



SCOTTISH HOME AND HEALTH DEPARTMENT
AND
CROWN OFFICE

Criminal Procedure in Scotland (Second Report)

Report by the Committee
appointed by The Secretary of State for Scotland
and
The Lord Advocate
(Chairman: The Honourable Lord Thomson)

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2.01 The subjects which gave us most difficulty were arrest, search and the interrogation of suspects. In these and certain other areas there is a general problem, namely the conflict between the public interest in the detection and suppression of crime on the one hand and the interest of the individual citizen in freedom from interference by the police on the other. The classic statement of this conflict is that of Lord Justice-General Cooper in *Lawrie v Muir* (1950 JC 19, at 26-27) which itself dealt with the admissibility of evidence obtained by search. His Lordship said:

‘From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps highhanded interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods. It is obvious that excessively rigid rules as to the exclusion of evidence bearing upon the commission of a crime might conceivably operate to the detriment and not the advantage of the accused, and might even lead to the conviction of the innocent; and extreme cases can easily be figured in which the exclusion of a vital piece of evidence from the knowledge of a jury because of some technical flaw in the conduct of the police would be an outrage upon common sense and a defiance of elementary justice.’

2.02 The same view was taken in a more recent case on the admissibility of statements to the police, *Miln v Cullen*, (1967 JC 21, at 29-30) where Lord Wheatley said:

‘While the law of Scotland has always very properly regarded fairness to an accused person as being an integral part of the administration of justice, fairness is not a unilateral consideration. Fairness to the public is also a legitimate consideration, and in so far as police officers in the exercise of their duties are prosecuting and protecting the public interest, it is the function of the Court to seek to provide a proper balance to secure that the rights of individuals are properly preserved, while not hamstringing the

necessarily be a compromise between these two interests—that of the public as represented by the police, and that of the individual. It must meet the requirements of the police for such powers as are necessary to enable them to carry out the duties of crime-detection in the interests of society, without giving them power to ride roughshod over individuals; it must safeguard the individual's right to go about his lawful business free from unreasonable police interference, and his right to have his personality and human dignity respected when he is in the hands of the police, without creating a situation in which criminals can render the investigation of their crimes difficult or even impossible merely by standing on their rights. It must recognise the realities of the situation, and take account of those police practices which are accepted as fair by the public including criminals although they may be technically illegal or at least of doubtful legality. It must avoid the situation which many police officers claim exists at present in which strict adherence to the rules would so hamper their efficiency and so reduce the detection rate as to subject them to severe criticism. Such an argument would carry little weight if the practices concerned were objectionable in themselves, for example, physical ill-treatment, but we believe that the argument does have some force in relation to practices which are not regarded by police or public as morally objectionable, and especially to practices which although formally prohibited are actually condoned. Society must make up its mind whether or not such things as detaining and questioning suspects are acceptable, and either prohibit them, or legalise them under suitable safeguards. We agree with the approach of the American Law Institute who state in commenting on their Draft Model Code of Pre-Arrest Procedure:

'It is one of the central conceptions of this Code that those powers which are indispensable in a rational scheme of police activity should be explicitly recognised, so that standards for their exercise may be created, and limitations imposed to prevent abuse.'

We firmly believe that if the powers and duties of the police are clearly defined the rights and obligations of the public will also become clearly understood with consequent improvement in relations between police and public.

2.04 The extent of the protection afforded to accused persons by the rules of criminal procedure is an index of the social conscience and stability of a society and of its respect for human rights. That protection must not be so strong as to restrict the collection and presentation to the court of such evidence against an accused person as is, in accordance with our current ideas of fairness and propriety, considered admissible. On the other hand it must be strong enough to eliminate so far as possible any aspects of the pretrial and trial process which are likely to prejudice an innocent man's chance of early discharge.

THE PRESENT LAW

3.01 A person is under arrest when he is taken into custody and kept by officers of law in custody until such time as he is brought before a court or liberated by judicial or quasi-judicial process. Arrest may be carried out with or without a warrant. So far as arrest on warrant is concerned, the only problems relate to the procedure for obtaining a warrant and these we deal with separately in Chapter 4. Arrest without warrant may be carried out by officers of law, or by magistrates or citizens.

Powers of magistrates and citizens

3.02 A magistrate may arrest or order others to arrest an alleged offender for a serious crime, riot or breach of the peace committed within his jurisdiction which he has witnessed, or of which he has received an immediate complaint. A private citizen may arrest for a serious crime he has witnessed. The exercise of these powers has not created a ny problem and we make no proposal for change. Arrest by a citizen differs from arrest by an officer of law in that the only lawful purpose of the former is the handing over of the arrestee to the police as soon as possible. This power has to be retained in order to protect the citizen who restricts the liberty of the person whom he has seen committing a crime from liability for assault. The rules regarding arrest or detention by officers of law will come into play as soon as the offender is handed over by the citizen to the police. Our subsequent discussion applies only to arrest by officers of law.

The meaning of 'custody'

3.03 Custody is detention against the will of the person detained. Persons may at present be held lawfully in police custody only when they have been lawfully arrested. There is, however, some uncertainty as to the distinction between a person who is in police custody and one who goes or stays with the police voluntarily. That some clarification of this is necessary can be seen from the cases of *Muir v Hamilton Magistrates* (1910, 1 SLT 164) and *Swankie v Milne* (1973 SLT (Notes) 28). In the case of *Swankie* plain-clothes police officers stopped a car driven by the accused, took the car keys from him and waited with him at the car until uniformed police officers arrived. The prosecutor in the lower court conceded that Swankie had been arrested, but the Sheriff took the contrary view and found that Swankie had been detained but not formally arrested, although he also found that had he attempted to leave the police would have prevented him. The Appeal Court upheld the Sheriff's view that there had not been an arrest. We make a recommendation in this connection in paragraph 3.12.

In Scotland the police may arrest without warrant in all cases of common law crimes. As there are no fixed maximum penalties for Scottish common law crimes, and as most crimes are based on common law, it is not possible to make any distinction similar to that created by the five year period in England and Wales.

3.05 In Scotland it is generally accepted that the common law gives the police a power to arrest without warrant for statutory offences. This power is frequently exercised for serious offences but its extent has not at any time been authoritatively determined. We consider that the extent should be defined and we deal with this in paragraph 3.29.

Grounds for arrest

3.06 We turn to another problem: the grounds upon which an arrest without warrant is justified. On one view the power to arrest without warrant is limited to offences witnessed by the arresting officer or reported to him immediately by an eye-witness, with an additional power to arrest a person found under suspicious circumstances in possession of goods believed to be stolen. On another view the power extends to the arrest of any suspected offender where this is necessary in the interests of justice. Again we think that this uncertainty should be removed and we make our recommendation in paragraph 3.30.

The stage of arrest and charge

3.07 At present the rule is that (apart from certain statutory exceptions) an arrest must be accompanied by a charge, (*Chalmers v HM Advocate*, 1954 JC 66, 78), and that therefore a person may be arrested only when there is sufficient evidence to charge him. Evidence sufficient to charge means evidence sufficient to report to the procurator fiscal. The accused will be charged in court on a writ at the instance of the procurator fiscal and not on the police 'charge', but this latter does represent a vital step in pretrial procedure. A person can, of course, be 'charged' by the police without being arrested, but the converse is not true.

