CRIMINAL PROCEDURE AND THE BANKING AND FINANCIAL INSTITUTIONS ACT 1989[1]

The *Banking and Financial Institutions Act 1989 (BANFIA)* came into force in two stages. On 1st October 1989 all provisions of the Act, except those in respect of scheduled institutions, came into force. All provisions of the Act in respect of scheduled institutions came into force on 1st January 1990.[2]

In this article, certain aspects of criminal procedure which may be relevant to the *BANFIA* are discussed. Reference will be made to various other penal statutes where relevant.

The *Criminal Procedure Code* (CPC) provides that it shall apply to all criminal proceedings subject to any written law for the time being in force.[3] The CPC therefore is the general law governing criminal procedure. If there is a special written law laying out criminal procedure that law overrides the CPC. The maxim *generalia specialibus non derogant* applies. It follows therefore if the *BANFIA* makes provision for any aspect in criminal procedure, that provision shall override the CPC.[4]

(a) Jurisdiction of Courts

It may be necessary to briefly set out the hierarchy of courts in Malaysia and their jurisdiction. In Peninsular Malaysia, for practical purposes, the lowest criminal court is the Second Class Magistrate's Court which may try offences punishable with imprisonment of up to 12 months or with fine only.[5] The Court may, however, impose a maximum

[1]An original draft of this article was presented in a lecture at the In-House Training for Lawyers and Investigators, Bank Negara Malaysia, on 13 January 1990.
[2]P.U.(B) 490/89.
[3]Section 3.
[4]See *P.P.* v *Chew Siew Luan* [1982] 2 MLJ 119.
[5]*Subordinate Courts Act* 1948, section 88.

term of 6 months' imprisonment, a fine not exceeding $1,000, or a combination of both punishments.[6] The First Class Magistrate's Court has jurisdiction to try all offences punishable with imprisonment of up to 10 years, or with fine only, and offences of robbery and housebreaking.[7] They may however impose a maximum sentence of five years' imprisonment, a fine of $10,000, whipping of up to 12 strokes, or any combination of the above sentences.[8]

The Sessions Court may try all offences, except those punishable with death. They may impose all punishments, except death. The High Court may try all offences and impose any punishment.[9]

Appeals from the Magistrate's Court and Sessions Court are heard by the High Court.[10] Appeals from the High Court exercising its original criminal jurisdiction are heard in the Supreme Court.[11] The Supreme Court may entertain references from the High Court on matters raised in the High Court when exercising its appellate criminal jurisdiction.[12]

The Fourth Schedule of the *BANFIA* lists the punishments for offences therein. A glance through the Schedule indicates that the maximum punishment that may be imposed is 10 years' imprisonment and $10 million fine. The First Class Magistrate's Court therefore may try all offences under the *BANFIA* because all the offences come within its criminal jurisdiction to try. However, it must be noted that the maximum sentence that may be imposed by the Magistrate is 5 years' imprisonment or $10,000 fine. There may be cases where these are inadequate and the prosecutor may wish to institute proceedings in the Sessions Courts instead. These courts do not have limits for imprisonment or fine. It will appear that most cases will be brought to the Sessions Courts.

Certain special cases may be tried in the High Court if the Public Prosecutor issues his certificate requesting a transfer

[6] *Op.cit.* section 89.
[7] *Op.cit.* section 85.
[8] *Op.cit.* section 87(1).
[9] *Op.cit.* sections 63, 64.
[10] *Courts of Judicature Act* 1964, section 26.
[11] *Op.cit.* section 50.
[12] *Op.cit.* section 66.

from either the Magistrates's Court or the Sessions Court.[13] Normally, the High Court will not be the first venue for trials of this nature as they have their share of capital offences to try.[14]

(b) Investigations

Before proceeding to investigations proper, there is need to examine the definition of the term *investigating officer*.

In the CPC, no express definition is provided but section 109 does provide that in seizable offences the officer who may investigate has to be of the rank of Sergeant and above or an OCS or officer-in-charge of station. A corporal may therefore investigate if he is an OCS.

Section 82(1) of the *BANFIA* stipulates that an Investigating Officer (IO) may be any officer or employee of the Bank or any other person not an officer or employee appointed under section 3(3). Would this include a police officer? Maybe. The words are wide enough to include a police officer. If he is a police officer, the officer is confined to the provisions of the *BANFIA* when he exercises any power under the Act.

