

## INQUIRY OF DEATHS UNDER THE MALAYSIAN CRIMINAL PROCEDURE CODE\*

by

DR ABDUL RANI BIN KAMARUDIN

LLB HONS, MCL

*PhD in Law*

*Associate Professor of Law*

*Ahmad Ibrahim Kuliyah of Laws*

*International Islamic University Malaysia*

### Abstract

*This paper deals with cases of any sudden death or unnatural death or death by violence or of any death under suspicious circumstances, or of the body of any person being found dead without its being known how that person came by death. It discusses among others, on the requirement to inform the relevant authorities especially the police, the manner of investigation to be conducted and whether a post-mortem of the deceased is required. It also looks at the nature of the inquiry, the powers given to the magistrates in ascertaining the cause of death, the rules of evidence and the procedures involved. The powers of the public prosecutor and the role of the pathologist in relation to the death of the person are also discussed.*

### INTRODUCTION

Section 13(1)(b) of the Criminal Procedure Code<sup>1</sup> ('CPC') requires every person who is aware of any sudden death or unnatural death or death by violence or of any death under suspicious circumstances, or of the body of any person being found dead without its being known how that person came by death, to immediately give information to the officer in charge of the nearest police station or to a police officer or the nearest *Penghulu* (village chief) of the commission or intention or of the sudden, unnatural or violent death, or of the finding of the dead body, as the case may be, unless he has a reasonable excuse for being unable to give such information. Failure to forward such

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1 Act 593 (Revised - 1999).

information is an offence under ss 176 and/or 202 of the Penal Code. Both provide for imprisonment of up to six months and/or a fine. Section 107 of the CPC consequently requires that any information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by the officer or under his direction, and be read over to the informant. The informant is then bound to truthfully provide the requisite information and to sign it.<sup>2</sup>

### CAUSE OF DEATH

'Cause of death' include not only:<sup>3</sup>

- (1) the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased (these may range from death by drowning to mortal wounds sustained as a result of suicide through jumping down from a high-rise building or from motor vehicle accidents);
- (2) but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death, such as the time of death and if by natural death, if the cause was due to heart failure or cancer, etc (s 16 of the Prevention and Control of Infectious Diseases Act 1988 would also necessitate an 'inquiry' as to the cause of death); and
- (3) whether his death was a result in any way from, or was accelerated by any unlawful act or omission on the part of any other person such as murder, or that the deceased being mortally injured was not brought to a hospital as soon as possible or was not put on a life support system, or that the same was discontinued.

### INVESTIGATION REPORT

Whenever any police officer in charge of a police station receives information that a person has committed suicide, been killed by another person, an animal, a machinery or by an accident, or that he came by death under circumstances that there is a reasonable suspicion that some other person has committed an offence, or that

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2 Furnishing false information is an offence under s 176 of the Penal Code and punishable with a fine and/or imprisonment not exceeding six months. Section 177 of the Penal Code makes it an offence punishable with imprisonment for up to three months and/or fine for any informant who refused to sign his own statement.

3 Section 328 of the CPC.

the apparent cause of death is not known or sudden, he shall with the least practical delay, inform the same to a police officer in charge of the police district.<sup>4</sup> The officer in charge of the police district or an officer acting under his direction who shall not be under the rank of sergeant in turn, shall immediately proceed to the place where the body of the deceased was found and draw out a report of the apparent cause of death, describing the wounds, fractures, bruises and other marks of injury on the deceased's body, and such marks, objects and circumstances (if any) that may relate to the cause of his death, who caused his death and the manner or by what weapon or instrument (if any) the marks appear to have been inflicted.<sup>5</sup> The investigating police officer is authorised to interview witnesses and suspects in the course of his investigations.<sup>6</sup> The officer who prepares the investigation report shall sign it and forward the same to the police officer in charge of the police district, and he in turn shall then immediately forward the same to the magistrate within the local limits of whose jurisdiction the body of the deceased was found.<sup>7</sup> The investigation and report shall be made and the report is to be forwarded to the local magistrate even under circumstances where the body is unlikely to be found or could not be recovered owing to its destruction by fire or at a place where it could not be recovered.<sup>8</sup> The investigation report may include the post-mortem report if a post-mortem was conducted on the deceased's body.

