1. INTRODUCTION

Interviewing criminal suspects and reducing their statements into writing is one of the important procedures in criminal investigation. The perpetrator of a crime is the person who knows exactly what had transpired during the transgression. Hence the confession of an accused person is often regarded by the police as the most valuable piece of information in their quest for the truth. Renowned criminologist Jeremy Bentham also claimed that a defendant’s testimony is the best form of evidence on which to base a trial. However, under the adversarial system of justice which is based on the due process model, an accused person is accorded the right to remain silent when questioned by the authorities. This right protects the suspects from unfair police practice of extracting confessions and provides a safeguard for the innocent against wrongful convictions. The vulnerable suspects in particular, are said to be susceptible to confusion and suggestibility under the hostile environment of police interrogation. In the celebrated case of Woolmington v DPP, it was established that a person is innocent until proven guilty and that the onus is on the prosecution to prove the case against the accused beyond reasonable doubt. Hence the accused cannot be compelled to furnish any evidence – confession included – to assist the prosecution in establishing a case against him.

It is thus provided under section 24 of the Evidence Act that only confessions given voluntarily without inducement, threat or promise maybe admitted in evidence. Section 113 of the Criminal Procedure Code also stipulates that the statement given by an accused person in police custody is admissible only if, inter alia, he had been cautioned in advance that he was “not obliged to say anything or answer any questions …” Not surprisingly, the courts have always been cautious, if not reluctant, in admitting statements of accused persons as evidence. In the name of fairness, cautioned statements have more often than not been ruled not admissible for want of voluntariness, or even on some technicality.

Undeniably, the right to silence creates an obstacle to the police in obtaining evidence through questioning. This right, if exercised widely by all suspects, may impede the efficacy of police investigation and prosecution of criminal cases. As the country develops and general level of education increases, the people become more aware of their rights and are more

1 Bentham J. (1825) Treaties on Judicial Evidence.
2 [1935] AC 462
3 See also Section 113 CPC.
ready to exercise those rights. Criminals with sophisticated minds who commit felonies of complex nature in particular, are more inclined to use the shield of right to silence when confronted by the police in order to evade conviction.

It would thus be worthwhile to find out the propensity of accused persons in this country to exercise their right to silence and whether such propensity has in anyway impaired the efficacy of police investigation.

This case study examines the extent to which accused persons in the Police District of Kajang exercised their right of silence during police investigation and the effect of the provisions of cautioned statements on the efficacy of criminal investigation and prosecution.

2. SCOPE OF STUDY AND METHODOLOGY

This is an exploratory study of issues related to cautioned statements and the right to silence. Relevant data pertaining to cautioned statements were collected from police investigation papers (IPs). Due to constraint of time and other limitations like problem of accessibility, only 68 IPs from one police district, i.e. Kajang Police District were used4. These were investigation papers of cases that have been disposed of in the court and closed for filing (CFF) in the IP store. IPs that have not been CFF were not used for fear of disturbing on-going investigation. These IPs were extracted from the IP store of Kajang Police Station by the staff there, as and when they found them. Hence the sample used in this study is by no means random nor representative of all cautioned statements recorded by the whole police force.

The sample comprised a total of 102 cautioned statements given by suspects detained for investigation at the Kajang Police District from the year 1994 to 2001 for various criminal offences. The following information/data were collected: the Police Station (Balai), report number, offence committed; race, age, sex, and occupation of the suspect; nature of statement (inculpatory, exculpatory or silence), guilty plea, outcome of the case and whether accused was legally represented. The data were then analysed to ascertain the extent to which suspects in police custody exercised the right of silence; whether demographical factors such as the background and social status of a suspect have any effect on his readiness to exercise such right, and whether persons accused of certain offences are more likely to confess voluntarily. Further analyses were carried out to find out if suspects who gave inculpatory statements were more likely to plead guilty to their charges. For analysis of data, simple descriptive statistical methods of percentages and cross-tabulation were used.