The IO who is a non-employee is subject to and enjoy such rights, privileges, protections, immunities and indemnities as may be specified in the *BANFIA*, *Central Bank of Malaysia Ordinance* or other written law applicable to an officer or employee of the Bank as if he were an officer or employee of the Bank. All IOs are subject to the direction and control of the Governor or such other officer authorised by the Governor to act on his behalf.

In investigations, the Act appears to provide for two broad situations. The first are investigations to be conducted by IOs, presumably prior to any arrest. The Police Department is very shorthanded and presumably do not have adequate expertise in the investigation of commerical crimes or banking offences. The Bank therefore has to appoint their own IOs. Wide powers are given to these officers, probably because of the difficulties in obtaining evidence for such offences. The

[13]CPC, section 418A.
[14]See *Courts of Judicature Act* 1964, section 22(2); CPC, section 200.

second situation are investigations conducted by the police, presumably after an arrest. The police may act on the materials obtained by the IOs or they may further investigate for further evidence. The police will have to rely on the general law for this purpose.

Arrest: The law on arrest in Malaysia has to be explained because arrest is the demarcation point where the police may assume duties under the Act. An arrest takes place where the body of a person is actually touched or confined, or where he submits to the custody by word or action. It also takes place when by words or action it is clear that the police will prevent the person from escaping should he wish to do so.[15] Any police officer may arrest without a warrant.[16] This includes even a constable. He may arrest either if there is reasonable suspicion, credible information, or reasonable complaint concerning a seizable offence. An offence is seizable if the offender may be arrested without a warrant.[17] The First Schedule of the CPC contains a list of offences under the *Penal Code* and Column 3 thereof provides whether the offences are seizable or non-seizable. Offences in other penal statutes are seizable only if they are punishable with imprisonment of 3 years and above. Otherwise, they are non-seizable. Sometimes, a particular statute spells out clearly whether offences therein are seizable or not. These provisions will override the CPC, they being special provisions in special statutes.[18]

In the *BANFIA*, section 103 and section 104 provide for offences and the Fourth Schedule provides for the punishments. Clearly, those offences punishable with imprisonment of less than three years are non-seizable and therefore require warrants for the arrest of the offenders. However, section 110 provides that all offences in the Act shall be seizable. Besides allowing the offenders to be arrested without a warrant, one practical effect is that the police are obliged to investigate the offences immediately. For non-seizable offences, the police will have to wait for an order to investigate (OTI) to be issued by the

[15]CPC, section 15; *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219.
[16]CPC, section 23.
[17]*Ibid.*
[18]See e.g. *Police Act* 1967, section 27.

Public Prosecutor before they may commence investigations.[19]

Section 110 of the *BANFIA* restricts arrests to Inspectors or above. An IO may also arrest and they arrest any person whom they "reasonably suspect to have committed or to be committing" any offence under sections 103 and 104. "Reasonableness" may attract the objective test. When the IO arrests he has to hand the person arrested "without unnecessary delay" to the nearest police officer or to the nearest police station. "Police officer" is undefined in the *BANFIA*. The definition in the *Police Act* 1967 will be relied on. It includes a constable. A possible reason for making over to any police officer is sheer convenience. However it may be inconsistent when on one hand the arrest has to be effected by an Inspector and, on the other, the re-arrest may be effected by a mere constable. Another point to note here is the status of the IO which is equated to that of a private person.[19a] Whether the delay is necessary or not is a question of fact to be decided by the court.[20]

Events after the making over to the police will be in accordance with the CPC and other relevant statutes governing criminal procedure. According to the *Federal Constitution*, whenever a person is arrested with or without a warrant grounds of arrest must be given.[21] He must be brought before a Magistrate within 24 hours (excluding the time taken for any journey).[22] The rationale behind this is to ensure that the person will not be detained any longer than needed for a charge to be framed and for him to be produced in court for the charge to be read. The police are to complete their investigations within 24 hours. If they are unable to do so they may apply to the Magistrate for a longer period of detention to complete their investigations. The maximum period cannot exceed 15 days altogether. If investigations are still uncompleted by then, the suspect must be released and discharged. This period of further detention is provided in section 117 of the CPC.

[19]But, see *PP* v *Seridaran* [1984] 1 MLJ 141.
[19a]CPC, section 27.
[20]See *John Lewis & Co. Ltd.* v *Tims* [1952] 1 All E.R. 1203.
[21]Article 5(3).
[22]Clause 4.

Search: A search may be conducted either with or without a warrant. If it is with a warrant, the search may be conducted by the person mentioned therein. He need not be a police officer. The warrant may specify the particular place or part thereof to which the search or inspection shall extend.

