for its production in court. If the police can produce secondary evidence of an article seized, there would be no need for it to retain same as an exhibit. Were it to be otherwise an aggrieved person would be entitled to claim that he is being dispossessed of the enjoyment of his property in a manner inconsistent

with the requirements of democratic necessity, as laid down in section 8(4)(a)(vii) of the Constitution.

Key Issue 21

Would it be appropriate to review the framework for the handling of exhibits so as not to interfere unjustifiably with the right to enjoyment of property of suspects?

(VIII) Rights of Special Groups in relation to Criminal Investigation

(A) Victims of Crime and Abuse of Power

142. The predicament of victims of crime and of abuse of power has been a matter of considerable concern at national, regional and international levels. The UN General Assembly adopted in 1985 the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'.⁵¹ The most effective way to assist victims is to prevent criminal activity and abuse of power, so that victimization, and revictimization, is minimized. Responsibility for prevention rests upon the State, for

⁵¹ Adopted by General Assembly Resolution 40/34 of 29 November 1985.

the safety and security of citizens is a prime function of government. The role of the police in preventing victimization and in assisting victims is critical. Police depend on cooperation from victims to obtain information on which successful investigations can be based. Two principles are fundamental to securing protection and redress for victims. First, victims are entitled to be treated with compassion and with respect for their human dignity. Secondly, victims are entitled to prompt redress for the harm they have suffered.

Victims of Crime

143. Paragraph 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines 'victims of crime' as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power".

Paragraph 2 states that a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted, and regardless of the family relationship between the perpetrator and the victim. The term 'victim' may include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Police officials could thus, in certain circumstances, be treated as victims of crime.

144. According to paragraph 4 of the Declaration, victims are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation,

for the harm that they have suffered.⁵² Judicial and administrative mechanisms have to be established and strengthened where necessary to enable victims to obtain redress through formal and informal procedures.⁵³ These procedures are required to be expeditious, fair, inexpensive and accessible. The judicial and administrative processes should be responsive to the needs and expectations of victims.⁵⁴ Victims should receive the necessary material, medical, psychological and social assistance through inter alia governmental means.⁵⁵ They should be informed of the available health and social services, and other relevant assistance, and be afforded access to them.⁵⁶ Attention is required to be given to victims who have special needs because of the nature of the harm inflicted or because of other factors which may disadvantage them in some way.⁵⁷

Victims should be treated with compassion and respect for their dignity.

145. It is crucial that investigators pay attention to the welfare of victims. This may be done by advising the victims as to the help they may receive from appropriate

⁵² Paragraphs 3 & 4 of the Declaration taken together are to the effect that victims are entitled to be treated with compassion and respect for their dignity, without distinction on any of the usual grounds, such as race, colour, sex, age, and ethnic, or social origin.

⁵³ Paragraph 5 of the Declaration.

⁵⁴ According to paragraph 6 of the Declaration, the responsiveness of the criminal justice system would be facilitated by: (i) informing victims of their role in proceedings, of the scope, timing and progress of the proceedings, and of the disposition of their cases; (ii) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused; (iii) providing proper assistance to victims throughout the legal process; (iv) minimizing inconvenience to victims, protecting their privacy, and ensuring their safety, as well as that of their families and witnesses on their behalf; (v) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

⁵⁵ Paragraph 14 of the Declaration.

⁵⁶ Paragraph 15 of the Declaration.

⁵⁷ Paragraph 17 of the Declaration.

- welfare bodies. The investigators should inform the victims of their role, the scope, timing and progress of the proceedings and of the disposition of their cases. They should take measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.
146. Paragraph 8 of the Declaration is to the effect that, where appropriate, restitution should be made to victims, their families or dependants by offenders or third parties responsible for their behaviour. This includes such measures as return of property or payment for harm or loss suffered.⁵⁸ Property seized by police should be returned to victims at the earliest possible opportunity. The necessity of retaining the property as evidence should be considered specifically in each case by police.
147. Paragraph 11 of the Declaration provides that where public officials or agents acting in an official or quasi-official capacity have violated criminal laws, victims should receive restitution from the State, whose officials or agents were responsible for the harm.
148. Paragraph 12 of the Declaration requires States to endeavour to provide financial compensation to victims who have sustained significant injury as a result of serious crimes, when compensation is not fully available from the offender or other sources. When persons have died or become incapacitated as a result of such victimization,

⁵⁸ When restitution is ordered in cases involving substantial harm to the environment, it should include such measures as restoration of the environment, reconstruction of the infrastructure and replacement of community facilities (Article 10 of the Declaration).

their families or dependants should be compensated financially. States should establish a Compensation Fund for victims.⁵⁹

149. Professor Carlson Anyangwe in his report on ‘Situation Analysis of the Human Rights Landscape in Mauritius’ in the context of the “Formulation and Implementation of a National Human Rights Strategy for Mauritius” (July 2006) considered one important measure that warrants introduction into the impending judicial reforms relates to the issue of victimology. It is apposite to quote what he had to say:

“The judiciary should be required always to take account of the interests of the victim when dealing with criminal cases. These interests are basically two, protection where need be and compensation (including restitution) for loss or injury suffered as a result of the crime for which the accused has been found guilty. This may involve the introduction of a variant of the French system of ‘*constitution de partie civile*’. It may also mean that in certain cases an *ex gratia* payment may have to be made to the victim especially where the evidence points ineluctably to fault on the part of law enforcement officials but a prosecution is deemed inexpedient or a conviction not secured.”

Victims of Abuse of Power

150. Paragraph 18 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines ‘victims of abuse of power’ as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental

⁵⁹ Paragraph 13 of the Declaration.

rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights".

151. States are required by article 19 of the Declaration to consider incorporating into national law norms proscribing abuses of power and providing remedies to victims of such abuses. Such remedies are to include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

Key Issue 22

Studies have shown elsewhere that a proportion of the crime actually committed is not reported to the police. This had led the authorities in UK to conduct crime surveys in order to grasp the criminal phenomenon better, in lieu of relying solely on criminal justice and security statistics. According to you, what is the situation in Mauritius? What could be, according to you, the reasons for such a situation?

Do you consider the current legal and administrative mechanisms sufficiently protect victims of crime from abuse and intimidation as a result of their involvement in criminal proceedings?

Key Issue 23

Should there be a mechanism which would provide the opportunity for victims to have stolen property returned to them before any case against suspects is concluded?

Key Issue 24

Do you consider a variant of the French system of ‘*constitution de partie civile*’ could be introduced in our legal system in order to better protect victims?

(B) Children

152. Apart from benefiting from the protection afforded by general human rights instruments, juveniles are protected by specific standards which take into account their special status and needs.⁶⁰ The international community, through the UN, acknowledges the importance of: (i) protecting juveniles against abuse, neglect and

⁶⁰ Various instruments have been adopted by the UN General Assembly: UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) [Resolution 40/33 of 29 November 1985]; UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) [Resolution 45/112 of 14 December 1990]; UN Rules for the Protection of Juveniles Deprived of their Liberty [Resolution 45/113 of 14 December 1990]

exploitation; (ii) protecting the well-being of all juveniles who come into conflict with the law; (iii) taking special measures to prevent delinquency by juveniles.