Even though the sample used was small and the study was confined to only one police district, the results nonetheless yielded some first-hand information on the position of pre-trial silence in this country as

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4 The writer would like to register his heartfelt gratitude to ACP Gingkoi Seman Pancras, the Kajang OCPD for allowing him to gain access to the IPs and make use of the data.
well as how useful have the provisions of cautioned statements been in helping the police in their investigation and prosecution. A comparison with the findings of various similar research studies done in the UK and Singapore revealed some consistency on the position of pre-trial silence in these Commonwealth countries sharing similar legal systems.

**3. RESULTS OF DATA ANALYSIS**

**3.1. NATURE OF CAUTIONED STATEMENTS**

The nature of the 102 cautioned statements were examined. For the purpose of analysis, the natures of the statements were divided into three categories as follows:

1. **Inculpatory** – where the maker of the statement made a confession,

2. **Exculpatory** – where the maker of the statement denied having committed the offence attributed to him. This includes also partial denial, where the suspect admitted certain ingredients of the offence but denied the others, e.g. denial on the *mens rea* part; or admitted to have been at the scene of crime but denied taking part in perpetration of the crime; and

3. **Silence** – where the maker of the statement remained silent, i.e. the maker refused to say anything and answered any questions, or said that he preferred to talk in court during his trial.

Chart 1 shows that 44 percent of the suspects made inculpatory statements or confessions after the caution under section 113 CPC had been administered to them. Whereas half of them denied totally or partially having committed the offences under investigation, and the remainder six percent chose to remain silent.
This finding is quite consistent with the findings of various similar research studies done in the United Kingdom. For example Leng (1993) found that only five percent of suspects remained silent during police questioning\(^5\); in the study conducted by Buckle, Street and Brown (2000) the proportion of suspects who refused to answered all questions was six percent\(^6\), whereas the figure was ten percent for Phillips and Brown’s (1998) study.\(^7\) As for the percentage of suspects making confessions during police interviews, both the studies by Buckle, Street and Brown (2000) and Phillips and Brown (1998) arrived at the same figure of 55 percent. Buckle and Brown (1997) also quoted that: “Various studies have also found that at least half of suspects in detention confess when questioned by officers (see Sanders et al., 1989; McConville, 1993; Moston and Stephenson, 1993)”\(^8\).

A study conducted by Yeo (1983) in Singapore on a sample of 119 persons charged with offences of culpable homicide not amounting to murder and the attempted use of fire-arms showed that overall, only 3.3% of the accused refused to make a statement to the police whereas 60.5% made a full confession or qualified confession.\(^9\)

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\(^9\) Yeo Meng Hong, “Diminishing the Right to Silence” The Singapore Experience’ [1983] *Crim. L.R.* 89. See also Chandra Mohan, “Police Interrogation and the Right to Silence in the
Beside the cautioned statements, the contents of the investigation papers were also briefly examined for the strength of evidence against the suspects. It was found that a suspect was generally more likely to either give an inculpatory statement or hide behind the shield of silence when the police already had strong evidence against him. Strong evidence includes being caught red-handed, positive identification, discovery of incriminating articles and other positive evidence. In all of the six cases (6%) where the suspects remained silent in their cautioned statements, the police already had some incriminating evidence against them. When the case against the suspect is weak, the suspect is more likely to exculpate himself by either denning totally or partially his involvement in the offence. The most common form of partial denial was the denial of having the *mens rea* while admitting to the *actus reus*. In cases where multiple suspects were arrested, e.g. a rioting case under section 148 of the Penal Code, it was not uncommon to find that only one or two of them confessed to the offence while the rest admitted to being present at the scene but denied having perpetrated the offence.

### 3.2. EFFECTS OF DEMOGRAPHICAL FACTORS

Previous research in the UK has shown that demographical factors like the background and personal characteristics of a suspect have significant effect on the way he responds to police interview or interrogation. Relevant personal characteristics include an abnormal physical or mental condition, low I.Q., problems of language and literacy, young age, and drug dependency.\(^\text{10}\) For example, a suspect with a low I.Q. or educational level and severe language problem may not understand the caution and is thus ignorant of his rights. Distrust of the police, particularly by a member of an ethnic minority group, will also affect the way he responds to police interrogation.\(^\text{11}\) People with these characteristics were referred to as the vulnerable groups and were the least likely to have benefited from having a right of silence because they were least likely to have exercised it.\(^\text{12}\) The following analyses examined the effects of some demographic factors on the nature of cautioned statements given by suspects in police custody.