3.08 Arrest thus marks the stage at which police enquiries are completed to the extent that the evidence is sufficient to justify reporting a particular person as the offender. They have ceased to be general enquiries; thereafter they will take the form of seeking further evidence under the general direction of the procurator fiscal, assuming that he takes up the case when it is reported to him. Arrest alters the status of the person arrested: he loses not only the right to liberty, but the right to decline to be fingerprinted or searched; he gains the right to have his solicitor informed of what has happened and to a subsequent interview with him; and the police lose any power they may have had to ask him questions the answers to which can be used in evidence.

methods not involving arrest.

Summary of problems

3.10 It is clear from the foregoing that the present law of arrest presents a number of problems. Most of these can be solved by clarification of existing rules and concepts: the definition of 'custody', the range of offences for which arrest without warrant is competent and the grounds on which such an arrest may be made. We make recommendations for these in paragraphs 3.12, 3.29 and 3.30 respectively. There remains the difficulty which is created by the rule that arrest must be accompanied by a charge, and this raises a fundamental issue. If, as Lord Cameron put it in *Swankie*, 'a person is either arrested or he is not: there is no halfway house', and if arrest is competent only when police enquiries have reached the stage at which there is sufficient evidence to charge, it follows that the police have no power to detain a person whom they have reasonable grounds to suspect of a crime unless and until the evidence against him is sufficiently corroborated to justify reporting him to the procurator fiscal. If the police wish a suspect to remain in a particular place or to go to a police station pending further enquiry they must persuade him to do so voluntarily, and this can lead as it did in *Swankie* to an artificial situation in which the suspect is technically a volunteer but is in practice not a free agent. We hope that the difficulties created by the present law of arrest in such situations will be solved by the new power of detention on suspicion which we propose the police should have.

PROPOSALS FOR REFORM

3.11 Some of our witnesses expressed satisfaction with the present law and practice of arrest and did not consider that it should be made any more specific. As is clear from the preceding paragraphs we do not accept this view. Unlawful arrest is an actionable wrong and so it is necessary for a police officer to know when it is lawful to arrest without warrant. It is therefore necessary for the protection of the police as well as of the citizen that the law should be clear. It is also necessary that it should be so framed as to allow the police to perform legally whatever functions in the investigation and prevention of crime the public regard as proper. We believe that the police at present are able to carry out their functions only because some persons whom they detain without warrant fail, through ignorance or fear of authority, to exercise their rights. It may be argued that if the police are given specific powers to enforce the attendance at a police station of those whose attendance is presently merely requested, they will require more people to go there. We appreciate the point of this argument, but we do not think that it is a strong one. At worst such legalisation of police practices as we propose will place the articulate and knowledgeable citizen in the same position as that presently occupied by the ignorant and inarticulate citizen. As people become increasingly aware of their rights the present tacit co-operation which makes it

Police custody

3.12 Since arrest and detention, which we describe in subsequent paragraphs, both involve taking a person into custody, we turn now to consider what test should be applied to determine whether or not a person is in police custody. In our view the crucial question is whether or not that person is free to go about his ordinary business. The test should not depend on any particular form of words used by police officers in addressing the person or on whether or not the person thinks that he is free to go. If the person would not in fact be allowed to go on his way should he attempt to do so, or even express a desire to do so, then he should be regarded as being no longer a free agent but as being in police custody. *We so recommend.*

Detention before arrest and charge

3.13 The policeman's real difficulty arises in investigations where he wants to interview a suspect or prevent him from interfering with evidence such as stolen property. At present the police are powerless to act without the consent of the very person who is likely to have most interest in refusing to give that consent. Clearly the police should not be entitled to arrest anyone they want to interview but it seems plainly wrong, for example, that a suspected violent criminal with significant evidence on his clothing has to be left at large while the police seek other evidence of his guilt sufficient to entitle them to charge.

3.14 We *recommend* that the practice of inviting persons to the police station should be regularised. We are convinced that it will continue if the law remains unchanged and that it can be controlled only by being recognised and made subject to clearly defined limits. We accept that certain people do and will continue to attend at police stations truly voluntarily, such as those who prefer to see the police there rather than have the police be seen to visit them, or those who call to confess to crime, but these are exceptional cases. Our recommendations will also cover the situation where the police stop in the street people who are suspected of committing or having recently committed an offence. At present, except where they act under Police Acts, which relate for the most part to stolen property, or under any other special statute such as the Road Traffic Act 1972, the police have no power to detain and question anyone in the street unless they are in a position to arrest him.

3.15 We *recommend*, therefore, a form of limited, or temporary arrest—arrest on suspicion. Since the rules governing this 'arrest' will differ from those governing arrest at the moment, we give it a separate name—detention. Detention will include power to take to and keep in a police station, but its duration will be limited by the following general rules:

- a. it should not last longer than is necessary in the interests of justice;
- b. it should be succeeded as soon as is reasonable by either release or arrest; and

where the detaining constable has reasonable cause to suspect the detainee of having committed an offence for which there is power to arrest without warrant (see paragraph 3.29). This, we would point out, is the criterion for arrest without warrant in England and Wales (Criminal Law Act 1967, section 2(4)), and also complies with the provisions of the European Convention of Human Rights, article 5(1)(c) of which provides for 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.' This power of detention should of course not be exercised in every case in which the police have reasonable cause for suspicion but only when the police consider it necessary to detain the suspect for the purpose of their investigations.

3.17 What constitutes reasonable cause to suspect will always be a question for the court. The criterion is an objective one. But 'reasonable cause' is not limited to grounds based on admissible evidence. As Lord Devlin said in *Hussein v Chong Fook Kam* ([1970] AC 942, at page 949):

'There is another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all.'

Detention in places other than police stations

3.18 The power of the police to detain on suspicion will cover the preliminary detention of a suspect for a short period of time before he is taken to the police station, as well as power to take to a police station and detain him there for a longer period. The person detained must be told immediately the reason for the detention. We considered placing a time limit on this preliminary period of detention such as has been suggested for 'on the street' detention of persons with material knowledge of a crime in the American Law Institute's Model Code of Pre-Arraignment Procedure, where twenty minutes is proposed (see Tentative Draft No 1, article 2.02(1)). We decided, however, that a rigid time-limit was not desirable where such short periods of time were concerned, and that it would be sufficient to provide that no person should be detained elsewhere than in a police station for longer than is necessary for the following purposes:

- a. asking for an explanation of suspicious behaviour;
- b. taking name and address of detainee and, where it can be done rapidly, for example, by radio, verifying these;
- c. searching outer clothing or baggage for stolen goods, tools of crime, or weapons.

We *recommend* accordingly.

3.19 We are aware that one of the problems relating to a power to detain on suspicion, and particularly a power to search for weapons, is a fear that this will lead to police harassment of young persons, particularly where such

avoid this danger. We agree with the majority of the Advisory Committee on Drug Dependence in their report on Powers of Arrest and Search in relation to Drug Offences (HMSO 1970) that it is not possible to define 'reasonable cause', but we consider that all the factors referred to in that report are relevant.

As they put it:

'The present unwritten code which is familiar to every police officer, but much less familiar to the public, might be said roughly to include:

- (1) the demeanour of the suspect;
- (2) the gait and manner of the suspect;
- (3) any knowledge the officer may have of the suspect's character or background;
- (4) whether the suspect is carrying anything, and the nature of what he is carrying;
- (5) the mode of his dress, bulges in his clothing, and particularly when these factors are considered in the light of all the surrounding circumstances;
- (6) the time of observation;
- (7) any remarks or conversation which he makes to any other person which might be overheard by an officer;
- (8) the street or the area involved;
- (9) information from a third party, who may in given circumstances be known or unknown;
- (10) any connection between that person and any other person whose conduct at that time is reasonably suspect;
- (11) the suspect's apparent connection with any overt criminal activity.