According to the CPC, such a warrant will be issued by the court (usually the Magistrates's Court) if any property or document is not known to the court to be in the possession of any person, or if the court considers that the purposes of justice or of any inquiry, trial or other proceedings under the Code will be served by a general search or inspection, or if a summons is issued or an order made for the production of any document or property, the court has reason to believe that the person directed in the summons or order will not produce it as required.

A search without a warrant is confined to specific situations, generally related to stolen property, counterfeit coins and counterfeit currency.

A summons may be issued by the court in cases where the court considers the production of any document or property is necessary or desirable for the purposes of investigation, inquiry or trial. The court acts either on the application of any party or on its own initiative.[23] If the summons is issued there is no guarantee that the document or property will be produced. If the court feels that even if the summons is issued the person concerned will not produce the item, it may issue a warrant for search immediately. The police investigating officer may himself make an order requiring the person mentioned therein to produce the item. Similarly, if he feels that the person concerned will not produce it, he may apply for a search warrant immediately. He may also immediately conduct a search even without a warrant. Of course, in practice, he will resort to the latter because it saves time and a whole lot of trouble. Section 435 of the CPC covers seizure in situations not provided elsewhere in the Code, for example, where items seized are suspected to have been stolen, or which are found in circumstances which create suspicion that an offence has been committed. The

[23]CPC, section 51

CPC allows the search of the body of any person; if a woman, by another woman.

The provisions in the *BANFIA* spell out powers of entry, search and seizure, all without a search warrant. These powers are very wide. Section 83 reminds us of a corresponding provision in the *Dangerous Drugs Act 1952 (DDA)*.[24] Section 84 refers to a body search and an additional power is given for the detention of a person for such period as may be necessary to have the search carried out, which shall not exceed 24 hours without the authorisation of the Magistrate. It appears that if a Magistrate authorises, the detention may be more than 24 hours because the maximum period is not specified. There is therefore the danger of abuse. Magistrates may well be guided by Article 5(4) of the *Federal Constitution* and section 117 of the CPC and confine detention to the maximum period of 15 days. But, what do they need that much time for?

Presumably, these powers are to be exercised by the IO prior to the arrest of the suspect. Article 5(4) mentions detention after an arrest whereas section 84(1) does not envisage an arrest. It is submitted that if the detention follows an arrest, the police can obtain a valid detention order under section 117 and conduct the body search.

What could be the rationale behind this provision? In the *Dangerous Drugs Act,* section 31A allows a suspected drug offender to be examined so as to afford evidence as to the commission of an offence. This examination is to be conducted by a medical officer and necessary force may be used. This refers to cases where drugs in plastic packets or tubes may have been ingested or inserted somewhere in the human anatomy. Can we therefore guess that the detention needed for a body search under section 84(1) is for a somewhat similar purpose as in the case of drugs? If that is the case, a similar provision empowering such examination may be needed to spell this out clearly. But are the items sought through a body search under the *BANFIA* similar in nature as dangerous drugs, small, easily concealed and easily ingested and protected by plastic coverings?

[24]Section 27.

Section 85 provides for offences where the IO's exercise of powers are obstructed. A similar provision appears in the DDA section 28. The punishments there are a maximum of 1 year's imprisonment or a fine up to $2,000, or both. Here, the punishments are five years' imprisonment and/or $5 million fine.

Section 86 provides for the practical situation where documents, books etc. need translation. The IO may require the translation to be done by the person possessing those documents, if he is not the suspected offender. Such translation has to be accurate, faithful and true. Otherwise, it is an offence punishable with a maximum fine of $1 million.

Police Investigations under CPC: According to section 111 of the CPC, the police investigating officer may *by order in writing* require the attendance before himself of any person within the limits of the police district in which he is making an investigation who from the information given or otherwise appears to be acquainted with the circumstances of the case, and such person shall so attend. Failure to do so is an offence under section 174 of the *Penal Code* and punishable with imprisonment of up to one month, or with fine of up to $250, or with both.

We have seen how in section 51 of the CPC the police investigating officer may make a *written order* addressed to the person in whose possession or power any property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the order. Disobedience of this order is an offence under section 175 of the *Penal Code* and punishable with imprisonment of up to one month, or with fine of up to $250.