#### 3.2.1. Geographical factor

Brown (1994) reported that the right of silence was exercised in up to 10 percent of cases outside of London and in up to 16 percent in the Metropolitan Police area.\(^\text{13}\) In both the studies conducted by Buckle, Street and Brown (2000) and Phillips and Brown (1998), it was also found that the

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\(^\text{10}\) Pattenden, R. *Inference from Silence* [1995] Crim LR 602

\(^\text{11}\) ibid

\(^\text{12}\) supra N. 6

frequencies of the use of silence among suspects were higher in Metropolitan Police area than in areas outside of London, while the suspects in Metropolitan London were less willing to answer all police questions. Why this difference should exist is unclear. Brown (1994) opined that it may reflect greater sophistication among the capital's criminals, differences in the provision of legal advice, more hostile attitudes towards the police, or a combination of all three.

Table 1 compares the nature of cautioned statements according to whether suspects were detained in the Kajang Police Station or other police stations in the same district. While the frequency of use of silence by suspects detained in the urban Kajang Police Station was higher, the proportion of inculpatory statements given by them was also higher. Hence, the situation here is different from that in the UK. Over here, there is no significant difference in the way suspects in urban and rural police stations respond to police questioning. Possible explanation to this phenomenon could be that suspects in this country seldom seek legal advice, be they in urban or rural areas; and some of the suspects detained in the Kajang Police Station might came from the jurisdiction areas of other police stations.

Table 1: Nature of cautioned statement by police station

<table>
<thead>
<tr>
<th></th>
<th>Inculpatory</th>
<th>Exculpatory</th>
<th>Silence</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Kajang Police Station</strong></td>
<td>21 (50.0%)</td>
<td>16 (38.1%)</td>
<td>5 (11.9%)</td>
<td>42 (100.0%)</td>
</tr>
<tr>
<td><strong>Other Police Stations</strong></td>
<td>24 (40.0%)</td>
<td>35 (58.3%)</td>
<td>1 (1.7%)</td>
<td>60 (100.0%)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>45 (44.1%)</td>
<td>51 (50.0%)</td>
<td>6 (5.9%)</td>
<td>102 (100.0%)</td>
</tr>
</tbody>
</table>

3.2.2. Race

Distrust of the police among certain ethnic groups was often cited as one of the reasons for the difference in the exercise of right of silence during police interview. Other reasons may include difference in educational levels among the races. In studies conducted in the UK, it was found that black people were most likely to exercise their right of silence during police interview and least likely to answer all police questions. This was followed by suspects of Asian origin, while the whites were least likely to remain silent and most likely to answer all police question.

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14 Supra N. 6 and 7.
15 Other police stations include Bandar Baru Bangi, Batu 9, Batu 14, Batu 18, Semenyih and Serdang. These are considered as rural areas as opposed to the urban area of Kajang.
16 See Pattenden, R (1998), N. 10, supra
In this case study in the Kajang Police District, it is evident that foreigners were most likely to confess to their crimes (see Table 2). It is interesting to note here that all of the six foreigner suspects (who confessed) were Indonesians, five of whom were illegal immigrants. They all confessed in their cautioned statements and later pleaded guilty at the trials and were subsequently convicted.\textsuperscript{18}

Among the major races, the Chinese were the least likely to remain silent when questioned by the police. They preferred to exonerate themselves with exculpatory statements instead. The proportion of exculpatory statements given by Chinese suspects was the highest (58.3\%) as compared to the Indians (48.2\%) and Malays (51.2\%). While larger proportion of Indians than other races exercised their right of silence (7.4\%), it must be noted that the actual figures were too small to indicate significant difference. The figures were two for Indians\textsuperscript{19}, one for Chinese and two for Malays. The absence of any clear trend of readiness to confess or remain silent here as opposed to the phenomenon in UK suggests the absence of distrust among any local ethnic groups towards the police in Malaysia. Whereas the foreigners, especially the illegal immigrants, seem to feel helpless and vulnerable in police custody in a foreign land.