To any such list must be added the essential fund of common sense, training and experience which every police officer is deemed to possess in some measure and without the exercise of which he may find himself in trouble with his superior officers.'

3.20 Again like the Advisory Committee, we wish to stress that mere physical appearance or dress, or presence or residence in a particular area, should not be sufficient to justify detention. We think, too, that it is important to stress that the mere appearance on the street of a person with a police record does not justify the police in detaining, questioning or searching him.

Detention to forestall crime

3.21 We considered whether there should be a power to detain a person in order to prevent his committing a crime. There is some authority for this in relation to threatened violence (Hume on Crimes, ii 76), but we do not think that such an extended power is necessary. There can be very few cases in which a power to arrest for breach of the peace, or the crime of threats, or contravention of the statutes relating to known thieves, etc, will be insufficient

considered by the officer in charge for the time being of the station. It should be for him to decide whether to authorise the detainee's continued detention. He should do so only where such detention is in his view justified. The detainee should again be told the reason for his detention and this, as well as the time of his arrival in the police station, should be recorded. If there is sufficient evidence to justify the arrest of the detainee, he should be arrested and charged. If neither arrest nor continued detention is justifiable, the detainee should be released. The time of release or charge should also be recorded. We so *recommend*.

3.23 Under the present law an arrested person is entitled to have information of his arrest sent to his solicitor, but his only right to see his solicitor is to see him before his appearance in court. We *recommend* that the detainee should have the same right to have his solicitor informed as has the arrestee, and we think that both, too, should have a right to have information sent to a friend or relative. In addition we are recommending (paragraph 3.24b. and c.) that in certain circumstances the detainee should have a right to legal advice.

The purpose of detention

3.24 We *recommend* that detention in a police station should be for the following purposes:

- a. To enable the police to isolate the detainee while they continue their enquiries elsewhere, interview witnesses, search for weapons, goods etc.
- b. To enable the police to obtain the detainee's fingerprints and to search him without his consent. This involves giving the police power to do things which generally at present they can do only after arrest. We do not think that the detainee should have a general right to legal advice, but the question whether he should be entitled to the presence and advice of a solicitor before being searched is a more difficult one. The arrested person has no such right at present. We think that the invasion of person involved in fingerprinting or in the search of luggage and clothing is so slight as to be outweighed by the usefulness of the information provided by such a search, and that the police should have power to carry out these activities without the intervention of the detainee's solicitor. Such searches can, in any event, be carried out prior to arrest at present where they are necessary to prevent the destruction of evidence, and this criterion, the criterion of 'urgency', is very widely interpreted by the court (see for example *Bell v Hogg* 1967 JC 49; *Hay v HM Advocate* 1968 JC 40). But where any form of medical examination or search of body cavities or removal of any portion of the body, for example, hair, nail clippings, etc, is sought by the police they must obtain the consent of the detainee, and he must therefore have the opportunity of consulting a solicitor before deciding whether or not to consent. This is without prejudice to any specific statutory provisions such as those of the Road Traffic Act 1972, section 8, and without prejudice to the right of

opportunity of having a solicitor present at such a parade. His consent to be placed on parade is inevitably necessary, since an identification parade could not be properly conducted with a protesting accused. On the other hand, where he does refuse to go on a parade he can hardly complain if witnesses are brought to look at him in the station, although the value of such evidence will vary according to the circumstances.

d. To enable the police to ask the detainee questions: this is dealt with in Chapter 7.

The duration of detention

3.25 Various views were expressed to us on the maximum permissible period of detention in a police station. Some considered that it should be as long as twenty-four hours and there was a strong body of opinion in favour of twelve hours, but we have come to the conclusion that the period ought not to exceed six hours and we so *recommend*. This was the minimum period favoured by the police witnesses who considered that generally it would be adequate for their purposes. We are reinforced in this view by the evidence of the representatives of the Scottish Council for Civil Liberties who, although averse to the principle of detention, did not feel that, if such detention was necessary, six hours would be too long. We stress that this is the maximum period of detention and that we expect that in the vast majority of cases the actual detention will be for a shorter period. As soon as the purpose of the detention is served, the police will have a clear duty. They must either liberate the detainee or arrest him. In any event he must be released within six hours of his arrival at the station, unless he is arrested and charged.

3.26 Once he has been charged, the detainee becomes an arrestee with the same rights and liabilities as a person who has been arrested without prior detention. In particular, he will be eligible for release under the provisions proposed in Chapter 11. We deal with the rights of arrestees in Chapter 5.

Summary of the controls on detention

3.27 The exercise of the power of detention will be subject to the following controls:

- a. The person detained shall be told immediately of the ground or grounds for his detention.
- b. No person shall be detained in a police station without being charged except on the authority of the police officer in charge of the police station. The time of his initial detention, and of his arrival at the police station, together with a brief statement of the ground of his detention in the station shall be recorded in a book kept by the authorising officer.
- c. If the detainee so requests, information of his detention shall be sent to his solicitor, and to a friend or relative.

place not being a police station for longer than is necessary to carry out the purposes specified in paragraph 3.18 above, save where he is in process of being taken to a police station as a detainee or arrestee.

It follows that there can, of course, be no question of 'detaining' a person on a charge in respect of which there exists a warrant for his arrest.

Arrest

3.28 Our proposals result in there being two classes of persons in custody. We have dealt with the detainee and now we turn to the arrestee.

Arrestable offences

3.29 As we have already stated in paragraph 3.04 it is not possible to base the distinction between arrestable and non-arrestable offences on the criterion used in England and Wales. We have also pointed out in paragraph 3.04 that the police have power to arrest without warrant in cases of common law crimes, all of which are punishable with imprisonment. In paragraph 3.05 we stated that the police have a power at common law to arrest for statutory offences but that there is a doubt as to the extent of this power. We consider that this doubt could best be removed by bringing statutory offences into line with common law crimes by restricting the power of the police to arrest without warrant for statutory offences to those which are punishable by imprisonment without the option of a fine and we so *recommend*. This does not affect statutory offences where the statute specifically provides for arrest without warrant.

Grounds for arrest

3.30 Much of the difficulty in the present law of arrest would be removed if our recommendations for the introduction of detention were adopted. The grounds for arrest still require however to be stated. In the first place we think that arrest should be competent only where the arresting officer has reasonable grounds for believing that he is entitled to charge the arrestee, i.e., that there is a *prima facie* case against him. In the second place we think that a police officer should not be entitled to arrest without a warrant unless in all the circumstances he has reasonable grounds for believing that the interests of justice require arrest at that time. Lapse of time since the commission of the offence should not in itself be a bar to arrest without warrant. We accordingly so *recommend*.

3.31 Among the facts brought to our notice in connection with arrest and charge was the practice in certain parts of the country of making a formal charge more than once, for example, at the place of arrest and then at a police station. In our view this is unnecessary and is likely to lead to confusion in the mind of the accused. It also raises problems as to the admissibility of statements made in answer to the later charge. Where a man is arrested at or near

Sanctions and remedies

3.32 The sanctions against unlawful arrest or detention are prosecutions for assault or disciplinary proceedings against the constable but these are not within the control of the citizen. His only remedy is an action for damages. There are very few reported cases of such actions, and not many unreported ones. This may be due to the rarity of unlawful arrest, to difficulties of proof, or to the fact that a person with a criminal record is unlikely to receive more than derisory damages, particularly if he has been convicted of the offence for which he was arrested. We do not suggest any change. There is a school of thought that an additional useful measure would be to provide a minimum sum to be awarded as damages to anyone who succeeds in an action for wrongful arrest or detention. We do not favour this. We consider that damages should not have a fixed minimum, but should reflect the claimant's true loss, however small or large that may be.