#### **WHEN POST-MORTEM IS NOT NECESSARY**

The investigation officer shall send the body to the nearest government hospital or another convenient place for holding a post-mortem examination of the body by a government medical officer (pathologist) if there appears to him any reason to suspect that the deceased came by his death in a sudden and unnatural manner or by violence or the death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any other person. A post-mortem is not necessary if the investigation officer is satisfied as to the

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4 Section 329(1) of the CPC.

5 Section 329(2) of the CPC.

6 Section 329(3) of the CPC; see also ss 112 (statement by a witness) and 113 (statement by an accused person) of the CPC.

7 Section 329(4) and (5) of the CPC; see also ss 2 and 121 of the CPC and s 76 of the Subordinate Courts Act 1948, which stipulates the local limits of jurisdiction of the Magistrates Courts which is the ordinary administrative district where the courts sit.

8 Section 329(5) of the CPC.

cause of the death and that the deceased came by his death by accident. Sometimes, death may result from old age, or from a long and incurable disease. In those circumstances, the police may issue the burial permit without the need for conducting an autopsy on the corpse. Another example would be one of a child accidentally drowning in a river whilst playing with other children. The incident could have been witnessed by the other children. In such circumstances, there is no need for the investigating officer to send the body for autopsy by a government medical officer. Where a post-mortem/autopsy is not required, the police officer may direct that the body be buried immediately.<sup>9</sup>

It is the duty of the investigating police officer to inform the next of kin of the deceased to come forward to identify the deceased so that they may claim the body for burial. In every case of a sudden or violent death, the investigating officer must ensure that the national registration identity card of the deceased is recovered and upon completion of the investigation, forward the same to the State Registration Officer for disposal. A burial permit (Am138-Pin 1/78) is accordingly issued to immediate members of the deceased's family or relatives to collect the body, usually from the hospital mortuary. The permit needs to be handed over to the caretaker of the burial ground. Whenever the deceased cannot be positively identified, the body has to be photographed face upwards with the deceased wearing all the items of clothing, ornaments, footwear, etc that he was last found wearing. The hospital practice has been that if after three days the corpse remains unclaimed, it will then be used for medical research.<sup>10</sup>

In a case reported in *Harian Metro Online* (Malaysia), the deceased's brother (Aris Ismail — 52 years), lodged a police report that the deceased, Hamidah Ismail, aged 43 years, died suspiciously because there was no police report made on how the deceased came by her death. The deceased's brothers and sisters were only informed of the deceased's death after her burial ceremony. Moreover, the deceased was buried at the burial ground in Country Homes without any death certificate (no burial permit was issued by the local police) at some distance from both her husband's premise (at Rawang) and her brothers' and sisters' village (in Bukit Kerdas, Batu Kikir Negeri Sembilan). Mohd Rizki Abdul Jalil, the magistrate in Rawang, ordered

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9 Section 330 of the CPC.

10 Chan Mei Ling (student matriculation No: 0019896), an officer of the Royal Malaysian Police on study leave who underwent the LLB (Hons) programme at the Law Faculty of International Islamic University, Malaysia.

the deceased who was buried at the burial ground in Country Homes to be exhumed under s 355(2) of the CPC to determine the cause of death. The exhumation work was done by forensic officers from the Kuala Lumpur Hospital, a pathologist from the Selayang Hospital and assisted by the local residents.<sup>11</sup>

In all fatal death cases, the deceased would be taken by ambulance to be deposited in a mortuary, which is usually in a hospital, for the deceased's next of kin to later claim the body. It is submitted that it would be unlawful for a government medical officer to conduct a post-mortem on the deceased if the investigating police officer is already satisfied with the cause of the death. In this situation, if the burial permit is issued, the deceased's next of kin may immediately claim the deceased's body, and if the body is already in a hospital mortuary, to claim it from the hospital concerned.