Table 2: Nature of cautioned statements by ethnic groups

<table>
<thead>
<tr>
<th>Ethnic Group</th>
<th>Inculpatory</th>
<th>Exculpatory</th>
<th>Silence</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Malay</td>
<td>18 (43.9%)</td>
<td>21 (51.2%)</td>
<td>2 (4.9%)</td>
<td>41 (100.0%)</td>
</tr>
<tr>
<td>Indian</td>
<td>12 (44.4%)</td>
<td>11 (48.2%)</td>
<td>2 (7.4%)</td>
<td>27 (100.0%)</td>
</tr>
<tr>
<td>Chinese</td>
<td>9 (37.5%)</td>
<td>14 (58.3%)</td>
<td>1 (4.2%)</td>
<td>24 (100.0%)</td>
</tr>
<tr>
<td>Foreigner</td>
<td>6 (60.0%)</td>
<td>3 (30.0%)</td>
<td>1 (10.0%)</td>
<td>10 (100.0%)</td>
</tr>
</tbody>
</table>

3.2.3. Age

Under the English Police and Criminal Evidence Act 1984 (PACE) Codes of Practice, the police must provide an ‘appropriate adult’ for juvenile and mentally disordered or mentally handicapped detainees (Code 3.9). The role of the appropriate adult – who may be the parent or guardian or social worker – is to provide support to a vulnerable person in custody which may involve: giving advice, ensuring police interviews are conducted properly,

\textsuperscript{18} The remainder one was an Indonesian maid with valid work permit. Though she gave an inculpatory cautioned statement, no further action was taken against her as the case (under section 26(1) of the Child Protection Act) was quite weak and the complainant requested for withdrawal of the case against her.

\textsuperscript{19} The two Indians were involved in a same rioting case under s 148 PC.
and facilitating communication between officers and the detainee. Persons of young age, just like the handicapped, are regarded as vulnerable due to their lack of maturity or intelligence to appreciate the importance of the statements they make to the police and to know and exercise their right.

Table 3 examines the effects of age on the nature of cautioned statements made by suspects in police custody. The proportion of child suspects giving inculpatory statements exceeds that of their adult counterparts (54.5% for child cf. 41.3% for adult). On the other hand, Table 3 also shows that child suspects were more likely to exercise their right of silence. However, a closer examination of the data set revealed that all of the three child suspects who remained silent were of age 19 and 20. Most notably, four suspects of age 13 and 14 all confessed to their crimes ranging from criminal intimidation (s.506 PC) to vehicle theft (s.379A PC) and causing hurt with dangerous weapon (s. 324 PC). These figures lend some support to the argument that persons of young age are vulnerable in the criminal justice system.

Table 3: Nature of cautioned statements by age groups

<table>
<thead>
<tr>
<th></th>
<th>Inculpatory</th>
<th>Exculpatory</th>
<th>Silence</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult</td>
<td>33 (41.3%)</td>
<td>44 (55.0%)</td>
<td>3 (3.8%)</td>
<td>80 (100.0%)</td>
</tr>
<tr>
<td>Child</td>
<td>12 (54.5%)</td>
<td>7 (31.8%)</td>
<td>3 (13.6%)</td>
<td>22 (100.0%)</td>
</tr>
</tbody>
</table>

* – those below 21 years old

3.2.4. Sex

There were only four female suspects in this study. All of them made inculpatory statements to the police. Nevertheless, great care must be exercised before making a general conclusion about the willingness of the fairer sex to confess to their sins and submit to the authority. All of them were Indonesians. Among them, three were detained for illegal entry into Malaysia. Hence no meaningful conclusion can be made about the difference in the nature of cautioned statements between the sexes.

3.2.5. Income status

It is often said that justice is only for the rich, while the poor are often the victims of injustice. The gap in financial affordability gives rise to different levels of accessibility to legal advice and thus procedural fairness or

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20 Supra N. 8
21 For this study, “child” suspects refer to those suspects below the age of 21.
22 The two 20-year old suspects were involved in a same rioting case mentioned above, supra N. 19
advantage. In addition, as a gap generally exists in the level of education between the rich and poor, the poor might not be aware of their rights as well as the rich are and thus are less likely to exercise their rights. Phillips and Brown (1998) reported that suspects who have received legal advice were among the groups most likely to exercise the right of silence.  