4.01 We have already dealt in Chapter 3 with the difficult question of arrest without warrant. In this Chapter we discuss the less controversial subject of arrest and search on the authority of a warrant granted prior to the court appearance of the accused. Such warrants may be granted by a magistrate at the request of a prosecutor or law enforcement officer.

WARRANT TO ARREST

Solemn procedure

4.02 The initial writ in solemn procedure is a petition which is presented to a sheriff. This petition sets forth, where the particulars are known, the name, designation and address of the accused person and the criminal charge against him, and craves warrant for his arrest. There is no procedure for citing an accused to appear on petition.

4.03 Upon the presentation of a petition, the sheriff grants the warrant to arrest the accused person as a matter of course provided the petition shows that the charge relates to a matter which is a crime according to the law of Scotland and which is alleged to have occurred within his jurisdiction. Such petitions are presented by procurators fiscal and are assumed to be wellfounded. The sheriff may grant a warrant to arrest a person charged with a crime although the charge may be of too serious a character for him to try.

4.04 The warrant gives authority to officers of law to arrest the accused and bring him before the sheriff for examination. It may be executed anywhere in Scotland, or in England or Wales by any police constable in his police area.

Summary procedure

4.05 Warrants to arrest are granted in summary cases sometimes because the nature of the offence justifies it, but more usually where the accused's whereabouts are not known. In such cases the complaint is laid before the judge who on the motion of the prosecutor may grant a warrant to arrest the accused if this appears to be justified.

Criticisms of present system in solemn procedure

4.06 Some of our witnesses were critical of the present system in solemn cases and alleged that in the majority of cases the sheriff merely acted as a rubber stamp when granting warrants. They suggested that the sheriff should not grant a warrant to arrest unless the procurator fiscal satisfies him that there is *prima facie* evidence which justifies this course. They think that the sheriff should never 'rubber stamp' a warrant merely because the procurator fiscal asks him to do so.

of the Lord Advocate, could be trusted to act with due propriety in this matter and to request a warrant only where the case merited it. They doubted whether there were any strong grounds for changing the present practice.

4.08 The evidence we received suggested that there may be some uncertainty about the present law on this matter. Whether the procurator fiscal should have to show cause for the granting of a warrant depends on whether one regards the granting of such a warrant as a matter for his discretion or for that of the sheriff. Historically it was clearly a question for the sheriff but this seems to be one of a number of areas in which sheriffs are in the main content to leave matters to the fiscal. On the other hand, so long as a warrant requires a sheriff's signature he can insist on receiving whatever information he wishes before granting it.

4.09 We support those of our witnesses referred to in paragraph 4.07 above who take the view that the present practice in this respect is operating satisfactorily and that procurators fiscal as public officials can be trusted to act responsibly. We therefore do not propose any change in the present system.

Criticism of present system in summary procedure

4.10 Cases which are suitable for summary procedure are of course not so serious as those meriting solemn procedure and as a result different considerations apply. The argument is that the nature of the offence *per se* should not be a ground for granting a warrant to arrest; if an accused's whereabouts are known, he should be cited and there should be no need to arrest him. In our opinion the procurator fiscal should not ask for a warrant to arrest unless the whole circumstances of the case justify this. We so recommend.

Right of appeal

4.11 In considering whether the sheriff should be entitled to refuse a warrant (as he is) we also addressed ourselves to the further question that arises of whether an appeal should be available to the procurator fiscal if the sheriff should refuse his request. There is no law on this and no provision for appeal. This may be because the sheriff grants a warrant partly in his capacity as an investigator of crime—a sort of examining magistrate—rather than in his judicial capacity. But two possibilities are open to the Crown at present: an application to the High Court for a warrant, or an appeal to the *nobile officium*.

4.12 The evidence we received on this question was about equally divided. Those witnesses who supported the provision of an appeal suggested that this should be to a single judge.

4.13 In the light of our proposal in paragraph 4.09 above that no change should be made in the present practice with regard to the granting of solemn

into custody when he can apply for bail.

Discretion to execute warrants

4.14 When a sheriff grants a warrant for the arrest of an accused person it is *ex facie* an order to the arresting police officer to detain the person in custody until he is brought before the sheriff. However there may be cases where there is no need for the person to remain in custody until he appears in court, for example, where the sole purpose of the arrest is to obtain his fingerprints. In such cases the procurator fiscal may exercise a discretion and direct the police to liberate the person after he has been arrested, on the understanding that he will appear in court on a given date. Alternatively the accused may be told that, although there is a warrant for his arrest, he will not be taken into custody if he agrees to report at the police station at a given time prior to appearing in court.

4.15 A police officer who goes to arrest an accused person may discover some fact hitherto unknown which suggests that the warrant should not be executed. In such circumstances the police officer should communicate his finding to the procurator fiscal, who may exercise his discretion not to enforce the warrant but to direct the accused to appear in court on a specified date (see Renton and Brown 5–20).

4.16 The general view of our witnesses was that any discretion in the enforcement of pre-conviction warrants should be exercised by the procurator fiscal and not the police. In so far as the police do exercise any discretion, they do so on the delegated authority of the procurator fiscal, express or implied. We share this view. The only recommendation we make for change is that contained in Chapter 11.18 which deals with conditional release of arrested persons. We discuss in Chapter 60 the question of warrants to arrest for non-payment of fines.

Post-conviction warrants

4.17 Although this Chapter deals particularly with pre-conviction warrants to arrest, we take this opportunity to point out that although the procurator fiscal is no longer master of the instance, for practical purposes the situation as regards post-conviction warrants is the same as for pre-conviction warrants in relation to the application for such warrants and the manner of their execution.

Acceptance of bail by arresting officer

4.18 It was suggested that in appropriate circumstances the sheriff should have power to back a warrant to arrest in such a way as to authorise the arresting officer to release the person named in the warrant on payment of a specified sum of money as bail for his future appearance in court. This suggestion is covered by our recommendations in Chapter 11 for conditional release and abolition of money bail.

applicable to all offences. Warrants to search may be either to search named premises for evidence of a crime or alternatively, in association with an arrest, to search a named person, his premises, his repositories and any place where he may be found.

Seizure of articles outwith the warrant

4.20 Some of our witnesses raised the question whether the police should have power to seize articles which are not specified in a warrant to search and which relate to crime other than that for which the warrant was granted. If this power were given the further question would arise whether the evidence resulting from such seizure should be admissible.

4.21 The present law as stated in Renton and Brown at paragraph 5–31 is as follows:

‘The general principle seems to be that once the police are lawfully on premises with a search warrant they may take any suspicious articles they happen to see, but cannot actively search for articles outwith the warrant or take away articles which might on further examination disclose further offences.’

4.22 The right to search may be incidental to arrest made without a warrant or it may proceed on the authority of a warrant. Where the warrant is for a specific offence the police right to search is primarily a right to search for evidence of that offence, and the position is similar where the search follows on arrest without warrant for a specific offence. Where the right to search arises from the consent of the person searched or the occupier of the premises, the searcher has a duty, if asked, to explain the purpose of the search and the right to search is then related to that purpose. The resultant evidence may be admissible whatever the legality of the search.