The burial place is a totally separate issue. For burial in a public cemetery, permission to bury the deceased must of course depend very much on the permission of the *Penghulu* of the community. Here, it is important that there is evidence that the deceased was from that particular locality to justify his burial in that place. The evidence may be from witnesses witnessing his regular attendance at the *surau* or mosque in the locality, payment of quit rent at the local land office and/or payment of council tax to the local authorities, etc. Otherwise, there seems to be no reason to have an outsider buried in a public cemetery in a certain locality or community to the detriment of the local residents especially when the deceased did not live there and where land space for burial is seriously in shortage. Priority should of course be given to the local residents.

### WHEN POST-MORTEM IS NECESSARY

The power of the government medical officer to conduct a post-mortem on the deceased only arises if the 'cause of death' is still an issue ie if for any reason, the investigating police officer suspects that the deceased came by his death in a sudden and unnatural manner or by violence or the death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any other person. The post-mortem shall extend to the dissection of the body and an analysis of any portion of it, and may cause any portion of it to be transmitted to the Institute for Medical Research.<sup>12</sup> Here, the discretion and

11 Tuesday, 3 October 2006, *Harian Metro Online* (Malaysia) in [www.hmetro.com.my](http://www.hmetro.com.my) — reported by Mohd Jamilul Anbia Md.

12 Section 331 of the CPC.

ingenuity of the government medical officer is important in deciding on whether to dissect the body and whether the cause of death may be ascertained through inspection by alternative means such as body scanning for internal injuries, forensic tests, etc. The pathologist examining the body then writes his report, which is referred to as 'the pathologist's report'. This report would include an appraisal of the body and the conclusions of the pathologist. It would also certify the cause of death and be dated and signed by the pathologist. The medical report is then forwarded to the police officer in charge of a police district who shall attach the same to the police investigation report. The report is admissible in court as evidence for the purpose of the inquiry,<sup>13</sup> and in a criminal trial, in the event that the government medical officer responsible for the post-mortem report dies.<sup>14</sup>

Under s 399 of the CPC, reports of persons such as officers of the Medical Research Institute, government medical officers, document examiner appointed by the Minister, inspectors of weight and measures, may be given in evidence in any inquiry, trial or other proceedings, unless the court or the accused require them to attend as a witness. It is trite law that when a witness whose report is admissible under the CPC is called to give oral evidence, his report should only be used, if at all, to refresh his memory (s 159 of the Evidence Act 1950) or to corroborate (s 157 of the Evidence Act 1950) the oral evidence.<sup>15</sup> It is submitted that these sections do not apply to an inquiry of deaths in view of s 332(2) of the CPC that specifically states:

The report of the Medical Officer and also the report of an officer of the Institute for Medical Research on anything transmitted to him under subsection 331(2) shall be admissible as evidence and shall be prima facie evidence of the facts stated in it at any inquiry held under this Chapter.

### **INQUIRY OF DEATH IS NOT MANDATORY**

The magistrate in receipt of the report need not hold an inquiry if he is satisfied with the cause of the death by stating the reasons for doing so, but shall report the same to the public prosecutor together with all reports and documents connected with the matter.<sup>16</sup> The

13 Section 332(2) of the CPC.

14 Section 340 of the CPC; see also s 399(2)(b) of the CPC.

15 *Saw Thean Teik v Regina* [1953] 19 MLJ 124; *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316; [1990] 2 CLJ 746 (Rep); [1990] 2 CLJ 1020.