It is considered that labeling a young person a 'delinquent' or criminal' often contributes to the development of a consistent pattern of antisocial and undesirable behaviour by that young person. The international community has thus recognized that the diversion of juveniles from the criminal justice system is fundamental to the human rights and the protection of juveniles, and is also fundamental to the prevention of juvenile delinquency.

UN Convention on the rights of the Child (CRC)

153. Article 37(a) of the Convention on the Rights of the Child (CRC) protects the child from torture and other cruel, inhuman or degrading treatment or punishment, and from capital punishment and life imprisonment.

Article 37(b) CRC lays down that "no child shall be deprived of his or her liberty unlawfully or arbitrarily". It further states that "the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

Article 37(c) CRC requires children deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person. They are to be treated in a manner which takes into account the needs of persons of their age; they are to be kept separate from adults; and they have the right to maintain contact with their family.

Article 37(d) CRC provides that where a child is deprived of his or her liberty, he or she shall have the right to prompt access to legal assistance and the right to challenge the legality of detention.

154. Article 40(1) CRC recognizes the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

155. The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) are meant, inter alia, to promote the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with juveniles in conflict with the law.⁶¹ The rights of juvenile offenders are specifically referred to in rule 7, which lays down the basic procedural safeguards; the juvenile's right to privacy is afforded special protection.⁶²

⁶¹ A juvenile is defined as "a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult".

⁶² Rule 8 requires the juvenile's right to privacy to be respected at all stages of the proceedings in order to avoid harm being caused to him or her by undue publicity or by the process of labeling. In principle, no information that may lead to the identification of a juvenile offender may be published.

The juvenile justice should ensure, according to rule 5, that any reaction to juvenile offenders is always in proportion to the circumstances of both the offenders and the offence.⁶³ Scope for discretion should exist at all stages of proceedings and at the different levels of juvenile justice administration, including investigation and prosecution, so that those who make determinations can take the action deemed to be most appropriate in each individual case.⁶⁴

156. As regards investigation and prosecution, the Beijing Rules provide inter alia that:
- (i) upon the apprehension of a juvenile, his or her parents or guardians are to be notified immediately (rule 10⁶⁵);
 - (ii) a judge or other competent official or body to consider, without delay, the issue of release (rule 10);
 - (iii) contacts between law enforcement officials and juvenile offenders to be managed in such a way as to respect the legal status of the juvenile and avoid harm to him or her, with due regard to the circumstances of the case (rule 10);
 - (iv) consideration should be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial (rule 11);

⁶³ The question of proportionality of the reaction to juvenile offenders is expanded on in the commentary to rule 5, which states:

"...The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (eg social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reaction (eg by having regard to the offender's endeavour to indemnify the victim or to his or her willingness to turn to a wholesome and useful life".

⁶⁴ Rule 6.

⁶⁵ The commentary to rule 10 states that involvement in juvenile justice processes in itself can be 'harmful' to juveniles. It points out that this is especially important in the initial contact with law enforcement agencies, which might profoundly influence a juvenile's attitude towards the State and society. The commentary emphasizes that compassion and kind firmness are important in those situations.

- (v) it is important for police officials who frequently or exclusively deal with juveniles, or who are primarily engaged in the prevention of juvenile crime, to be specially instructed and trained so that they act in an informed and appropriate manner (rule 12);
- (vi) detention pending trial should be used only as a measure of last resort and for the shortest possible period of time and, if detained, they should be kept separate from adults (rule 13).

UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)

157. The Riyadh Guidelines assert that the prevention of juvenile delinquency is an essential part of crime prevention in society, the well-being of young persons from their early childhood should be the focus of any prevention program. To that end it is considered that the policies and measures adopted should, inter alia, consider that youthful conduct not conforming to overall social norms is often part of the maturation process and tends to disappear spontaneously with the transition to adulthood; that the labeling of a young person as 'deviant' or 'delinquent' often contribute to the development of a consistent pattern of undesirable behaviour by that person.

UN Rules for the Protection of Juveniles deprived of their Liberty

158. This instrument applies to all types and forms of detention facilities in which juveniles are deprived of their liberty. Though detention of juveniles by police is usually of short duration and for reasons connected with the immediate protection of the juvenile or the investigation of crime, there are a number of principles and provisions in that instrument which are of interest to law enforcement officials, or which have greater relevance to the treatment of juveniles detained by police.

The juvenile-justice system should uphold the rights and safety, and promote the physical and mental well-being of juveniles. It is considered in the instrument that the deprivation of liberty of juveniles should be effected in conditions and circumstances which ensure respect for their human rights. The instrument also stresses that the deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. When juveniles are detained under arrest or awaiting trial, courts and investigative bodies should give the highest priority to the most expeditious processing of such cases to ensure the shortest possible period of detention.

UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)⁶⁶

159. The Tokyo Rules are based on the notion that alternatives to imprisonment can be an effective means of treating offenders within the community, to the best advantage of both the offenders and society. While the rules are applicable to both adult and juvenile offenders, it is particularly important that they be considered in relation to juvenile offenders. They emphasize that criminal action against a child, and penalizing him or her, for some forms of delinquent behaviour should be avoided; wherever possible, juveniles should be diverted from criminal-justice processing and redirected to community support services; juveniles deprived of their liberty are highly vulnerable to abuse, victimization and violation of their rights.

Legislative and other Measures giving effect to Rights of Children coming into conflict with the law

160. Section 8 of the Juvenile offenders Act provides that the Commissioner of Police shall make arrangements for preventing a juvenile while detained in a police station, or while being conveyed to and from any criminal court, or while waiting before or after attendance in any criminal court, from associating with an adult (other than a relative), who is charged with any offence other than an offence with which the juvenile is jointly charged, or of which he has been jointly convicted,

⁶⁶ UN General Assembly Resolution 45/110 of 14 December 1990.

and for ensuring that a girl, being a juvenile, while so detained, being conveyed or waiting, is under the care of a woman.

Section 9(1) of the Act is to the effect that where a person apparently under the age of 18 is apprehended with or without warrant and cannot be brought forthwith before a Court, the police officer in charge of the station to which that person is brought shall inquire into the case, and may release him on a recognisance being entered into by him, or his parent or guardian, (with or without sureties), for such an amount as will, in the opinion of the officer, secure his attendance upon the hearing of the charge, and shall release him save in exceptional circumstances.

According to section 9(3) of the Act, where any person apparently below the age of 18 is apprehended, the police officer in charge of the station to which that person is brought shall, immediately, take all reasonable steps to inform his parent or guardian of his apprehension and the place where he may be seen by the parent or guardian. No statement shall be recorded from an apprehended person below the age of 18 outside the presence of his parent or guardian unless the parent or guardian cannot be contacted within a reasonable time or the parent or guardian, after being contacted, fails to call at the police station where the statement is to be recorded within a reasonable time fixed by the police officer in charge of the station.⁶⁷

Section 13(2) of the Act provides that where a juvenile is arrested, the police officer by whom he is arrested, or the officer in charge of the police station to which he is brought, as the case may be, shall cause the parent or guardian of the juvenile where he can be found, to be warned to attend at the court before which the juvenile will appear.