4.23 All the witnesses who gave evidence on the question raised in paragraph 4.20 seemed to be generally content with the law as it stands. We agree that the present law is satisfactory and make no proposal for change.

Search of premises of person who is not accused

4.24 We considered a suggestion that the law might be clarified as to the rights of the police to search for evidence in premises of parties who are not accused. For example, it might be necessary to search a bookmaker’s premises to examine his books in connection with a theft of money which may have been spent there. We consider that as a matter of principle a sheriff should have power to grant a warrant in such circumstances. It must be for the sheriff in every case to balance the right of the citizen to privacy in his affairs against the right of the Crown to secure evidence necessary to prove the guilt of the accused person. Unless the sheriff is satisfied that there is a real risk of the evidence being destroyed or tampered with, the third party should be given an opportunity of being heard before the warrant is granted. We so *recommend*.

removal of any part of the person’s body, for example, the taking of blood. A warrant should always be obtained for the taking of blood samples, dental impressions and all searches which involve the invasion of the person’s body or removal of any part thereof. In appropriate cases the sheriff may direct that the authorised act be carried out by a professional person, such as a medical or dental practitioner. When such a warrant is requested by a procurator fiscal the sheriff if he sees fit may order intimation of the application to the person and give him the right to be heard on the application. We consider that the present practice is satisfactory and we make no proposal for change.

4.26 The power of the police to search a suspect *before* arrest is discussed in the context of our proposals for detention in Chapter 3.24*b*. We therefore *recommend* that search and medical examination involving the invasion of the person’s body should not be carried out without his consent. This we stress again is without prejudice to the right of the procurator fiscal to seek a warrant for such examination from the sheriff, as in the case of an arrested person. When a person is not in custody the warrant requires to be for search and detention for that purpose.

Right of appeal

4.27 In paragraph 4.13 we decided that it was not necessary to provide an appeal against the refusal by the sheriff to grant a warrant to arrest. Similarly we do not consider that there should be a right of appeal against the sheriff’s decision to grant or refuse a warrant for a specific purpose such as the taking of blood. The Crown has no such right of appeal in comparable procedural situations and no compelling reasons have been submitted to us which would justify us recommending an exception in this case. Judging from experience we think that the number of refusals against which a procurator fiscal would wish to appeal would be minimal.

Arrestees

5.01 We have identified two matters in this connection, which require clarification. These are the right of the arrestee to know the charge in relation to which he has been arrested, and the right of the arrestee to communicate with his solicitor or some other person.

Knowledge of the charge

5.02 An arrestee must be told why he has been arrested. As however it is the procurator fiscal who prepares the indictment or complaint which contains the charge against the accused in court, it follows that the charge made by the police may be different from the charge eventually libelled against the accused in court. We have dealt with this in Chapter 3.07. We do not see how this could be changed, as the prosecutor cannot be bound by the police charge. We do not therefore propose any alteration in the present system in this respect. The police must continue to charge an arrestee as soon as possible after he has been arrested as we have explained in Chapter 3.31.

Communication

5.03 It is the practice of the police to contact a solicitor if an arrestee so desires. They do not however usually allow an arrestee to speak personally on the telephone to his solicitor. When a solicitor arrives at a police station he is allowed to have an interview with his client. The police will send a message to a relative or friend advising him that an arrestee is in custody, and use their discretion whether to allow an interview with the arrestee.

Solicitor's discretion

5.04 A solicitor is not bound to visit his client on receipt of information that his client is in custody. If the charge is murder, a solicitor would undoubtedly feel that it was his duty to attend, but on charges of lesser crimes it is for the solicitor to decide whether or not an immediate interview is necessary. This must remain within the discretion of the solicitor.

5.05 Most arrested persons do not have a solicitor. The duty solicitor under the Legal Aid Scheme is available to act for such persons, but always within the discretion mentioned in the last paragraph. The police must therefore be able to contact the duty solicitor at any time. We are not aware that this causes any difficulty, but if it does, it is a matter which should be capable of being arranged administratively between the Law Society and the police.

... speak to their solicitors on the telephone. The various police bodies were all opposed to this from the point of view of security, keeping in mind the shortage of manpower, but they were prepared to concede that in special cases it could take place. We therefore propose that it should continue to be a matter of police discretion as to whether or not an arrestee is permitted to speak on the telephone to his solicitor.

Detainees

5.08 So far in this Chapter we have been dealing with arrestees, but we have also considered the rights of persons who will be detained if our proposals in Chapter 3 are accepted. We have set out these rights in Chapter 3.22 and 3.23. In general they are the same as those of the arrestee, but we *recommend* one important difference—whereas the arrestee will be entitled to an interview with his solicitor in the police station, the detainee's right will be confined to having his solicitor advised that he has been detained. It will be a matter of police discretion whether to allow the detainee an interview with his solicitor. We consider that such a discretion is necessary at the stage of investigation prior to arrest.

6.01 Situations arise in which it is necessary for the police to detain people for short periods in order to obtain their names and addresses so that they may be subsequently examined as witnesses. This may occur, for example, when an assault has been committed in a crowded dance hall. The police have at present no legal authority to close the doors to prevent people from leaving until they have given their names and addresses. Likewise at common law a person does not commit any crime by refusing to give a statement or even his name and address to the police.

6.02 We do not propose to alter the law so as to require a person to give a statement to the police, but we agree with most of our witnesses, including the Scottish Council for Civil Liberties, that there should be a legal duty on anyone the police reasonably believe to be a potential witness to give his name and address. Failure to do so or the giving of a false name and address should be a statutory arrestable offence. We so *recommend*. What is important is not the penalty for that offence but that, if it is an offence, the police will have power to arrest anyone who refuses to give his name and address, and power to detain anyone whom they have reasonable cause to suspect of having given a false name or address. Such detention should be for only so long as is necessary to verify these particulars. If the police obtain the name and address of a person who refuses to give them a statement, they may pass the information to the procurator fiscal who may cite the person for precognition.

7.01 If discussion of the law of arrest in Scotland is made difficult and vague by the absence of authority, that of the law of interrogation is made difficult and confused because of an excess of inconsistent authority. Although some account of the present position, or of our conception of it, is necessary as a background to our recommendations we do not propose to give any detailed description of the case-law on this subject. (Reference may be made to Renton and Brown, paragraphs 18–24 to 18–29; A. D. Gibb, 'Fair play for the Criminal' (1954) 66 JR 199; G. H. Gordon, 'Institution of Criminal Proceedings in Scotland' (1968) 19 NILQ 249; J. W. R. Gray, 'Chalmers and After' Police Interrogation and the Trial within a Trial', 1970 JR 1). We shall limit our attention to the law regarding interrogation by police officers and the admissibility in evidence of statements made to them by the accused.

7.02 Scots law on this matter has proceeded not so much on any fundamental constitutional or philosophic basis, such as the privilege against self-incrimination, as on a conception of fairness and a determination by the courts to control police activity in the interest of fairness. What has been in issue has been not so much the truth of the accused's statements as the propriety of the circumstances in which they were made. Statements improperly obtained are not evidence, however reliable and obviously true. They are excluded by the courts because an exclusionary rule is the only effective weapon possessed by the courts to control police interrogation (of *Chalmers v HM Advocate*, 1954 JC 66, Lord Justice-General at 77–78). It is, of course, true that statements extorted by unfair methods are for that reason unreliable, but Scots law excludes not only those statements but also statements whose only taint is that they were made at a certain stage of investigation. It should also be remembered that no person who maintains a plea of not guilty can be convicted in Scotland on his own statement alone.