16 Section 333(1) of the CPC.

magistrate should proceed as soon as may be, to hold an inquiry if he decides otherwise.<sup>17</sup> Upon deciding to hold an inquiry under this chapter, the magistrate may (if he considers it expedient that the body of the deceased person should be examined by a medical officer in order to discover the cause of death), issue an order to the government medical officer to make a post-mortem examination of the body, and may for that purpose, order the body to be exhumed, whether or not a post-mortem examination had been made under s 331. Until such an order is made, the pathologist is not duty bound to conduct a second post-mortem if one has already been done.<sup>18</sup>

An inquiry or a report to the public prosecutor is not necessary if criminal proceedings have been instituted against any person concerned with the death of the deceased.<sup>19</sup> Where the death of a person occurs while the person is in the custody of the police, in a mental hospital or prison, the officer having the custody or the person in charge shall immediately intimate the matter to the nearest magistrate, and if he thinks expedient, hold an inquiry to the cause of death.<sup>20</sup> Where the magistrate decides to hold an inquiry, it follows that the deceased should be sent before a government medical officer for post-mortem, and if the deceased has been buried, to order the body to be exhumed where necessary.<sup>21</sup> The public prosecutor, however, may at any time direct the magistrate to hold an inquiry, and the magistrate is then obliged to do so and to forward the evidence and his findings to the public prosecutor. The public prosecutor may even require the magistrate to reopen the inquiry and if necessary, to have the body exhumed if it appears to him that further investigation is necessary, unless a finding of murder or culpable homicide not amounting to murder has been returned against any person.<sup>22</sup>

17 Section 333(2) of the CPC.

18 Section 335(2) of the CPC; see *Ho Kooi Sang v Universiti Malaya* [2004] 2 MLJ 516; [2004] 5 CLJ 445 (HC) — Originating Summons No R2-24-52 of 2003, Wan Afrah Ibrahim JC.

19 Section 333(3) of the CPC.

20 Section 334 of the CPC.

21 Section 335 of the CPC.

22 Section 339(1) of the CPC; ss 302 (intentional murder) and 304 (unintentional murder) of the Penal Code; art 7 of the Federal Constitution provides that a person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted. Section 302 of the CPC deals with previous acquittals and convictions.

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RULES OF EVIDENCE AND PROCEDURES

An 'inquiry' does not exclude a trial, and a preliminary inquiry is also not a trial.<sup>23</sup> A 'trial' is also not defined in the CPC but a 'judicial proceeding' is. Be that as it may, it is submitted that an inquiry to determine the cause of death under s 328 is not the same as a preliminary inquiry into a case triable by the High Court; this is fortified by the fact that preliminary inquiries into cases triable by the High Courts have been abolished for quite some time vide s 5 of the Criminal Procedure Code (Amendment) Act 1995 (Act A908). Section 2 of the CPC defines an 'inquiry' as including every inquiry conducted under the Code before a magistrate and 'judicial proceeding' as any proceeding in the course of which evidence is, or may be, legally taken. In other words, the moment a witness gives evidence on oath under the Oath and Affirmation Act 1949 which reads 'oaths shall be taken by witnesses, that is to say, all persons who ... give evidence ... before the court ...', the inquiry is considered a judicial proceeding too and hence the magistrate by virtue of s 2 of the Evidence Act 1950 is bound to follow the rule of evidence and is also bound to follow the provisions of the CPC by virtue of s 3.

'Evidence' is defined to include (a) all statements which the court permits or requires to be made before it, by witnesses in relation to matters of fact under inquiry (such statements are oral evidence); and (b) all documents produced for the inspection of the courts (such documents are called documentary evidence). It would be quite discernible that the definition of 'evidence' is not the real definition, but is rather a statement of the term 'evidence'. Therefore, 'evidence' would include circumstantial evidence<sup>24</sup> and real evidence,<sup>25</sup> even though they are not defined as 'evidence'. Similarly, even though, admission and confession are not defined as evidence, they are regarded as such, by the Act. Section 4(1)(a) of the Oaths and Affirmation Act 1949 reads 'oaths shall be taken by witnesses, that is to say, all persons who ... give evidence ... before the court ...', suggesting that if a witness is to give oral evidence in court, it shall be made on oath from the witness box, or the same cannot be construed as 'evidence'.<sup>26</sup> Thus, the decision in *Re Loh Kah Kheng (deceased) (No 2)*<sup>27</sup> that in ascertaining the cause of death, a magistrate when examining a witness on oath during the inquiry, need not follow

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23 *Ng Gob Weng & Ors v Public Prosecutor* [1978] 2 MLJ 74 at p 75.