⁶⁷ Section 9(4) of the Juvenile Offenders Act.

161. The administrative directions to Police on interrogation and the taking of statements states that as far as practicable, children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child. A child or a young person should not be arrested, nor even interviewed, at school if such action can possibly be avoided. Where it is found essential to conduct the interview at school, this should be done only with the consent, and in the presence, of the head teacher, or his nominee.

Key Issue 25

Does the criminal justice system adequately safeguard the rights of juvenile offenders apprehended by police officers?

(C)Women

162. Police officials are required to carry out all their duties in accordance with the principle of non-discrimination; they are required to prevent and deal with the consequences of, victimization; and, in their dealings with women, they are required to ensure that the special status of women is respected and their special needs met. If they meet all these requirements, they will prevent, or remedy in some way, particular wrongs or injuries; they will sensitize the wider community to the issues involved; and they will, in some circumstances, prevent much greater harms or tragedies occurring.

Law enforcement agencies are predominantly male numerically and culturally. It is important therefore that police officials should be sensitized to the human rights of women in the process of law enforcement. The central issues regarding women are "discrimination"⁶⁸ and "violence"⁶⁹. These are closely connected with the issue of women as victims in certain situations, and with that of the special status and needs of women, in others.

Women as Victims of Domestic Violence

163. Violence against women by their male partners is a serious violation of their rights. When it occurs, it means that a State has failed to protect the right to security of the person, and possibly even the right to life, in respect of a person or persons within its jurisdiction. It is through policing that States are able to secure these two fundamental rights, and it is for this

⁶⁸ Vide the UN Declaration on the Elimination of Discrimination against Women and CEDAW.

⁶⁹ Vide the UN Declaration on the Elimination of Violence against Women (G.A. Res. 48/104 of 20 December 1993).

reason that the question of domestic violence is an important aspect of the human rights dimension of law enforcement.

The term "domestic violence" generally means physical or mental assault of women by their male partners; it includes also repeated verbal abuse and deprivation of resources. Although domestic violence has been for a very long time a hidden problem, it is known to occur in families from every social class and it crosses all cultural boundaries. The effects of domestic violence include death, physical injury, psychological problems, and hazards to other members of the family, especially children. While individual causes, such as abuse of alcohol, can be identified, it appears that the social, political and economic dependence of women on men provides the structure whereby men can perpetrate violence against women. The origins of such violence can be found in the social structure, and in cultural habits and beliefs - those concerning male superiority, for example.

164. The police response to domestic violence is a technical policing matter, which requires special approaches and policies. This is so not only because of its harmful effects and complex causes, but also because domestic violence is an offence which takes place within the family between people emotionally and financially involved with each other. The UN Centre for Social Development and Humanitarian Affairs has identified strategies for confronting more effectively domestic violence.⁷⁰ When domestic violence is dealt with through the criminal justice system, the policies adopted for law enforcement should reflect the unique nature of domestic crime, providing support for the victim and for her dependants. They should also take into account the cultural, economic and political realities of the country.⁷¹
165. A number of requirements have to be met for law enforcement policies to be effective: (i) the specialized training for the police officials dealing with the phenomenon, including the establishment of special units; (ii) the development of victim-oriented crisis-intervention techniques and practices to improve the level of service offered to victims (these would include a family consultation service providing 24-hour crisis intervention, emergency

⁷⁰ UN Centre for Social development. *Strategies for Confronting Domestic Violence: a Resource Manual* (1993).

⁷¹ UN Centre for Social development. *Strategies for Confronting Domestic Violence: a Resource Manual* (1993).

- shelters for women and children, and advisory clinics to provide emotional counseling for women); (iii) the effective investigation of crimes arising out of incidents of domestic violence; (iv) the provision of treatment for men who abuse and assault (in addition to criminal prosecution). These requirements depend on a multi-agency approach, as domestic violence is a complex problem requiring the efforts of people from different professional backgrounds, and from the community in general.⁷²
166. Recourse to the criminal justice system generally involves two distinct procedures. Perpetrators may be either charged with criminal offences disclosed by the investigation and supported by evidence⁷³; or be dealt with under legislation which provides for a court order protecting the victim against further abuse or attacks⁷⁴.

Women as Victims of rape and other sexual offences

167. Sexual abuse of women, in all its forms, is a serious violation of their rights and a crime of the gravest kind. When it happens, it means the State has failed to protect the right to security of person and the right to privacy of the individual. Because rape and other sexual attacks are criminal offences, it is the responsibility of police to ensure that they are effective in both the prevention and the detection of such crimes, and that their response to victims is humane and professionally competent.
- Prevention requires the development of effective prevention strategies, both generally and in response to situations in which there is a heightened risk of victimization because of a particular offence or series of offences which have not been detected. General prevention

⁷² Those who generally become involved include educators, personnel from religious organizations, social workers, health personnel, members of women's groups, and people working in shelters and refuges for victims of domestic violence. Cooperation between police and these people or groups is essential in order to avoid duplication of effort, and to ensure that the essential functions of one organization or group are not subverted by the actions of another.

⁷³ Vide in the Criminal Code 'Offences Against the Persons of Individual'.

⁷⁴ Vide the Protection from Domestic Violence Act.

- strategies require police, for example, to give advice to women on how to avoid becoming victims of sexual attacks, to provide heightened security in high-risk areas, and includes the surveillance of suspects. Prevention activities when there is a heightened risk of victimization include giving more specific advice on avoidance, and intelligent deployment of manpower and other resources - both based on an understanding and assessment of the specific risk.
168. Detection requires the application of the necessary expertise for the interviewing of victims and suspects, the gathering and preserving of forensic evidence. The police should provide a sympathetic environment for carrying out interviews and medical examination of victims.

Women detainees

169. The special status of women is acknowledged and protected by two types of provision: one requiring women detainees to be accommodated separately from men, and the other on the question of discrimination.

Rule 8 of the UN Standard Minimum Rules for the Treatment of Prisoners require women and men prisoners to be kept, as far as possible, in separate institutions. While, generally, the provision of separate institutions and premises for women detained in police custody is neither necessary nor feasible, the principle that they should be accommodated separately from men must be complied with.

170. While principle 5 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment lays down that the principles are to be applied without distinction of any kind, such as sex, it provides that measures

applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, shall not be deemed discriminatory.

The rules requiring women police officials to supervise women detainees, searches of detainees to be carried out by persons of the same sex as the detainee, should be strictly complied with.

Key Issue 26

Are the rights of women, their special status and special needs, adequately safeguarded in the course of criminal investigations?

(D) Other Groups requiring Special Protection or Treatment

171. Other groups deserve special protection or treatment on the part of the police force, such as refugees and displaced persons⁷⁵, persons who are not nationals of the country in which they live (migrant workers)⁷⁶, the elderly and disabled persons.

⁷⁵ Mauritius is unfortunately not a party to the Convention relating to the Status of Refugees (United Nations, *Treaty Series*, vol. 189, p. 137); the Protocol relating to the Status of Refugees (United Nations, *Treaty Series*, vol. 606, p. 267); the Convention relating to the Status of Stateless Persons (United Nations, *Treaty Series*, vol. 360, p. 131); the Convention on the Reduction of Statelessness (United Nations, *Treaty Series*, vol. 989, p. 175).