In this case study, the suspects had a wide range of occupations from being unemployed to businessmen. Even though data of their incomes were not available, it is obvious that most of them were not from the upper class of the society. For the purpose of analysis, the occupations of the suspects were arbitrarily divided into three groups as below:

1. **High-income group** – businessmen, civil servants, sales/marketing, executives, taxi drivers and hawker.

2. **Medium-income group** – carpenters, lorry drivers, plumbers, car repossessors, chefs, electricians, mechanics, self-employed and technicians.

3. **Low-income group** – labourers, maid, shop assistant, store keepers, dispatch boys, rubber tappers, factory workers, students and unemployed.

Table 4 presents the type of cautioned statements given by the suspects of three different income groups. It is observed that the tendency of those from the low-income group to give incriminating statements was slightly higher than the others. However, the low-income group had also the highest tendency to exercise their right of silence. Hence, unless the actual income of the suspects are made available, no conclusive generalization may be made on the effects of income status upon the way a suspect responds to police investigation at this point.

Table 4: Nature of cautioned statements by income levels

<table>
<thead>
<tr>
<th></th>
<th>Inculpatory</th>
<th>Exculpatory</th>
<th>Silence</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Low-income</strong></td>
<td>27 (48.2%)</td>
<td>25 (44.6%)</td>
<td>4 (7.1%)</td>
<td>56 (100.0%)</td>
</tr>
<tr>
<td><strong>Medium-income</strong></td>
<td>8 (36.4%)</td>
<td>13 (59.1%)</td>
<td>1 (4.5%)</td>
<td>22 (100.0%)</td>
</tr>
<tr>
<td><strong>High-income</strong></td>
<td>10 (41.7%)</td>
<td>13 (54.2%)</td>
<td>1 (4.2%)</td>
<td>24 (100.0%)</td>
</tr>
</tbody>
</table>

23 supra N. 7
24 The division was arbitrarily done by the writer using personal judgment on the likely relative income level of each occupation.
3.3. EFFECTS OF SERIOUSNESS OF OFFENCE

Phillips and Brown (1998) found that suspects arrested for serious offences were more likely to exercise their right of silence. As serious offences carry heavy sentences, suspects normally exercise more caution when answering police questions, and are less willing to admit guilt in order to avoid the harsh penalty. An analysis of the data set in this study seems to reveal a mild indication to support such argument. All six suspects who remained silent in their cautioned statements were arrested for offences that carry maximum jail sentences ranging from five to 14 years, some with mandatory custodial sentence and whipping. Nevertheless, significant proportions of suspects arrested for serious offences also made inculpatory statements to the police. These offences included culpable homicide under s. 304 PC (100%), causing hurt with dangerous weapon under s. 324 PC (60%), causing grievous hurt under s. 325 PC (100%), rape (50%), robbery under s. 392 PC (66.7%), house breaking by night for theft under s. 457 PC (100%) and criminal intimidation under s. 506 PC (75%). Hence there is no conclusive indication of any obvious effects of seriousness of offences on the likelihood to confess.

The readiness of a suspect to either confess or deny is more likely to be affected by the strength of evidence the police have against him. Those arrested red-handed, eg illegal immigrants; and those arrested for confrontational crimes – eg causing hurt, rioting, rape, robbery and criminal intimidation – were more likely to confess. Where the case against the suspect was weak, or where it was difficult for the police to establish the suspect’s guilt, exculpatory statements were to be expected. For instance, majority of suspects arrested for criminal breach of trust under ss. 406, 407 and 408 PC denied their involvement in the offences (50% to 100%). For rioting (ss. 147 and 148 PC) cases where there were multiple arrests made, only one or two of the arrested persons would admit to the crime, and the rest just conveniently put the blame on them.