24 See ss 6-16, 45-51 of the Evidence Act 1950.

25 See s 60(3) of the Evidence Act 1950.

26 See *Public Prosecutor v Sanassi* [1970] 2 MLJ 198 at p 200.

27 [1990] 2 MLJ 237.



strictly the rule of evidence nor be bound to follow the usual procedure of law courts, it is submitted, is not correct. This is so because, once evidence from witnesses are taken on oath, it is not simply an 'inquiry' any longer, but a 'judicial proceeding' that requires strict compliance with the Evidence Act 1950 (s 2) and the Criminal Procedure Code (s 3). The decision in *Re Loh Kah Kheng (deceased) (No 2)* was, however, referred and agreed upon by Suriyadi Halim Omar J, in *Public Prosecutor v Shanmugam & Ors*<sup>28</sup> who deliberated that the Criminal Procedure Code (Amendment and Extension) Act 1976 (Act A324) repealed all other statutes governing inquests of deaths of a person, and being applicable throughout Malaysia, it vested in the magistrate, the power and duties of a Coroner's Court. The learned judge said that a Coroner's Court had always been accepted as a court of law, though not a court of justice, as it was set up to investigate and ascertain the cause of death, and was not bound to follow the usual procedure of law courts. Therefore, he opined that the position of the magistrates court is no different from the archaic Coroner's Court. Here I beg to differ, and add to say that the Coroner's Court has become history, and the task is now taken over by the magistrate who operates in a magistrates court setting with its own rules of evidence and procedure. The magistrate should not act as though he were sitting in a Coroner's Court but must be mindful of the law of evidence and procedure, for the magistrates court is not a Coroner's Court as much as it is not a tribunal. The only thing is, in inquiries of deaths, the magistrate has limited mandate to establish the cause of death similar to when it conducts a *voir dire* specifically for determining the voluntariness and admissibility of the accused's confession.

### THE NATURE OF THE INQUIRY

An inquest is a proceeding under the CPC. It means an inquiry by a magistrate with a view to record a finding as to the cause of death and to any of the circumstances connected therewith in regard to which the public prosecutor may also have directed a magistrate to make inquiry. The language used under the relevant provision in the CPC clearly reveals that an inquest is not, by any stretch of the interpretation, a trial. In a criminal trial, a charge is preferred against a particular person, and this is a necessary element in a criminal trial.<sup>29</sup> The inquiry is to determine when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death. In so doing, all matters

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28 [2002] 6 MLJ 562.

necessary to enable an opinion to be formed as to the manner in which the deceased came by his death are relevant. Thus any person who has a real, substantive and reasonable interest in the inquest such as the deceased's mother, may at the discretion of the magistrate be allowed to examine (not cross-examine) witnesses at the inquest.<sup>30</sup> The magistrate holding an inquiry shall record the evidence in legible handwriting and may include in the footnote of the evidence his remarks as to the demeanour of the witnesses.<sup>31</sup> He shall immediately transmit to the public prosecutor his original evidence and findings duly authenticated by his signature or a copy of such evidence and findings duly certified under his hand as correct.<sup>32</sup> The inquiry should ordinarily be held in open court, but it may be held fully or partly *in camera*, if the court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reasons so to do.<sup>33</sup>

In an inquest, there are no parties, indictment, prosecution or defence, and no trial because the function of an inquest is to establish the facts. It is an inquisitorial process; a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends with the judge, holding the balance or the ring.<sup>34</sup> At the conclusion of the inquiry, the magistrate is expected to make the finding of death by misadventure (caused by eg accident, struck by lightning, drowning, suicide or death caused by a person or persons unknown as a result of

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29 *Public Prosecutor v Straits Times (Malaya) Bhd* [1971] 1 MLJ 69, Abdul Hamid J, Criminal Application No 18 of 1970, 9 October 1970 (HC); s 173(a) of the CPC states, 'When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried'.