⁷⁶ The administrative directions to Police on interrogation and the taking of statements states that in the case of a foreigner making a statement in his native language:

(a) The interpreter should take down the statement in the language in which it is made.

Key Issue 27

How can the rights of persons belonging to vulnerable groups be better safeguarded in the course of criminal investigations?

(IX) Concluding Remarks

172. Those enforcing the criminal law are endowed with extremely coercive powers and controls are needed to prevent them exercising these powers in an oppressive manner. Moreover, they have to be subjected to a performance monitoring system.

173. It is a basic right of all human beings - basic in the sense that his other rights depend upon it - not to be subject to physical restraint except for good cause. No one may be arrested except upon a determination that a criminal offence has probably been

(b) An official English translation should be made in due course and be proved as an exhibit with the original statement.

(c) The foreigner should sign the statement at (a).

It is also stated that apart from the question of apparent unfairness, to obtain the signature of a suspect to an English translation of what he said in a foreign language can have little or no value as evidence if the suspect disputes the accuracy of this record of his statement.

committed and that he is the person who probably committed it. Normally, such a determination should be made independently by a magistrate in deciding whether to issue a warrant, but in situations of necessity, it may be made by a police officer acting on probative data that is subject to subsequent judicial scrutiny. Any less stringent standard opens the door to the probability of grave abuse.

It is far from being demonstrable that broad powers of arrest for investigation are necessary to the efficient operation of the police. The practical consequence of enlarging police authority to detain individuals for questioning is not likely to be that all classes of the population will thereupon be subjected to interference. If that were the consequence, the practice would carry its own limiting features. The danger is rather that they will be applied in a discriminatory fashion to precisely those elements in the population - the poor, the ignorant, the illiterate, the unpopular - who are least able to draw attention to their plight and to whose sufferings the vast majority of the population are the least responsive

174. The process should penalize, and thus label as inefficient, arrests that are based on any standard less rigorous than probable cause.

Consideration must be given as to whether, as a minimal requirement, any evidence that is obtained directly or indirectly on the basis of an illegal arrest should be suppressed. Also as to whether any criminal prosecution commenced on the basis of an illegal arrest should be dismissed.

Direct disciplinary measures against the offending police officer are also desirable. Outside scrutiny is needed, both to ensure that the law is being impartially enforced and, what is perhaps even more important, to reassure the general public that the police are not a law unto themselves. To this end, there is need for civilian boards (that is boards not dominated by police) to which complaints about illegal police activity may be directed and which can at least initiate, if not conduct, disciplinary

proceedings in cases where preliminary investigation shows that the complaint may have merit.

175. The decision to arrest in order to be valid must be based on probable cause to believe that the suspect has committed a criminal offence. It follows that if proper arrest standards have been employed, there is no necessity to get additional evidence out of the mouth of the suspect. He is to be arrested so that he may be held to answer the case against him, not so that a case against him that does not exist at the time of his arrest can be developed.

Anyone who is held in arrest should be afforded the right, if need be at public expense, to test the legality of his arrest. The suspect is entitled to the assistance of counsel, if need be at public expense, assistance that he needs most acutely as soon as he is arrested.

176. If the suspect does make self-incriminating statements while under arrest and before he is brought before a magistrate, their admissibility against him should be barred under any of the following conditions: (i) if the police failed to warn him of his rights, including his right to the assistance of a lawyer; (ii) if he was questioned after the required warnings were given, unless he expressly waived his right to be silent and to see a lawyer; (iii) if the confession was made by coercive means, such as the use of force.
177. The right to privacy cannot be forced to give way to the asserted exigencies of law enforcement. Electronic surveillance should, if permitted by law, be strictly limited to a small class of very serious cases, such as drug dealing, organized crime, terrorism and other crimes affecting national security. Even in those limited cases where electronic surveillance might be permitted by law, there should be judicial control comparable to what would be exercised in deciding whether to issue a search warrant.

178. A hardened and sophisticated criminal knows enough to keep silent in the face of police interrogation. He knows that self-exculpatory statements are often incriminating. He knows that he does not have to talk and that he is not likely to realize any advantage by talking. An inexperienced person in the toils of the law knows none of this. Unless the operative rules forbid it, the situations of these two categories of suspects are bound to be unequal.

Likewise, there is no moment in the criminal process when the disparity in resources between the State and the accused is greater than at the moment of arrest. There is every opportunity for abuse on the part of the police. What actually takes place in the police station is known only to the suspect and to the police. It is not hard to predict whose word will carry weight if a contradiction arises. The only way to ensure that these two equally obnoxious forms of inequality do not have a decisively malign impact on the criminal process is to require at the time of arrest (i) that the suspect be immediately apprised of his right to remain silent and to have a lawyer; (ii) that he promptly be given access to a lawyer, either his own or one appointed for him; or (iii) that failing the presence of a lawyer to protect the suspect's interest, he not be subjected to police interrogation

Key Issues for Discussion

1. Can there be a fair trial if there has not been a fair enquiry into alleged offence(s)?

Should a prosecution based on an unfair enquiry be regarded as amounting to an abuse of court process likely to bring the administration of justice into disrepute?

2. Should there be a statutory obligation on the prosecution to make available to the defence all materials, including unused materials, gathered in the course of investigation?

In order to ensure equality of arms between parties to proceedings, should the defence also be under a statutory obligation, after prosecution has disclosed materials in its possession, to disclose its case?

3. What could be done in order to better achieve the desired goal of effective investigations?

Do we need to review the legal and regulatory framework in order to operate an effective national criminal intelligence strategy?

4. What can be done in order to better reassure the community that recourse to confidential informants does not undermine ethical policing?

Are there adequate safeguards to ensure an investigator has, in the course of an enquiry, complied with legal and ethical standards? Is there a need for new safeguards? Should the existing safeguards be strengthened in order to make them more effective?

Should law enforcement officials be subjected to the obligation of having to disclose violations of legal and ethical standards to superior officers and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power in respect of alleged violations of human rights by such officials?

5. Is the legal framework for arrest satisfactory?
6. Are there sufficient safeguards for ensuring that police and other law enforcement officials exercise their powers of arrest in accordance with law?

Are there sufficient safeguards for ensuring the power to arrest is exercised in a reasonable manner, based on evidence in support thereof?

Are there effective mechanisms of redress against arbitrary arrests or detention?

7. In order to better secure the rights of a person arrested, should a duty barrister scheme be put in place in all stations so that everyone arrested or detained, who does not have the means to retain services of a legal representative of his own choice, is entitled to free legal advice and representation? If so, would free legal advice and representation be made available in respect of all offences or only the more serious ones?
8. Is it necessary for the State to derogate from fundamental rights, through measures such as denying a detainee access to counsel or declining bail, in order to fight crime and protect society?
9. Should legal assistance be afforded to any person claiming compensation for arbitrary arrest and detention by officials and who does not have the means to retain the services of law practitioners?
10. Would it enhance trust in the integrity of the investigation process if there were video recordings of police interviews of suspects? Which other measures could enhance confidence in police practices and procedures?
11. Deaths in police custody, whether from suicide, illness, or the effects of drinks or drugs, are always of considerable concern to the public. In the event of such a death occurring, which mechanisms could best reassure the public about police practice and procedures for dealing with vulnerable detainees?
12. To ensure greater transparency and professionalism in the conduct of criminal investigations, is it necessary to put in place a system of ‘juge d’instruction’?
13. The rules governing the interrogation and interviewing of suspects are designed to prevent undue compulsion on suspects to confess guilt. Are the safeguards in our legal system adequate?