3.4. CAUTIONED STATEMENT AND GUILTY PLEA

Table 5 exhibits the relationship between the nature of cautioned statement given by a suspect during police investigation and the way he pleaded at his trial. It is evidently clear that those who confessed during police investigation were more likely to plead guilty when they were charged in court (64.4%). Whereas those who gave exculpatory statements or remained silent would more likely go on to claim trial (70.6% and 66.7% respectively). Majority of suspects arrested but not charged in court were those who gave exculpatory statements (10 out of 14). This finding lends some support to the suggestion that those suspects against whom the police have weak evidence were more likely to deny their guilt.
Table 5: Relationship between nature of cautioned statement and guilty plea

<table>
<thead>
<tr>
<th></th>
<th>Plead guilty</th>
<th>Claim trial</th>
<th>Not charged</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inculpatory</td>
<td>29 (64.4%)</td>
<td>13 (28.9%)</td>
<td>3 (6.7%)</td>
<td>45 (100.0%)</td>
</tr>
<tr>
<td>Exculpatory</td>
<td>5 (9.8%)</td>
<td>36 (70.6%)</td>
<td>10 (19.6%)</td>
<td>51 (100.0%)</td>
</tr>
<tr>
<td>Silence</td>
<td>1 (16.7%)</td>
<td>4 (66.7%)</td>
<td>1 (16.7%)</td>
<td>6 (100.0%)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>35 (34.3%)</td>
<td>53 (52.0%)</td>
<td>14 (13.7%)</td>
<td>102 (100.0%)</td>
</tr>
</tbody>
</table>

b – Suspects not charged in court include those arrested together with others for a same offence but were not charged due to lack of evidence, and those whose victims requested for withdrawal of case.

3.5. CAUTIONED STATEMENT AND OUTCOME OF CASE

As suspects who gave inculpatory cautioned statements are more inclined to plead guilty at their trials, coupled with the additional piece of evidence made available to the prosecution in the form of suspects’ confessions, one would expect the corresponding conviction rate to be higher too. Table 6 displays the various outcomes of prosecution cases in accordance with the nature of cautioned statements given by suspects at the investigation stage. The conviction rate of those who gave inculpatory statements almost doubled the conviction rates of those who gave exculpatory statements and kept silent put together, whereas the acquittal rate was zero. This finding confirms the suggestion stated above and provides some indication that cautioned statement is indeed a very important tool of police investigation and prosecution.

Table 6: Outcomes of case by nature of cautioned statements

<table>
<thead>
<tr>
<th></th>
<th>Convicted</th>
<th>DNAA</th>
<th>Acquitted</th>
<th>Case Withdrawn</th>
<th>Not charged</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inculpatory</td>
<td>19 (42.2%)</td>
<td>6 (13.3%)</td>
<td>0</td>
<td>15 (33.3%)</td>
<td>3 (6.7%)</td>
<td>45 (100.0%)</td>
</tr>
<tr>
<td>Exculpatory</td>
<td>4 (7.8%)</td>
<td>9 (17.6%)</td>
<td>2 (3.9%)</td>
<td>26 (51.0%)</td>
<td>10 (19.6%)</td>
<td>51 (100.0%)</td>
</tr>
<tr>
<td>Silence</td>
<td>1 (16.7%)</td>
<td>1 (16.7%)</td>
<td>1 (16.7%)</td>
<td>2 (33.3%)</td>
<td>1 (16.7%)</td>
<td>6 (100.0%)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>24 (23.5%)</td>
<td>16 (15.7%)</td>
<td>3 (2.9%)</td>
<td>43 (42.2%)</td>
<td>14 (13.7%)</td>
<td>102 (100.0%)</td>
</tr>
</tbody>
</table>

c – Discharged Not Amounting to Acquittal
d – Reasons for withdrawal of cases included: (1) weak evidence, (2) requested by victims or complainants, and (3) death of accused or victim or important witness.
3.6. LEGAL COUNSEL

The right to legal counsel is guaranteed under the Constitution. It serves to defend the rights of suspects and protect the suspects against unfair police practice. As stated above, suspects who have received legal advice were among the groups most likely to exercise the right of silence. Unfortunately, in Malaysia, such luxury is still beyond the means of majority of the population. Prohibitive legal fees and limited legal aids service prevent the bulk of those who run foul of the law from seeking legal assistance. Majority of people arrested for involvement in criminal cases are from the lower-income groups. Legal representation during investigation stage is very rare indeed. And only a small portion of the accused persons can afford the service of defence counsels during the trials. In the current study, only 11 out of the total 102 suspects (10.8%) were legally represented at their trials. Data on legal representation during police investigation was not available, but it is believed the percentage would be much lower. Table 7 presents the details of cases where suspects were legally represented during trial. It may be concluded that only those who could afford (eg businessmen) and those who were charged with serious offences (eg s. 325, 376 and 377A PC, and s. 8 FIPA) engaged the service of defence counsels.