30 Section 337 of the CPC; see *Sara Lily & satu lagi lwn Public Prosecutor* [2004] 7 CLJ 335 (HC), (Civil Revision No 43-16 of 2004), Mohtarudin Baki PK.

31 Sections 267-269, 271 of the CPC.

32 Section 338 of the CPC; see also ss 76, 77, 79 and 80 of the Evidence Act 1950.

33 Section 7 of the CPC states that an open and public court is one which the public generally may have access to; see also s 101(1) of the Subordinate Courts Act 1948. Similar provision is also found in the Courts of Judicature Act 1964.

34 Lane CJ in *R v South London Coroner, ex p Thompson* (1982) 126 SJ 625 DC referred to in *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562.

lawful or unlawful intentional and or unintentional act culminating in unforeseeable death), death caused by an act of God, death caused by natural causes and open verdicts. As for the latter verdict, where there is insufficient evidence to bring in any of the other verdicts, the magistrate resorts to an open verdict.<sup>35</sup> A magistrate who conducted the inquiry must, however, confine himself to the evidence made available to him, and decide on that evidence alone. If any verdict was based on probability and not on the established facts, that verdict must be quashed, and an open verdict returned.<sup>36</sup>

In *Public Prosecutor v Shanmugam & Ors*, the facts disclosed that the death of the six persons in the van was the result of mortal gunshot wounds to their heads and bodies with the shots 'all directed at their heads'. The police acting on information that the suspected van was being used for gun smuggling and drug trafficking activities, stopped the vehicle at about close to midnight, and then claimed that they had to retaliate to shots fired from the direction of the van. The police fired 47 shots and 37 had struck the deceased. The deceased were six male Indians who were government servants, a politician and RELA members. Though there were three bullet holes that exited the van (in a questionable exit manner), it was never proven that the shots had been the fired from within. There were no spent cartridges found in the van even though four firearms were retrieved from it. There was no bullet hole to the police car nor were any of the police officers injured despite the fact that four of the deceased were RELA (voluntary corps) members in possession of weapons which 'sprayed bullets'. The police, in two teams in their respective cars could have misinterpreted that the shots coming from the direction of the suspected van originated from the deceased to which they were ordered to retaliate. It was concluded by the reviewing judge that no shots had been proved conclusively to have been discharged from inside the van. Thus the police could not have been acting in self-defence as determined by the learned magistrate who conducted the inquiry as to the 'cause of death', and that an open verdict should instead be returned. In this case, the reviewing judge quashed the learned magistrate's finding and substituted it with a verdict of misadventure with the persons being shot by a person or a persons unknown. The reviewing judge was also not able to conclude

35 Suriyadi Halim Omar J, in *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562.

36 Viscount Caldecote CJ in *The King v Huntbach, ex p Lockley* [1944] KB 606 referred to in *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562.

whether there was any outright criminality committed by any identifiable police personnel due to insufficient evidence before him for consideration.

#### PUBLIC DOCUMENT

A public document is a document made by a public officer in the course of his public duties and not his private duties.<sup>37</sup> In *Tob Kong Joo v Penguasa Perubatan Hospital Sultanah Aminah, Johore Bahru*, Zakaria Yatim J said that a 'public officer' is defined in the Interpretation Acts 1948 and 1967 as a person lawfully holding, acting in or exercising the functions of a public office; and a 'public office' is defined in the same Act as an office in any public service. The public service is enumerated in art 132(1) of the Federal Constitution and includes the general public service of the Federation.<sup>38</sup>