Should Courts decline to convict an accused where prosecution evidence is based solely on his confession? Should confessions be treated as admissible only when supported by other corroborative evidence?
14. Do Judges’ Rules effectively secure rights of suspects during the course of an interview? Should they be conferred the status of law?

15. Are the conditions imposed under the Bail Act for release on bail satisfactory? Are they not too financial in nature? Should legislation be introduced with a view to modernizing the monitoring mechanism for bail administration?
16. Is the current framework for release of suspects during week-ends satisfactory?
17. Are the sanctions for breaches of conditions of bail adequate?
18. Does our legal system provide sufficient safeguards against unduly prolonged pre-trial detention?
19. Should the law determine in what circumstances a person charged should be released unconditionally?
20. Are there sufficient safeguards against arbitrary interference with privacy during a criminal investigation?

Should the law provide in what circumstances a person shall be presumed not to have consented to the search of his person or his property or the entry by others on his premises?
21. Would it be appropriate to review the framework for the handling of exhibits so as not to interfere unjustifiably with the right to enjoyment of property of suspects?
22. Studies have shown elsewhere that a proportion of the crime actually committed is not reported to the police. This had led the authorities in UK to conduct crime surveys in order to grasp the criminal phenomenon better, in lieu of relying solely on criminal justice and security statistics.
According to you, what is the situation in Mauritius? What could be, according to you, the reasons for such a situation?

Do you consider the current legal and administrative mechanisms sufficiently protect victims of crime from abuse and intimidation as a result of their involvement in criminal proceedings?
23. Should there be a mechanism which would provide the opportunity for victims to have stolen property returned to them before any case against suspects is concluded?
24. Do you consider a variant of the French system of ‘*constitution de partie civile*’ could be introduced in our legal system in order to better protect victims?

25. Does the criminal justice system adequately safeguard the rights of juvenile offenders apprehended by police officers?

26. Are the rights of women, their special status and special needs, adequately safeguarded in the course of criminal investigations?

27. How can the rights of persons belonging to vulnerable groups be better safeguarded in the course of criminal investigations?

Annexure 1: Bail Act

Act 32 of 1999 - 14 February 2000

Amended 11/02; 21/04

ARRANGEMENT OF SECTIONS

- PART I – PRELIMINARY**
- 1 Short title
- 2 Interpretation
- PART II – BAIL**
- 3 Right to release on bail
- 4 Refusal to release on bail
- PART III – CONDITIONS FOR RELEASE ON BAIL**
- 5 Recognisance and surety
- 6 Recognisance in money or money's worth
- 7 Other conditions for release on bail
- 8 Qualifications of surety
- 9 Discharge of surety
- 10 Estreatment of recognisance
- 11 Termination of recognisance
- PART IV – RELEASE ON PAROLE**
- 12 Release on parole during weekend
- PART V – PROHIBITION AGAINST DEPARTURE**
- 13 Interim restriction on departure
- 14 Prohibition order
- 15 -
- 16 Variation of order
- PART VI – BAIL AND REMAND COURT**
- 17 Interpretation of Parts VI and VII
- 18 Establishment of Court
- 19 Jurisdiction of Court
- PART VII – LIVE VIDEO AND TELEVISION LINK**
- 20 Live video and television link
- PART VIII – MISCELLANEOUS**
- 21 Agreement to indemnify surety
- 22 Other offences
- ~~23-24~~
- 25 Rules
- 26 -
- SCHEDULE

PART I – PRELIMINARY

1 Short title

This Act may be cited as the Bail Act.

2 Interpretation

In this Act –

“defendant” means a person who is under arrest and is charged before a court with having committed an offence;

“detainee” means a person who is under arrest upon reasonable suspicion of having committed an offence;

“release on bail” means the release from custody of a person who is under arrest on condition that he enters into a recognisance;

“recognisance” –

(a) means a recognisance entered into in accordance with section 5(1)(a);

(b) includes a recognisance entered into by a surety;

“serious offence” means –

(a) an offence punishable by penal servitude;

(b) an offence under any of the provisions of the Dangerous Drugs Act other than section 34. [Repealed and replaced 21/04]

“surety” means a person referred to in section 5(1)(b).

PART II – BAIL

3 Right to release on bail

Subject to section 4, every defendant or detainee shall be entitled to be released on bail.

4 Refusal to release on bail

- (1) A Judge or a Magistrate may refuse to release a defendant or a detainee on bail where –
- (a) he is satisfied that there is reasonable ground for believing that the defendant or detainee if released is likely to –
 - (i) fail to surrender to custody or to appear before a Court as and when required;
 - (ii) commit an offence, other than an offence punishable only by a fine not exceeding 1,000 rupees;
 - (iii) interfere with witnesses, tamper with evidence or otherwise obstruct the course of justice, in relation to him or to any other person;
 - (b) he is satisfied that the defendant or detainee should be kept in custody –
 - (i) for his own protection; or
 - (ii) in the case of a minor, for his own welfare;
 - (c) the defendant or detainee, having been released on bail, has –
 - (i) committed an act referred to in paragraph (a); or
 - (ii) breached any other condition imposed on him for his release;
 - (d) the defendant or detainee is charged or is likely to be charged with a serious offence;
 - (e) there is reasonable ground for believing that the defendant or detainee has –
 - (i) given false or misleading information regarding his names or address; or
 - (ii) no fixed place of abode;
 - (f) a detainee has failed to comply with section 12(2).

(2) In making a determination under subsection (1), the Judge or Magistrate shall have regard to such considerations as appear to the Judge or Magistrate to be relevant, including –

- (a) the nature of the offence and the penalty applicable thereto;
- (b) the character and antecedents of the defendant or detainee;
- (c) the nature of the evidence available with regard to the offence.

(3) Where a request for the release on bail of a defendant or detainee is objected to, the Judge or Magistrate shall place on record the written reasons for his determination thereon.

(4) (a) Where a Magistrate has ordered the release on bail of a defendant or a detainee notwithstanding an objection by the Commissioner of Police or the Director of Public Prosecutions on any of the grounds set out in this section, the Commissioner of Police or the Director of Public Prosecutions, as the case may be, may, within 7 days of the determination of the Magistrate, apply to the Supreme Court for an order setting aside the decision of the Magistrate to release the defendant or detainee.

(b) Where, immediately after ordering the release of the defendant or detainee, the Magistrate is notified by the Director of Public Prosecutions that an application under paragraph (a) is being made and that a stay of execution is required, the Magistrate shall stay execution of the order and remand the defendant or detainee until the Supreme Court determines the application.