7.03 Our approach to this question has been based on the following general principles:

- a. Subject to statutory exceptions no one should be under a legal obligation to give information to the police.
- b. The police should not exert pressure on any person to make him give information to them. In particular they should not offer inducements, threaten, bully, or deprive of rest or food.
- c. It is reasonable and necessary for the police to ask questions in the course of a criminal investigation.
- d. It is unreasonable and unrealistic to expect the police not to ask questions of a person whom they suspect of an offence.

7.05 That is at issue is yet again the creation of a balance between on the one hand, fairness to the individual and a recognition of his right to be left alone by the police, and on the other hand, the public interest and the need to allow the police reasonable powers to carry out the criminal investigation duties entrusted to them by the public (see Chapter 2.01).

7.05 In Chapter 8 we recommend the revival of judicial examination, a process which will give an accused person an early opportunity of admitting or denying statements alleged to have been made by him to the police, but we believe that it would be unrealistic and undesirable to exclude from evidence all statements made by an accused person to the police and admit only those made at judicial examination. It would be impracticable to arrange judicial examinations at all hours of the day and night. Whatever the law, the police in the course of investigation into a crime will have to ask questions of suspects, and it would be quixotic in the extreme to reject the answers if made in unobjectionable circumstances. On the other hand we would regard a system in which there was a duty to provide answers to the police as too heavily weighted against the suspect. We need hardly add that we believe that under any system the court should reject statements made to the police which have been unfairly obtained.

The present law

7.06 Until about the middle of the nineteenth century the investigation of crime was one of the functions of the sheriff and as part of that function he carried out judicial examination of persons arrested for serious crimes. This traditional form of judicial examination has fallen into desuetude since 1887. The investigation of crime is now a function of the procurator fiscal assisted by the police, and for the most part is carried out by the police alone, but the extent of the admissibility in evidence of statements made to the police in the course of their investigations is not clear.

7.07 Discussions of the law divide police enquiries into three stages:

- (1) before the police have reasonable cause to suspect any particular person of having committed the offence;
- (2) after the police have reasonable cause to suspect a particular person of having committed the offence but are not in a position to charge him; and
- (3) after a person has been, or ought to have been, charged.

Stage (1)

7.08 It is clear that in the first stage the police may question whom they wish without administering a caution, that no one has any obligation at common law to assist them, and that any statements made to them by a person subsequently tried for the offence are admissible in evidence, as is also the fact that

7.07 As regards stage (2), the position of a suspect is not so clear. One view of the law, and it is a view held by a number of our witnesses, is that contained in the following extracts from the opinions of the Lord Justice-Clerk (Thomson) and the Lord Justice-General (Cooper) in the Full Bench case of *Chalmers v HM Advocate*, 1954 JC 66:

Lord Justice-Clerk

(pages 81–82)

‘But there comes a point of time in ordinary police investigation when the law intervenes to render inadmissible as evidence answers even to questions which are not tainted by [bullying, pressure, third degree methods and so forth]. After the point is reached, further interrogation is incompatible with the answers being regarded as a voluntary statement, and the law intervenes to safeguard the party questioned from possible self-incrimination. Just when that point of time is reached is in any particular case extremely difficult to define—or even for an experienced police official to release its arrival. There does come a time, however, when a police officer, carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in process of questioning is under serious consideration as the perpetrator of the crime. Once that stage of suspicion is reached, the suspect is in the position that thereafter the only evidence admissible against him is his own voluntary statement.’

Lord Justice-General

(pages 78–79)

‘... This however, it is possible to say with regard to Scots Law. It is not the function of the police when investigating a crime to direct their endeavours to obtaining a confession from the suspect to be used as evidence against him at the trial. In some legal systems the inquisitorial method of investigation is allowed in different degrees and subject to various safeguards; but by our law self-incriminating statements, when tendered in evidence at a criminal trial, are always jealously examined from the standpoint of being assured as to their spontaneity; and if, on a review of all the proved circumstances that test is not satisfied, evidence of such statements will usually be excluded altogether. The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. . .

... putting aside the case of proper apprehension without a warrant of

questioned. In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect. In the eyes of every ordinary citizen the venue is a sinister one. When he stands alone in such a place confronted by several police officers, usually some of high rank, the dice are loaded against him, especially as he knows that there is no one to corroborate him as to what exactly occurred during the interrogation, how it was conducted, and how long it lasted. If under such circumstances cross-examination is pursued with the result, though perhaps not with the deliberate object, of causing him to break down and to condemn himself out of his own mouth, the impropriety of the proceedings cannot be cured by the giving of any number of formal cautions or by the introduction of some officer other than the questioner to record the ultimate statement. In the ordinary case, as many decisions now demonstrate, that statement, if tendered in evidence at the trial, will not be treated as possessing that quality of spontaneity on which our law insists, and its rejection when tendered in evidence, may, and sometimes does, wreck the prosecution. The practice exemplified by this and other recent cases in substance puts the suspect in much the same position as if he had been arrested, while depriving him of the privileges and safeguards which are extended by the statute and the decisions to an accused person who has been apprehended. The police have, of course, the right and the duty to produce all the incriminating evidence they can lay their hands on, from whatever source they may legitimately derive the clue which leads to its discovery, so long as any admission or confession by the accused is not elicited before the jury as an element in proof of guilt. The matter may be put in another way. The accused cannot be compelled to give evidence at his trial and to submit to cross-examination. If it were competent for the police at their own hand to subject the accused to interrogation and cross-examination and to adduce evidence of what he said, the prosecution would in effect be making the accused a compellable witness, and laying before the jury, at *second hand*, evidence which could not be adduced at first hand, even subject to all the precautions which are available for the protection of the accused at a criminal trial.'

7.10 Later cases, however, have laid less stress on the stage at which answers are made, and more stress on general considerations of fairness. They have also suggested that in so far as the stage of suspicion is important it is reached only when one person has emerged as the prime suspect, and not, for example, when there are two suspects and it is clear that one of them is going to be charged but not clear which. But whether the court will go so far as to exclude evidence of a statement to the police will depend on a combination of factors, and not simply on whether the maker of the statement was a suspect (see *Brown v HM Advocate*, 1966 SLT 105; *Miln v Cullen*, 1967 JC 21; *Thompson*

representation of the law . . . the mere fact that a suspected person is asked a question by a police officer before being cautioned is not in itself unfairness. The whole circumstances must be taken into account, and the test in every case is whether in the particular set of circumstances there has been unfairness on the part of the police.'

Even more significant is Lord Wheatley's direction to the jury in *Thompson* that:

'... if the police in the course of a very difficult and serious investigation have got to keep asking questions and probing and probing and probing then as long as they are doing that fairly having regard to their task and their duty, and that nothing unfavourable or unfair to the accused was done either by word or by deed or by trickery, then, of course, anything that they can elicit is normally competent and acceptable evidence.'