Under section 112 of the CPC, the police investigating officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Any statement made shall be reduced to writing. Cases have held that the statement shall be in the form of answers to questions although it need not contain the questions.[25] Cases have also held that such statement may be orally made and still be

[25] *PP* v *Subramaniam* [1956] MLJ 58; *Abdullah Ambik* [1984] 1 CLJ 189.

admissible as evidence in court provided there is reasonable excuse for it being in that form.[26] The person questioned shall be bound to answer all questions relating to the case but he may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture; in other words, incriminate him. He is legally bound to state the truth. All such statements are to be signed or affixed with his thumbprint and has to be read to him in the language in which he made it. He must be given the opportunity to make any corrections he may wish.

If the person later becomes the accused person, this statement of his may be admitted as evidence in Court. Section 113 of the CPC spells out several requirements for admissibility. They include voluntariness when the accused made it. There must not have been any inducement, threat or promise on the part of any person in authority and there must not be any oppression on the accused. Otherwise, the statement will be inadmissible. If the statement is made after an arrest, a statutory caution has to be administered reminding the person that he is not obliged to answer any question put to him. The recorder of statement must be of the rank of Inspector or above. Interpreters may be used but they should not be involved in the arrest of the person. The recorder too preferably should not be concerned in the investigations. Equivalent provisions appear in the *Internal Security Act* 1960, *Dangerous Drugs Act* 1952, *Kidnapping Act* 1961, *Prevention of Corruption Act* 1971, *Essential (Security Cases) (Amendment) Regulations* 1975 (ESCAR), and the *Dangerous Drugs (Forfeiture of Property) Act* 1988. The difference mainly relate to the recording officer whose rank may vary, or who may include Senior Customs Officers as in the *Dangerous Drugs Act*, and to the interpreters who may be an interested party. In the ESCAR, a caution is not needed after an arrest. These special statutes seek to allow more statements to be admitted, presumably because the offences provided therein are grave and serious.

[26] *Jayaraman & Ors v PP* [1982] 2 MLJ 306.

The *BANFIA* has gone a few steps ahead of these special statutes and the CPC in the area of investigations. Section 87(1) provides that the IO need only suspect that the person has committed an offence under the Act. He may then do any of the 3 things below:-

(a) order him orally in writing to attend before him for the purpose of being examined orally by the IO in relation to any matter which may, in the opinion of the IO, assist in the investigation into the offence;

(b) order any person orally or in writing to produce before the IO books, documents, property, articles etc. which may, in the opinion of the IO, assist in the investigation into the offence; or

(c) by written notice require any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the notice, being information which, in the opinion of the IO, would be of assistance in the investigation into the offence.

Compliance with the above is essential, otherwise an offence is committed and the offender is liable to five years' imprisonment or a fine of $5 million, or to both. A small comment on the drafting of section 87(1). Was it the intention of the legislators for (a), (b) or (c) to apply in the alternative or are these three matters applicable in any combination where suitable or necessary? It would appear, as it is, that each will apply in the alternative. This could restrict the IO; he may wish to apply all three or any two and find himself limited to only one.

When an order under (a) is given, the person to whom it is directed shall attend in accordance with the terms of the order to be examined, and shall continue to so attend from day to day as directed by the IO until the examination is completed. During the examination, all information within his knowledge, or available to him, or capable of being obtained by him in respect of the matter being examined

shall be given. He has to answer all questions truthfully, and shall not refuse to answer any question on the ground that it tends to incriminate him or his spouse.

When an order under (b) is given, he shall not conceal, hide, destroy, alter, remove from or send out of the country, or deal with, expend, or dispense of, any book, other document, property, article, or thing specified in the order, or alter, deface any entry in any such book or document, or cause the same to be done, or assist or conspire to do the same.

When an order under (c) is given, the person shall in his statement on oath or affirmation, furnish and disclose truthfully all information required under the notice which is within his knowledge, or available to him, or capable of being obtained by him. He has to furnish or disclose the same despite the tendency to incriminate him or his spouse.

One point to note here is that whereas the CPC does not make it mandatory for the person to answer any question which may incriminate him, the *BANFIA* makes it mandatory. Another point is with regard to the written orders required under sections 51 and 111 of the CPC compared with the oral or written orders in section 87. Difficulties may arise when proving the existence of the oral order. There would be a need to call witnesses to testify whereas in the case of written orders, proof is easier. The penalties for non-compliance with these orders differ greatly, those under *BANFIA* being much heavier.