(5) Pending the determination of an application made under subsection (4)(a), the Supreme Court may, where the defendant or detainee has been released on bail and no stay of execution has been sought under subsection (4)(b), on motion made by the Director of Public Prosecutions, order that the decision of the Magistrate be stayed and that the defendant be apprehended and remanded in custody

(6) A defendant or a detainee whose release on bail is refused under subsection (1) shall be remanded in custody for a period not exceeding 21 days, after which the defendant or detainee shall be brought again before the Court.

(7) Where a defendant or detainee has been remanded by the Magistrate under subsection (4)(b) and the Commissioner of Police or the Director of Public Prosecutions fails to apply to the Supreme Court within 7 days as provided in subsection (4)(a), the defendant shall forthwith be brought before the Magistrate who shall thereupon release him on bail as originally ordered by the Magistrate.

PART III – CONDITIONS FOR RELEASE ON BAIL

5 Recognisance and surety

(1) A defendant or detainee who is released on bail –

- (a) shall be released on his own recognisance to appear before a court for his trial, for any proceedings preliminary to trial or otherwise as he may be required to do;
- (b) may, subject to subsection (2), be required to provide such number of sureties as the Judge or Magistrate deems necessary to guarantee his appearance in the manner specified in paragraph (a) and his compliance with any other condition imposed for his release on bail.

(2) A defendant or detainee shall not be required to provide surety unless –

- (a) the charge or the arrest relates to a serious offence; or
- (b) the Judge or Magistrate is satisfied that there is reasonable ground to believe that the defendant or detainee is likely to breach a condition of his recognisance.

(3) Where a defendant or detainee refuses to enter into a recognisance or to provide surety, he shall be remanded in custody.

(4) A recognisance shall be in the form set out in the Schedule.

(5) No detainee or defendant shall, in respect of the provision of recognisance or surety for his release on bail for –

- (a) an offence under section 34 of the Dangerous Drugs Act; or
- (b) an offence punishable by any fine not exceeding 10,000 rupees or any term of imprisonment not exceeding 2 years or by such a fine and term of imprisonment,

be liable to pay any sum under any enactment relating to court fees or costs.

[Added 21/04]

6 Recognisance in money or money’s worth

(1) Where, in relation to a serious offence, a Judge or Magistrate has reasonable grounds, whether by reason of the magnitude of the financial or other benefit arising from or related to the commission of an offence or otherwise, to believe that a defendant or detainee is likely to fail to surrender to custody or to appear before a court as and when required, he may order that a recognisance shall be in such amount as he considers reasonable in the circumstances.

(2) An order made under subsection (1) may, on good cause shown, be discharged or varied by a Judge or a Magistrate.

7 Other conditions for release on bail

A Judge or a Magistrate may impose such other conditions of a general or specific nature as he thinks fit for the release on bail of a defendant or detainee, requiring him to do or not to do any act, and any recognisance shall apply to any such condition.

8 Qualifications of surety

(1) No person shall stand as a surety unless he is of age, swears an affidavit as to his means and is, in the opinion of the Magistrate, otherwise a suitable person.

(2) In considering the suitability of a proposed surety, the Magistrate shall have regard to –

- (a) his financial resources;
- (b) his character and antecedents;
- (c) whether he appears, or is reputed, to be a professional surety;
- (d) his proximity to or relationship with the person for whom he is to be surety;
- (e) his readiness to comply with the obligations of a surety; and
- (f) his age and the state of his health.

(3) A person may be examined on oath before he is accepted as a surety.

9 Discharge of surety

(1) A surety may apply to a Judge or a Magistrate to be discharged from his obligations as a surety.

(2) No surety shall be discharged from his obligations unless he –

- (a) brings and surrenders before the court the person for whom he stood surety; or
- (b) explains to the satisfaction of the Judge or Magistrate his inability to do so.

(3) Where a surety is discharged, the Judge or Magistrate shall order that the person for whom he stood surety shall be arrested, and shall be remanded in custody unless –

- (a) the Judge or Magistrate is satisfied that the discharge was not due to any act of the person arrested that would warrant his not being released on bail; and
- (b) the person arrested agrees to any condition which the Judge or Magistrate may think fit to impose for his release on bail.

10 Estreatment of recognisance

(1) Where a recognisance referred to in section 6 has been taken for the appearance of a person and that person does not surrender to custody or appear before a court as and when required, the court shall order the recognisance to be estreated, unless the court is satisfied that there are reasonable grounds explaining his failure to surrender to custody or to appear before court in which case the court may on the day of such failure or the following day, reinstate the recognisance if already estreated.

(2) Where a recognisance has been estreated pursuant to subsection (1), the amount of the recognisance shall, even if it exceeds the jurisdiction of the Court, be recoverable from the person who entered into the recognisance or from any surety in the same manner as if it were a fine lawfully imposed by the Court.

(3) (a) The Attorney-General may, on good cause shown, remit in whole or in part the amount of an estreated recognisance.

(b) Where the Attorney-General has received a petition for the remission of an estreated recognisance, he may require the Court to stay the recovery of any amount due thereon for a period which shall not exceed 3 months.

11 Termination of recognisance

Subject to section 9, where a person has been released on bail, any recognisance entered into by him or by a surety shall lapse where the person –

- (a) is convicted or acquitted of an offence arising from the facts in respect of which he was arrested or detained; or
- (b) is sooner discharged by an order of the Court.

PART IV – RELEASE ON PAROLE

12 Release on parole during weekend

(1) Where a detainee arrested in respect of an offence, other than a serious offence, is likely to spend Saturday and Sunday or any part thereof, in custody before his first appearance before a Magistrate, he shall be released on parole unless a police officer not below the rank of Assistant Superintendent certifies in writing that he has reasonable ground for believing that the detainee, if released, is likely to fail to comply with subsection (2) or to commit another offence.

(2) Where a detainee is released pursuant to subsection (1) he shall surrender to the custody of the police, at the police station where he was detained, on the first working day after the weekend.

(3) A detainee who fails to comply with subsection (2) may be arrested without a warrant.

PART V – PROHIBITION AGAINST DEPARTURE

13 Interim restriction on departure

(1) Where a police officer not below the rank of Assistant Superintendent certifies in writing that a defendant or a detainee should be prevented from leaving Mauritius, he may require the Immigration Officer to prohibit the departure of that person, and the Immigration Officer shall take all necessary steps to comply with the request.

(2) Any restriction imposed pursuant to subsection (1) shall, unless otherwise ordered by a Judge or a Magistrate, lapse 72 hours after it has been notified to the defendant or detainee.

[Amended 11/02]

14 Prohibition order

(1) A Judge or a Magistrate may, upon application made by the Commissioner of Police and being satisfied that an order should be made preventing defendant or detainee from leaving Mauritius, make an order to that effect.

(2) An order made under subsection (1) shall -

- (a) remain in force until the disposal of the charge against the defendant or detainee;
- (b) be inserted in the record of the court before which the defendant is charged or the detainee is brought.

(3) The clerk of the court specified in subsection (2) (b) shall immediately after an order is made under this section, inform the Immigration Officer in writing.

[Repealed and replaced 11/02]

15 ---

[Repealed 11/02]

16 Variation of order

(1) A person against whom an order has been made under section 14 may apply to the court before which his case is pending for a variation of the order.