7.11 An unfortunate result of the present state of the law is that the police may be tempted to take answers given to questioning over a period, put them together into a single statement, and present that to the court as a spontaneous voluntary statement. Some of us with experience of these matters have seen so-called voluntary statements which covered so precisely the disparate points of the police case as to make their spontaneity highly suspect. But in disputes in court as to the circumstances in which a statement was made it is difficult, if not impossible, for a judge to reject the statement as inadmissible on the grounds that the police account of the circumstances is untrue. We think that what Lord Devlin has said about the English Judges' Rules is relevant to our common law provisions:

'Lawyer-like tendencies flourish to an even greater extent among the police than they do at the bar or on the Bench. The police have sometimes seemed to treat the Judges' Rules as if they were a drill manual and to be unwilling to admit to the slightest deviation from the test. Rather than become engaged in a discussion about whether a question was or was not necessary to remove an ambiguity, some police witnesses seem to have preferred stoutly to deny that they asked any questions at all and even to maintain that they hardly opened their mouths. Consequently, statements have sometimes been put in evidence which have been said to be the prisoner's own unaided work as taken down by the police officer and in which the prisoner has recounted in the stately language of the police station (where, for example, people never eat but partake of refreshment and never quarrel but indulge in altercations) the tale of his misdeeds.'

'The Rules undoubtedly require the observance of a very high standard and it may be of a higher standard than the average policeman was in the first instance naturally inclined to adopt. It is difficult to say to what extent the spirit of the Rules is infringed because, as I have said, it is the general habit of the police never to admit to the slightest departure from correctness. This is a habit which must be noted in any study of police methods of inquiry.'

present a case that makes the jury feel sure of the prisoner's guilt, and they will not do that if their main witnesses do not feel sure about their own evidence. As a corollary to this, it is a habit—and this is the third factor—of counsel for the defence to make the most of minor uncertainties or discrepancies and to deal with a police officer in cross-examination as if any venial sin to which he might admit justified his professional damnation. The result of this is that police witnesses allow themselves sometimes to be almost bullied into a complete denial.'

(Lord Devlin: *The Criminal Prosecution in England*, pages 39–40).

Our conclusion

7.12 We are satisfied that whatever the state of the law the police do question and will continue to question suspects. It is only reasonable that an investigator should ask questions of persons who, he thinks, might be concerned in the subject of his investigation, and that the more he suspects a particular person the more he will question him until he is satisfied in his own mind that that person is the one to be charged or cleared of suspicion. There is in our view nothing improper in the police asking questions, checking the answers and coming back to the suspect to ask for his explanation of any discrepancies. We are not suggesting that a suspect should be compelled to answer police questions, or that any adverse inference may be drawn from his silence at this stage. We recommend in paragraph 7.13*b*, that the suspect should be cautioned before such interrogation and it would not be fair to found upon his refusal to answer questions which he has been told he need not answer.

7.13 We *recommend* that it should be competent for the Crown to lead evidence of statements made by a suspect before arrest in answer to police questioning. We further *recommend* that the admissibility of such evidence should be subject to the following qualifications:

a. It must have been fairly obtained. Unfairness cannot be exhaustively defined or catalogued. It includes forms of both physical and psychological pressure. While it is a proper police function to question a suspect in order to obtain information, it is not their function to extract a confession from him.

b. Before being questioned the suspect must have been cautioned. The caution should be in the following terms:

'You are going to be asked questions about [brief description of the crime]. You are not bound to answer but, if you do, your answers will be noted and may be used in evidence. Do you understand?'

We do not regard the caution as having any magical significance or effect, but it should be retained because there is no point in a man having the right to remain silent unless he is aware of it. The practised criminal and the educated citizen may know their rights; others in the hands of the police

present a case that makes the jury feel sure of the prisoner's guilt, and they will not do that if their main witnesses do not feel sure about their own evidence. As a corollary to this, it is a habit—and this is the third factor—of counsel for the defence to make the most of minor uncertainties or discrepancies and to deal with a police officer in cross-examination as if any venial sin to which he might admit justified his professional damnation. The result of this is that police witnesses allow themselves sometimes to be almost bullied into a complete denial.'

is to provide a safeguard for persons being interrogated in the privacy of a police station and also to protect the police against unjustified allegations. We therefore do not suggest that interrogations conducted elsewhere need be recorded on tape.

d. Where a person is proceeded against on petition the record of any interrogation should not be admissible at his subsequent trial unless the procedure set out in Chapter 8.17 and 8.18 has been complied with at a judicial examination held as soon as is reasonably practicable after the interrogation so as to give him an opportunity for admitting, denying, expanding or qualifying any answers alleged to have been made by him, or of making any complaints he may have about the interrogation.

Nothing in the foregoing would prejudice the right of the accused to elicit at his trial evidence of anything said or done in the course of interrogation.

7.14 The previous paragraph applies to answers made in response to questions by the police. Occasionally a suspect will say to the police that he wishes to make a statement. When this happens we *recommend* that the following procedure should apply:

a. The police should again caution him in the following style of words: 'You have indicated that you wish to make a statement. I must remind you of the caution which you have received and again inform you that anything you say will be noted and may be used in evidence. Do you understand?'

b. The statement will then be recorded by a police officer and signed by the suspect.

c. If made in a police station it will also be recorded on tape.

d. Although there is a school of thought that such statements should be recorded by a police officer who is not connected with the case, we do not subscribe to this view. We believe that the investigating officer, who knows the facts of the case, is the proper person to record the statement. His knowledge of the case will enable him to ask supplementary questions to clear up ambiguities and we believe that our proposed rules for tape-recording such statements (see paragraph 7.21) will safeguard the suspect from oppression.

e. Where a person is proceeded against on petition any such statement will not be admissible at his subsequent trial unless at a judicial examination held as soon as reasonably practicable after the making of the statement he was asked whether he admitted or denied making it.

7.15 A suspect may make spontaneous remarks to the police or in their hearing. Such remarks will be admissible in evidence, subject to the provisions of paragraph 7.22.

possess regarding the offence, and this purpose might be served by the participation of his solicitor. It is for this reason that we recommend in Chapter 5.08 that it will be a matter of police discretion whether to allow the detainee an interview with his solicitor.

Stage (3)

Statements after charge

7.17 When an accused is charged, although cautioned that he need not say anything, he has the opportunity to make a reply to the charge. We recommend that he should be specifically asked if he has anything to say in reply to the charge. We suggest that the police should use the following words:

'I am going to charge you, but before I do so I must caution you that you do not need to say anything in answer to the charge, but anything you do say will be noted and may be used in evidence. Do you understand? [await reply.] The charge against you is that you did— Do you understand the charge? [await reply.] Have you anything to say?'

7.18 It is settled law that after the reply to the caution and charge the only admissible evidence of statements by the accused is evidence of a statement not made in response to police invitation, and unaffected by questioning except for the purpose of clearing up ambiguities in the statement (see *Manuel v HM Advocate*, 1958 JC 41). We agree that so far as the admissibility of evidence at the trial is concerned the stage of arrest and charge is that at which police questioning should cease. At that stage the police have, *ex hypothesi*, sufficient information to report the accused for prosecution. We make no proposal for change.

7.19 We considered a suggestion that formal post-charge statements by an arrested person should be taken by a magistrate (see *HM Advocate v Christie*, Glasgow High Court, November 1961; 1961 SLT(News) 179; and the article by Lord Kilbrandon in 'The Accused' ed. J. A. Coutts 1966). We are concerned here with the situation where the accused says he wants to make a statement. There is much to be said for requiring such statements to be made before the sheriff, both on grounds of history and of reliability, and some of us were at one time inclined to support such a requirement. However, taking account of the practical difficulties involved, we recommend that such statements made to police officers should continue to be admissible in evidence provided that the following conditions obtain:

- a. The statement must be preceded by a caution and by an offer of an interview with a solicitor.
- b. The statement must be recorded in a document which is written either by the accused or by a police officer at his dictation.
- c. The document must contain an acknowledgement by the accused of his right to silence, and a statement that he has seen a solicitor or has decided not to see one. The following form of words should be used:

added.