Table 7: Cases where suspects engaged defence counsels

<table>
<thead>
<tr>
<th>No.</th>
<th>Offence</th>
<th>Race</th>
<th>Age</th>
<th>Occupation</th>
<th>Nature of C/Statement</th>
<th>Plea</th>
<th>Outcome of Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>S.453 PC</td>
<td>Indian</td>
<td>52</td>
<td>Salesman</td>
<td>exculpatory</td>
<td>PG</td>
<td>Convicted</td>
</tr>
<tr>
<td>2</td>
<td>S.325 PC</td>
<td>Chinese</td>
<td>26</td>
<td>Labourer</td>
<td>inculpatory</td>
<td>PG</td>
<td>Convicted</td>
</tr>
<tr>
<td>3</td>
<td>S.376 PC</td>
<td>Malay</td>
<td>20</td>
<td>Labourer</td>
<td>inculpatory</td>
<td>CT</td>
<td>withdrawn</td>
</tr>
<tr>
<td>4</td>
<td>S.376 PC</td>
<td>Indian</td>
<td>24</td>
<td>technician</td>
<td>exculpatory</td>
<td>CT</td>
<td>withdrawn</td>
</tr>
<tr>
<td>5</td>
<td>S.376 PC</td>
<td>Malay</td>
<td>19</td>
<td>factory worker</td>
<td>inculpatory</td>
<td>CT</td>
<td>withdrawn</td>
</tr>
<tr>
<td>6</td>
<td>S.376 PC</td>
<td>Indian</td>
<td>39</td>
<td>Lorry driver</td>
<td>inculpatory</td>
<td>PG</td>
<td>accused died</td>
</tr>
<tr>
<td>7</td>
<td>S.376 PC</td>
<td>Indian</td>
<td>39</td>
<td>Lorry driver</td>
<td>inculpatory</td>
<td>PG</td>
<td>accused died</td>
</tr>
<tr>
<td>8</td>
<td>S.377A PC</td>
<td>Malay</td>
<td>40</td>
<td>Civil servant</td>
<td>inculpatory</td>
<td>CT</td>
<td>acquitted</td>
</tr>
<tr>
<td>9</td>
<td>s.8 FIPA</td>
<td>Chinese</td>
<td>31</td>
<td>unemployed</td>
<td>silence</td>
<td>CT</td>
<td>acquitted</td>
</tr>
<tr>
<td>10</td>
<td>s.376 PC</td>
<td>Chinese</td>
<td>24</td>
<td>factory worker</td>
<td>exculpatory</td>
<td>CT</td>
<td>withdrawn</td>
</tr>
<tr>
<td>11</td>
<td>S.6(3)(a) Act 495</td>
<td>Chinese</td>
<td>25</td>
<td>Business</td>
<td>exculpatory</td>
<td>CT</td>
<td>withdrawn</td>
</tr>
</tbody>
</table>

Note: Act 495 – Betting Act 1953
PG – plead guilty
CT – claim trial

– Same accused arrested and charged for two separate rape cases

28 Article 5
29 Phillips and Brown (1998), supra N. 7
4. CONCLUSION

In this case study, it was discovered that only six percent of suspects in police custody (Kajang) actually exercised their right to remain silent when a cautioned statement was recorded from them, whereas 44 percent gave inculpatory statements or confessions. This trend is quite consistent with the situation in the United Kingdom and Singapore which share similar legal system with Malaysia.

Suspects who exercised their right to silence consisted mainly of those against whom the police already had strong incriminating evidence. At the same time, strong evidence would also induce suspects to admit their misdemeanour. On the other hand, when the police had a weak case, exculpatory statements were to be expected.