In *Public Prosecutor v Lim Sooi Booi*, the accused who was charged for murder requested for a copy of the post-mortem report of the person he was alleged to have murdered. He contended that he needed the report to prepare his defence and to instruct his counsel. He also contended that the post-mortem report was a public document and as such, he was entitled to a copy of it under s 74 read together with s 76 of the Evidence Act 1950. Balia Yusof JC held that the production of the post-mortem report was governed by s 399 of the CPC to the exclusion of ss 74 and 76 of the Evidence Act 1950 and the common law thereunder. Section 399 of the CPC entitles the accused to the report only if the prosecution intends to use it during trial, in which case, they must then serve it on the accused ten clear days before the commencement of the trial. That means that the prosecution had discretion as to whether or not to use the document, and should they decide to do so, the service must be done within the stipulated time. The judge referred to the Supreme Court case of *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436, and held that the right of any person having an interest to inspect a public document was still subject to the court's discretion (or entirely at the court's discretion) by virtue of s 51 of the CPC. In exercising its discretion, the court will have regard to the justice of the case, the stage of the proceedings at which the application to inspect is made, and ss 152, 153 and 154 of the CPC in relation to the framing of the charge. In this case, the accused failed to show that the post-mortem report was a document

37 See ss 74 and 75 of the Evidence Act 1950.

38 [1990] 2 MLJ 235 (HC).

specified or referred to in the charge. The court's discretion should also not be exercised if the effect were to enable an accused person to gain access to materials before the trial as in the case of a civil pre-trial discovery and inspection of documents. The rationale to this is that the court cannot anticipate how the prosecution will proceed, unless the documents and materials themselves are specified or referred in the charge. The earliest or prescribed occasion to ask for a public document is during the opening statement made by the prosecution at the actual commencement of the trial when the prosecution would state shortly the nature of the offence charged and the evidence by which it proposes to prove the guilt of the accused.<sup>39</sup>

In a civil proceeding, the deceased's heir may apply to the court for the post-mortem report (a public document) directly from the government medical officer who performed the post-mortem or the hospital the officer worked in to enable the next of kin to sue the appropriate party. In *Ba Rao & Ors v Sapuran Kaur & Anor*, the Federal Court held that the court will have the final say in the task of determining national or public interest rather than the authority claiming the privilege. Merely to assert that a report is privileged is insufficient as it is the court's view that there is nothing more important than that all relevant facts should be disclosed before the tribunal of facts unless their disclosure would be detrimental to national or public interest.<sup>40</sup> In *Toh Kong Joo v Penguasa Perubatan Hospital Sultanah Aminah, Johore Bahru*, the applicant, was arrested, placed under police custody, interrogated and beaten. He was subsequently sent for treatment. It was held that his medical report is a public document made by public officers. The applicant therefore has a tangible interest over his own medical report on payment of the prescribed fees as provided under s 76 of the Evidence Act 1950.<sup>41</sup> However, in the face of a clear provision provided by some specific legislations such as the Dangerous Drugs (Special Preventive Measures) Act 1985, which in clear terms state that nothing shall require those members or public servants to disclose or produce, 'the court will have to take a back seat'.<sup>42</sup>

39 [2003] 2 MLJ 433; [2003] 2 CLJ 597 (HC) - Criminal Trial No 45-4 of 2002, Balia Yusof JC. See also s 175 of the Penal Code.

40 [1978] 2 MLJ 146; see s 5, 123 and 165 of the Evidence Act 1950.

41 [1990] 2 MLJ 235 (HC).

42 *Huzir bin Hassan v Ketua Polis Daerah, Polis Di-Raja Malaysia, Johore Bahru* [1991] 1 MLJ 445 (HC).