[Repealed and replaced 11/02]

(2) Where an application is made under subsection (1), the Court may vary the order if it is satisfied that it is necessary to do so –

- (a) to avoid loss or prejudice to the applicant;
- (b) to avoid damage or loss to the applicant’s property;
- (c) because of the health of the applicant or his next of kin; or
- (d) in such other cases as the Court thinks fit.

[Amended 11/02]

(3) Where a court makes a variation order under subsection (2), the court may -

- (a) on being satisfied that there are sufficient reasons for so doing, allow the applicant multiple departures from, and returns to, the country within a period specified by the Court;
- (b) impose on the applicant such other terms and conditions as it deems fit.

[Added 11/02]

PART VI – BAIL AND REMAND COURT

17 Interpretation of Parts VI and VII

In this Part and in Part VII “Court” means the Bail and Remand Court established under section 18.

18 Establishment of Court

(1) There shall be a Bail and Remand Court which shall be a court of record and have an official seal.

(2) The Chief Justice shall assign one or more Magistrates to exercise jurisdiction in the Court.

(3) The Master and Registrar shall post to the Court such number of Court Officers, ushers and other public officers as may be required for the proper discharge of the Court’s functions.

19 Jurisdiction of court

Notwithstanding any other enactment, the question whether a defendant or a detainee shall be released on bail or remanded in custody shall, except where the question arises in the course of proceedings before another court or it is otherwise impractical to do so, lie within the exclusive jurisdiction of the Court.

PART VII – LIVE VIDEO AND TELEVISION LINK

20 Live video and television link

(1) Notwithstanding any other enactment, the court may, in its discretion, order a defendant or a detainee who is in custody to appear before it, through such live video or live television link system as may be approved in writing for the purpose of any proceedings by the Chief Justice in relation to –

- (a) an application for his release on bail; or
- (b) an extension of his remand in custody.

(2) The Court may, where an order is made under subsection (1), determine –

- (a) who may or may not be present at the place where the defendant or the detainee is appearing;
- (b) who, in the court-room, shall or shall not be able to be heard, or seen and heard, by the defendant or the detainee;
- (c) who, in the court-room, shall or shall not be able to hear, or to see and hear, the defendant or the detainee.

(3) The Court shall, in making an order under subsection (1) and while conducting any proceedings referred to therein, comply with its duty to ensure that there is a fair hearing in the matter.

PART VIII – MISCELLANEOUS

21 Agreement to indemnify surety

(1) Where a person agrees with another to indemnify that other person against any liability which he may incur as a surety, he and that other person shall commit an offence and shall, on conviction, be liable to a fine not exceeding 5,000 rupees and to imprisonment for a term not exceeding 2 years.

- (2) An offence under subsection (1) shall be committed –
- (a) whether the agreement is made before or after the person to be indemnified becomes a surety;
 - (b) whether or not he becomes a surety; and
 - (c) whether or not the agreement contemplates a compensation in money or money’s worth.

22 Other offences

Any person who –

- (a) having been released on bail –
 - (i) fails to surrender to custody or to appear before a court as and when required;
 - (ii) commits an offence other than an offence punishable only by a fine not exceeding 1,000 rupees;
 - (iii) interferes with a witness, tampers with evidence or otherwise obstructs the course of justice, in relation to him or to any other person; or
 - (iv) breaches any other condition imposed on him for his release on bail;
- (b) having stood as a surety, fails to take all reasonable steps to ensure that the person for whom he stood as surety –
 - (i) surrenders to custody;
 - (ii) appears before a Court as and when required; or
 - (iii) complies with any other condition imposed for his release on bail;
- (c) leaves Mauritius in breach of an order made under Part V;
- (d) contravenes this Act in any other manner,

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 5,000 rupees and to imprisonment for a term not exceeding 2 years.

23-24–

25 Rules

- (1) The Chief Justice may, for the purposes of this Act, make such rules as he thinks fit.
- (2) Any rules made under subsection (1) may provide for the payment of fees or the levying of charges.

26 –

SCHEDULE
(section 5(4))

REPUBLIC OF MAURITIUS

Cause No:

**RECOGNISANCE FOR THE APPEARANCE OF
A PARTY CHARGED TO STAND TRIAL**

IN THE DISTRICT COURT OF
.....acknowledges himself to be indebted to the
State in the sum of Rs.....

UPON condition that the said..... do personally appear before the
District Court of on the at 09.30 a.m. and on any other date/s to be thereafter
fixed and any other Court/s of the Island until the final disposal of the case there and then to answer a charge of

Law Reform Commission of Mauritius [LRC] – Discussion Paper ‘Law and Practice relating to Criminal Investigation, Arrest and Bail’ [April 2008]

having on the day of committed the offence of, and does not depart the Court without leave, then this recognisance shall be null and void, otherwise to remain in full force.

SIGNATURES OR MARKS OF PRINCIPAL AND SURETY

Principal.....
Surety (if any)
.....
.....
Surety (if any)
.....
.....

TAKEN and ACKNOWLEDGED after due interpretation at the District Court of, this day of

Interpreted by me

Before me

Court Officer

Magistrate

Annexure 2: Judges’ Rules and Administrative Directions to the Police

No. 5068/6

12th March, 1965

JUDGES RULES AND ADMINISTRATIVE DIRECTIONS TO THE POLICE

Sir,

I am directed by the Governor to refer to his despatch to the Secretary of State No. 114 of the 26th February 1965 on the new Judges Rules relating to interrogation and the taking of statements by the police, a copy of which was sent to you, and to enclose for your own guidance and for that of all members of the Mauritius Police a copy of the following documents:

- (1) The new Judges Rules and their explanatory, introductory Notes (Appendix “A”)
- (2) Administrative directions to the police on interrogation and the taking of statements (Appendix “B”).

The new Rules supersede the old ones and the administrative directions to the police have been approved by the Chief Justice and authorised by the Governor.

2. The new Rules differ in certain important respects from the old. In particular two forms of caution are prescribed according to the stage which an investigation has reached. One is to be given when a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence. After this caution questioning may continue, but a record must be kept of the time and place at which such questioning began and ended and of the persons present. The second form of caution is to be given as soon as a person is charged with, or informed that he may be prosecuted for, an offence. Thereafter questions relating to the offence can be put only in exceptional cases, where they are necessary for the purpose of preventing or minimising harm or loss to any person or to the public or for clearing up an ambiguity in a previous answer or statement.

3. As is made clear by the Judges, the Rules are concerned with the admissibility in evidence against a person of answers, oral or written, given by that person to questions asked by police officers and of statements made by that person. In giving evidence as to the circumstances in which any statement was made or taken down in writing, police officers must be absolutely frank in describing to the court exactly what occurred, and it will then be for the Judge to decide whether or not the statement tendered should be admitted in evidence.

4. The Rules, which have been made by the Judges as a guide to police officers, conducting investigations, should constantly be borne in mind, as should the general principles which the Judges have set out in paragraph 3 of the explanatory, introductory Notes to the Rules. In addition to complying with the Rules, interrogating police officers should always try to be fair to

the person who is being questioned, and scrupulously avoid any method which could be regarded as in any way unfair or oppressive.