'I have read over the foregoing statement. I do not wish to add to it or alter it.'

(If on reading the statement he expresses a desire to amend it, he is allowed to do so and the foregoing style of words is altered accordingly.)

Thereafter he signs the last page of the statement initialling any earlier pages and any alterations. A witness also signs and the date is added.

d. The whole proceedings must be recorded on tape if they take place in a police station or a prison.

e. The statement must be voluntary and not made in response to any invitation, threat or promise by the police.

f. The police officer taking the statement must not interrupt or ask any questions save such as are necessary for clarification. Any questions put must be inserted in the record of the statement.

g. Where a person is proceeded against on petition the statement will not be admissible at his subsequent trial unless at a judicial examination held as soon as reasonably practicable after the making of the statement he was asked whether he admitted or denied making it.

7.20 Although formal statements made to the police by a person in custody after arrest will not be admissible unless the procedure detailed above has been complied with, remarks blurted out to the police or made to third parties and overheard by the police will continue to be admissible subject to the provisions of paragraph 7.22. In the unreported case of *Welsh and Breen v HM Advocate* in 1973 the court on appeal held that evidence of a conversation between prisoners in cells, which was overheard by police officers, was properly admitted at the trial because it was not in any way induced by their presence. We believe this to be the correct approach and that in such circumstances, provided the police role is passive, the evidence of anything said by an accused person to or in the hearing of the police should be admitted. Whether or not the accused person is aware that a police officer is listening to him is immaterial. Nothing in this or the preceding paragraph would prejudice the accused's right to elicit at his trial evidence of anything said by him to or in the hearing of the police.

Recording of statements

7.21 For this purpose statements fall into six categories, namely:

- a. anything said to the police by a person who is not a suspect;
- b. answers made to police questions by a suspect;
- c. voluntary statements made to the police by a suspect;
- d. the reply by an accused to a charge;
- e. voluntary statements made to the police by an accused after charge; and

At this stage of general enquiry a policeman simply records in his notebook the gist of what such a person tells him. We make no proposal for any change.

b. Answers made to police questions by a suspect

In paragraph 7.13c. we recommend that interrogation of suspects in police stations must be recorded on tape. We carried out a practical experiment with simulated interrogation of a suspect by police officers and found the result to be technically satisfactory. While we accept that there will of course always be difficulties with inarticulate suspects or with those who use unfamiliar dialects, the quality of reproduction was sufficiently good to satisfy us that it is practicable to obtain on tape an adequate record of interrogations. Furthermore we confidently expect that the availability of more sophisticated equipment will improve the standard of reproduction and that with training the technique of interrogation by police officers will also improve, so that vague or ill-expressed statements are not allowed to go unexplained. The cost of tape recording is not prohibitive, the models of tape recorders which we used being marketed at £25–£75. (We understand that a feasibility study is being carried out in England and Wales—Hansard HC columns 902–4, dated 4 February 1974). The presence of a tape recorder may upset some persons, but on balance we consider that the vast majority of persons will be reassured by knowing that anything that is said will be accurately recorded. The fact that the police know that the interview is being recorded on tape will tend to reduce the chances of interrogation being conducted with any impropriety. We think that tampering is unlikely but to reduce that possibility we *recommend* that the tape be sealed and placed in the custody of the procurator fiscal as soon as possible after the conclusion of the interrogation. If the interrogation does not take place within a police station, and a tape recorder is not used, a police officer will require to rely on his notebook.

c. Voluntary statements to the police by a suspect

We *recommend* that voluntary statements made by a suspect to the police outwith a police station should be recorded in the officer's notebook and signed by the suspect, but those made inside a police station should also be recorded on tape (see paragraph 7.14).

d. The reply by an accused to a charge

We *recommend* the use of a *pro forma*, which will record the caution, the charge and the reply, for cases where an accused is charged in a police station. In cases where an accused is charged outwith a police station, the police officer should record what is said in his notebook.

e. Voluntary statements made to the police by an accused after charge

We *recommend* that such statements should be treated in the same way as voluntary statements made to the police by a suspect (see *c.* above).

f. Remarks blurted out

Because of the circumstances in which such remarks are made, there can

of voluntary statements, described in *c.* and *e.* above.

Admissibility of statements in evidence

7.22 a. Solemn procedure

We *recommend* that nothing alleged to have been said to or in the hearing of the police by a suspect or an accused shall be admissible in evidence for the Crown at his trial unless it has been put to the accused at a judicial examination. Our primary reason for this proposal is to ensure that the accused is given the earliest possible opportunity to admit or deny having made any such statement or to challenge it on the ground that it is inaccurate or was unfairly obtained. At present such statements are not challenged until the trial and guilty accused have weeks in which to think up false explanations for making such statements. If an accused has to make that challenge within a day or two or even a few hours of making the statement, this would reduce any chance of police unfairness to the accused and also of false challenge, so protecting the police against unjustified attacks upon their integrity.

b. Summary procedure

Summary proceedings are by their definition informal and expeditious. We consider that the prosecutor should be entitled to lead evidence of anything alleged to have been said to or in the presence of the police by a suspect or accused person without preliminary judicial enquiry which would be inconsistent with the nature of summary procedure.

c. Solemn cases reduced to summary

Occasionally a decision is taken to deal summarily with a case initiated by petition. We *recommend* that in such cases the rules in *a.* above should apply as there will have been an opportunity for judicial examination.

7.23 It is appreciated that our proposals rely to a large extent on the effectiveness of tape recorders. We realise that all or part of a police interrogation may not be recorded through failure of a tape recorder. The question arises whether or not an account of any unrecorded interrogation given by a police officer from memory and notes made at the time or immediately afterwards, should be admissible in evidence. We consider that it should not be admissible, as we feel strongly that particularly accurate recording of interrogation in a police station is essential as a safeguard to all the persons concerned. The same considerations do not apply to a voluntary statement which, although recorded on tape, will also be recorded in a written document authenticated by the accused. Such a statement should be admissible in evidence, even though the tape recorder has failed. We accordingly so *recommend*.

'Forbidden fruit'

7.24 If our proposals are accepted, answers given to improper questions will be inadmissible in evidence in subsequent court proceedings. This raises

...is an evidence obtained by means of improper questioning to be tainted and rendered inadmissible by the impropriety, as it is in the United States, or is the fact that articles are recovered where the accused says they would be in itself sufficient to make that part of his statement credible and admissible, as it may be in England, and is in Canada, India and Sri Lanka? (For an account of the present law in the various countries see J. D. Heydon, 'Illegally obtained Evidence' [1973] Criminal Law Review 603).

7.26 Here again we find it necessary to balance conflicting interests in compromise. The view that the discovery of the article renders any part of the statement admissible has been rejected in Scotland (*Chalmers v HM Advocate* 1954 JC 66). We accept this. Scots law excludes evidence on the ground that it has been improperly obtained without consideration of its reliability. To allow evidence of a statement to be led because it can be shown to be true might encourage police irregularity. On the other hand, it does not follow that evidence of the discovery of articles should be excluded merely because the information supplied by an accused, which led to their discovery, is inadmissible.

7.27 We take the view that there is nothing improper in the police asking questions of an accused person after charge, for example, regarding the whereabouts of a missing child or stolen property. Indeed, the police have a duty to ask such questions and the public expect them to do so. Although the answers which they receive will not be admissible in evidence, the court may allow evidence of recovery, provided:

- a. the prosecution does not disclose in evidence the source of the information; and
- b. the information was not obtained by methods which the court decides are unfair in the circumstances.