Across the board, demographical factors such as the location of police station, race and sex did not have significant effects on the way suspects responded to police interviews. However the illegal immigrants and young children aged 14 or below were most likely to confess to their offences. They might be categorized as the “vulnerable groups”. There was no conclusive indication of any significant effects of occupation or income status on pre-trial silence. Nevertheless, it cannot be denied that majority of the offenders were from the lower income bracket. As a result, most of the suspects could not afford the luxury of legal advice during investigation and trial. Only 10.8 percent of the suspects were legally represented during their trials, and they were either the rich minority or those charged with serious offences.

Even though research studies in the UK revealed that suspects arrested for serious offences were more likely to exercise their right to silence, such trend was not noticeable over here. However, suspects arrested for offences of complicated nature (like CBT) showed greater propensity (50 to 100 percent) to exculpate themselves in their statements.

Majority of suspects who gave inculpatory cautioned statements pleaded guilty to their charges in court. Conversely, those who gave exculpatory statements or remained silent were more likely to claim trial. Consequently, the conviction rate of the former group was much higher than that of the latter. This is a strong indication that some criminals do feel remorse for their sins and are willing to confess and atone instead of hiding behind silence.

5. COMMENTS

The finding that only a small fraction of suspects exercised the right to silence and nearly half of them actually confessed, highlights the importance of cautioned statements in police investigation and prosecution. Therefore, this finding does not lend any support to the notion that the right
to silence undermines the efficacy of police investigation and prosecution of criminal cases generally.

Despite the relatively high percentage of incriminating statements, most prosecuting officers would agree that the percentage of cautioned statements that have been tendered in court and eventually admitted in evidence is miserably low. The judiciary cannot be blamed for being vigilant on the use of cautioned statements in evidence lest it result in miscarriage of justice. Very often it is the weaknesses of the police during the recording process that cost the admissibility of most of these statements. Hence the police must take all necessary actions to overcome whatever problems and weaknesses they face to ensure that this powerful tool of investigation may be utilized to the fullest. Perhaps the police should make use of the service of the magistrates to record accused’s confessions under s.115 CPC whenever possible. The courts always consider confessions recorded under s.115 more favourably compared to cautioned statements recorded under s.113.

One area that is in dire need of attention of the policy makers is the high cost of legal service which is beyond the means of most accused persons. The government and the Bar Council alike must take immediate actions to extend legal aid service to more people. Eligibility requirements of the service should be relaxed and red-tapes should be cut. Most importantly, more publicity should be made to elevate the level of awareness of the service among the general public.

Complicated crimes like the white-collar offences are difficult to be proved. Hence the offenders, who are generally more sophisticated, are more likely to deny their involvement or exploit the right to silence when interviewed by the police. Given the complicated nature of the offences, they have the unfair advantages by virtue of their freedom to say nothing during interrogation and not to reveal their defence before trial. Since they know what the police and the prosecution have against them, they are able to tailor their defence and surprise the prosecution with it at the trial. This may undermine the efficacy of combating these crimes. Hence the legislative curtailment of right to silence in the form of Section 45 of the Anti Corruption Act 1997 and Section 72 of the Anti Money Laundering Act 2001 that require an accused to disclose his defence to the authority before the commencement of prosecution is a step in the right direction.

Importance of cautioned statements notwithstanding, it is morally wrong and procedurally unfair for the police to depend too much on the

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30 These sections state that: “Where any person is arrested or is informed that he may be prosecuted for any offence under this Act, he shall be served with a notice in writing, which shall be explained to him, to the following effect:

‘You have been arrested/informed that you may be prosecuted for...(the possible offence under this Act). Do you wish to say anything? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed, and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.’ ”
confession and admission of the accused to solve crimes. Over reliance on this means of investigation would inevitably lead to abuse and improper police practice. Hence, in every case, more attention should be given to the collection of positive evidence – e.g. forensic evidence and witnesses' statements – rather than getting the suspect to “sing”, which is sometime the most convenient and easiest way of investigation. It is ardently hoped that the low conviction rate (7.8 percent) of accused persons who gave exculpatory cautioned statements was not the result of poor investigation and over reliance on confession and guilty plea.

REFERENCES


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