I am,

Sir,

Your obedient Servant,

The Commissioner of Police

(s) Tom VICKERS

PORT LOUIS

Chief Secretary

JUDGES RULES

Introductory Notes

1. The origin of the Judges’ Rules is probably to be found in a letter dated the 26th October 1906, which the then Lord Chief Justice, Lord Alverstone, wrote to the Chief Constable of Birmingham in answer to a request for advice in consequence of the fact that on the same Circuit one Judge had censured a member of his force for having cautioned a prisoner, whilst another Judge had censured a constable for having omitted to do so. The first four of the Rules were formulated and approved by the Judges of the King’s Bench Division in 1912; the remaining five in 1918. They have been much criticised, inter alia, for alleged lack of clarity and of efficacy for the protection of persons who are questioned by police officers; on the other hand it has been maintained that their application unduly hampers the detection and punishment of crime. A Committee of Judges has devoted considerable time and attention to producing, after consideration of representative views, a new set of Rules which has been approved by a meeting of all the Queen’s Bench Judges.

2. The Judges control the conduct of trials and the admission of evidence against persons on trial before them: they do not control or in any way initiate or supervise police activities or conduct. As stated in sub-paragraph (e) of paragraph 3 below it is the law that answers and statements made are only admissible in evidence, if they have been voluntary in the sense that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a

person in authority, or by oppression. The new Rules do not purport, any more than the old Rules, to envisage or deal with the many varieties of conduct which might render answers and statements involuntary and therefore inadmissible. The Rules merely deal with particular aspects of the matter. Other matters such as affording reasonably comfortable conditions, adequate breaks for rest and refreshment, special procedures in the case of persons unfamiliar with any local language or of immature age or feeble understanding, are proper subjects for administrative directions to the police.

3. These Rules do not affect the principles that:

- (a) citizens have a duty to help a police officer to discover and apprehend offenders;
- (b) police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;
- (c) every person at any stage of an investigation should be able to communicate and to consult privately with a legal adviser. This is so even if he is in custody, provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so;
- (d) when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;

(e) it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear or prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

4. The principle set out in paragraph (e) above is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigation. Nonconformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

5. Section 162 of the Courts Ordinance (Cap.168) provides that ‘except where it is otherwise provided by special laws now in force in the colony or hereafter to be enacted, the English law of evidence for the time being shall prevail and be applied in all Courts of the Colony’.

THE RULES

Rule I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

Rule II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

“You are not obliged to say anything unless you wish to do so but what you say may be put in writing and given in evidence.”

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

Rule III. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

“Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.”

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other persons or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

“I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.”

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

Rule IV. All written statements made after caution shall be taken in the following manner:

- (a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:

“I.....wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.”

- (b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

- (c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

“I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.”

- (d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him.
- (e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following Certificate at the end of the statement:
- “I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will.”
- (f) If the person who has made a statement refused to read it or to write the above mentioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

Rule V. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by Rule III (a).

Rule VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.

Administrative directions to the police on interrogation and the taking of statements

1. Procedure generally

- (a) When possible statements of persons under caution should be written on the forms provided for the purpose. Police officers’ notebooks should be used for taking statements only when no forms are available.
- (b) When a person is being questioned or elects to make a statement, a record should be kept of the time or times at which during the questioning or making of a statement there were intervals or refreshment was taken. The nature of the refreshment should be noted. In no circumstances should alcoholic drink be given.
- (c) In writing down a statement, the words used should not be translated into “official” vocabulary; this may give a misleading impression of the genuineness of the statement.
- (d) Care should be taken to avoid any suggestion that the person’s answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might help to clear him of the charge.

2. Record of interrogation

Rule II and Rule III (c) demand that a record should be kept of the following matters:

(a) When, after being cautioned in accordance with Rule II, the person is being questioned or elects to make a statement - of the time and place at which any such questioning began and ended and of the persons present.

(b) When, after being cautioned in accordance with Rule III (a) or (b) a person is being questioned or elects to make a statement – of the time and place at which any questioning and statement began and ended and of the persons present.

In addition to the records required by these Rules full records of the following matters should additionally be kept:

(a) of the time or times at which cautions were taken, and

(b) of the time when a charge was made and/or the person was arrested, and

(c) of the matters referred to in paragraph 1 (b) above.

If two or more police officers are present when the questions are being put or the statement made, the records made should be countersigned by at least two of the police officers present.

3. Comfort and refreshment

Reasonable arrangements should be made for the comfort and the refreshment of persons being questioned. Whenever practicable both the person being questioned or making a statement and the officers asking the questions or taking the statement should be seated.

4. Interrogation of children and young persons

As far as practicable children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child. A child or young person should not be arrested, nor even interviewed, at school if such action can possibly be avoided. Where it is found essential to conduct the interview at school, this should be done only with the consent, and in the presence, of the head teacher, or his nominee.

5. Interrogation of foreigners

In the case of a foreigner making a statement in his native language:

- (a) The interpreter should take down the statement in the language in which it is made.
- (b) An official English translation should be made in due course and be proved as an exhibit with the original statement.
- (c) The foreigner should sign the statement at (a).

Apart from the question of apparent unfairness, to obtain the signature of a suspect to an English translation of what he said in a foreign language can have little or no value as evidence if the suspect disputes the accuracy of this record of his statement.

6. Supply to accused persons of written copy of charges

- (a) The following procedure should be adopted whenever a charge is preferred against a person arrested without warrant for any offence:

As soon as a charge has been accepted by the appropriate police officer the accused person should be given a written notice containing a copy of the entry in the charge sheet or book giving particulars of the offence with which he is charged. So far as possible the particulars of the charge should be stated in simple language so that the accused person may understand it, but they should also show clearly the precise offence in the law with which he is charged. Where the offence charged is a statutory one, it should be sufficient for the latter purpose to quote the section of the statute which created the offence.

The written notice should include some statement on the lines of the caution given orally to the accused person in accordance with the Judges’ Rules after a charge has been preferred. It is suggested that the form of notice should begin with the following words:

“You are charged with the offence (s) shown below. You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence”.

- (b) After the accused person has appeared before the court it is not necessary to serve him with a written notice of any further charges which may be preferred. If, however, before the accused person has appeared before a Court, the police decide to modify the charge or to prefer further charges, it is desirable that the person concerned should be formally charged with the further offence and given a copy of the modified charge or further charges as soon as it is possible to do so having regard to the particular circumstances of the case. If the accused person has then been released on bail, it may not always be practicable or reasonable to prefer the new charge at once, and in cases where he is due to surrender to his bail within forty-eight hours or in other cases of difficulty it will be sufficient for him to be formally charged with the further offence and served with a written notice of the charge after he has surrendered to his bail and before he appears before the court.

7. Facilities for defence

- (a) A person in police custody should be allowed to speak on the telephone to his legal adviser or to his nearest relative provided that no hindrance is reasonably likely to be caused to the processes of investigation or the administration of justice by his doing so.

He should be supplied on request with writing materials and his letters should be sent by post or otherwise with the least possible delay. Additionally, telegrams should be sent at once, at his own expense.

- (b) Persons in police custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in police custody should be drawn to these notices.