## CONCLUSION

The magistrate is still 'accountable' to the public prosecutor on whether he decides to hold an inquiry or not, and since the public prosecutor would at the 'end of the day' get an inquiry report as to the 'cause of death', the responsibility is on him to see that the process is transparent. The public prosecutor may, if he desires, order an inquiry to be held by the magistrate on whether one has been done or not. Any suggestion to give pathologists full power or to handle police custody deaths is not a good answer to why there were only eight cases of death inquests held despite the 80 death cases in police custody. The task of explaining to a magistrate the cause of death lies on the government medical officer making the findings, in addition to the inquiry through the examination of witnesses and the report submitted by the investigation police officer. Facts that are already apparent are not the purview of the government medical officer (pathologists). A pathologist only gives the scientific part of the evidence, but a magistrate in addition to the report of the pathologists, has access to other witnesses and other matters in deciding the cause of death much better than what the pathologist thinks. Thus, a magistrate is most impartial in taking the task of holding an inquiry of deaths, and ultimately, it is the magistrate who must decide on the cause of death, not the pathologists. Therefore, the proposal from the Attorney General that the process of the inquiry be done by the pathologist and not the magistrate should be looked at with caution.<sup>43</sup>

Magistrates perform a variety of tasks such as hearing and determining civil and criminal matters, maintaining the peace in the community by examining a complainant, deciding and issuing a warrant of arrest or search warrant, authorising the remand of any suspect pending investigation and pending being charged, considering the granting of bail and fixing the amount of the bond, etc, which require tremendous ingenuity and discretion on their part. It is therefore recommended that magistrates should be selected from among judicial and legal officers of no less than three years of working experience but definitely not among fresh graduates from law schools. Their tasks should not be learnt through trial and error so as to cause a miscarriage of justice but should be consistent with the fulcrum of justice.

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<sup>43</sup> *New Straits Times* (Anizah Damis reporting), 'Instant Inquests, says A-G: Pathologists to handle police custody deaths', at p 11, Friday, 26 August 2005.

Recently, on 16 July 2009, Teoh Beng Hock, 30, the political aide to Selangor New Village Development and Illegal Factory Task Force Committee chairman Ean Yong Hian Wah was found dead at a corridor of the fifth floor of Plaza Masalam, Shah Alam, which houses the Malaysian Anti-Corruption Commission ('MACC') office on the 14th floor following questioning as a witness by the MACC over the alleged misuse of funds by Pakatan Rakyat Selangor state executive councilors. A Royal Commission was set up for the purpose of inquiring into the procedural aspects of the Malaysian Anti-Corruption Commission in carrying out investigations leaving the magistrate as the appropriate legal avenue to hear and determine the cause of death.<sup>44</sup> Prior to this, on 20 January 2009, there was another controversial death of A Kugan, arrested and detained for suspected car theft, who died whilst under police custody which resulted in a second post-mortem being conducted on the body. The initial post-mortem revealed that he had died due to fluid in his lungs, but Kugan's family entered the Serdang Hospital mortuary that same day and took photographs of his body, which showed severe bruising. In the second post-mortem, the UMMC pathologist declared that Kugan was beaten so badly that his tissues broke down and his kidneys failed. The pathologist also found that Kugan had suffered hemorrhaging in his trachea, chest, spleen, stomach and the back of his neck and spine, and that there were signs of hemorrhaging in his heart. The soles of his feet had many bruises caused by beatings and he also suffered blunt trauma to his skull. Eleven policemen who were allegedly involved in the questioning of Kugan were reassigned to desk duties pending investigations.<sup>45</sup>

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44 <http://www.mysinchew.com/node/27563?tid=14>; *AG Defends Cabinet's Decision on Inquest into MACC Death* — 24 July 2005 at 22:15pm; <http://thestar.com.my/news/story.asp?file=/2009/7/24/nation/20090724212007&sec=nation> — *Teoh's Death Inquest* on 29 July.

45 [http://www.straitstimes.com/Breaking%2BNews/SE%2BAsia/Story/STIStory\\_329971.html](http://www.straitstimes.com/Breaking%2BNews/SE%2BAsia/Story/STIStory_329971.html) — *Indian Death in Malaysia Jail Classified as Murder*, 23 January 2009; <http://thestar.com.my/news/story.asp?file=/2009/3/3/nation/20090303151615&sec=nation> — *2nd Post-mortem: Kugan Beaten to Death* (updated).