The examination by the IO may be conducted orally but the IO has to put down in writing the record in his own hand and it shall be read to and signed by the person examined. It is not clear what form the written record would take, that is, whether it should be in the narrative, question and answer form, or merely answers to questions. If the person refuses to sign the record, it shall be endorsed as such. All the record of examination, written statement on oath or affirmation, documents, articles, thing or property produced shall be admissible in evidence in any proceedings in any court for 3 situations, namely -

(a) for, or in relation to, an offence under the Act;

(b) for, or in relation to, any other matter under this Act;

(c) for, or in relation to, any offence under any written law -

regardless of whether such proceedings are against the person who was examined, or who produced the property etc., or who made the written statement on oath or affirmation or against *any other person.*

This subsection (7) is extremely wide in application. The statements may not only be used in a trial of the accused person in relation to any offence under the *BANFIA*, it may also be used for other purposes, for example, investigations under the *BANFIA*, presumably against any other person. The statements may be used against the accused person even if he is subsequently charged with offences under laws other than the *BANFIA*, for example, the offences of cheating, criminal breach of trust under the *Penal Code;* corruption under the *Prevention of Corruption Act* 1971; trafficking in drugs under the *Dangerous Drugs Act*. It even allows those statements to be used against any other person.

It will be remembered that section 113 allows statements of the accused person to be admitted at the trial of that accused person. That section also lays down many pre-requisites for admissibility, which do not appear here in the *BANFIA*. Section 97(7) hardly provides for any safeguards and it applies "notwithstanding any written law or rule of law to the contrary".

If the IO is the prosecuting officer in court, he may produce these statements and items as evidence. In the event that further investigations are handed over to the police and the prosecution is conducted by the police or Deputy Public Prosecutor (DPP), all these statements and items may be handed over by the Bank. The DPP may request the statements or items for prosecutions under any other statutes involving any other persons too.

(c) Initiation of Prosecution

Article 145(3) of the *Constitution* states that the Attorney General has the discretion to institute, conduct and discontinue criminal proceedings in all criminal courts, other than the

Syariah courts, native courts and the courts martial. Section 376 says the Attorney General shall be the Public Prosecutor (PP) and shall have the control and direction of all criminal prosecutions and proceedings under the Code.

Normally, in trials before the Magistrate's Court or Sessions Court, the prosecuting officer will be a police prosecuting officer. The DPP prosecutes in the High Court and sometimes in the Magistrate's or Sessions Court. If the offence is seizable, the PP, DPP or an Inspector or above may prosecute. Section 380 CPC allows public officers to prosecute in seizable cases if they are so empowered by any written law. Public officers include officers from the Biro Siasatan Negara who prosecute in corruption cases, immigration officers in immigration cases, City Hall officers in City Hall cases, and so on.

Section 90 of the *BANFIA* states that the IO is a public officer within the context of the CPC. Can he therefore prosecute? Section 109 states that only an officer or employee of the Bank may be authorised by the Governor to prosecute in any court any case in respect of any offence committed under this Act. The written consent of the PP is required as well. It appears therefore that the IOs cannot prosecute unless they have been authorised under section 109.

A question which arises is who decides whether to charge a person under the *BANFIA*? Is it the PP or his deputies, or is it the Governor, the IO or the prosecuting officer? Section 109 refers to prosecution and it is submitted that a prosecution commences in court as soon as the charge is read. The *Constitution* gives the PP the discretion to institute criminal proceedings and hence the decision whether to charge or not belongs to him and his deputies. His deputies are delegated those powers under section 376 (iii) of the CPC.

(d) Composition of Offences

A composition means an arrangement between two or more persons for the payment by one to the other or others of a sum of money in satisfaction of an obligation to pay another sum differing either in amount or mode of payment. When a person compounds an offence, it means he agrees to

accept a composition.[27]

In the CPC, composition is provided for specific offences mentioned in section 260. They are mainly offences which involve injury either to the body of a person, his reputation or his name. The effect of such composition is an acquittal, that is, the same charge cannot be brought against the accused person in the future. If the proceedings are pending in court, that is, a summons has been issued for the attendance of the accused person (and the court is already involved thereby), the court's permission is required. Otherwise, the parties need only inform the court of the composition.

Section 108 of the *BANFIA* allows composition by the Governor, with the concurrence of the Minister, in fit and proper cases, but only with regard to offences punishable under sections 103 or 104, or any other provisions of the Act.

The Governor makes a written offer to such person to compound the offence by paying to the Governor within such time as may be specified in the offer such sum of money as may be specified in the offer. The amount shall not exceed fifty percent (50%) of the amount of the maximum fine to which the person would have been liable if he had been convicted of the offence. Such an offer is to be made only after the offence has been committed but before any prosecution for it has been instituted. If the amount is not paid during the specified time or extension allowed, the institution of prosecution will proceed. The effect of this composition is that no prosecution shall thereafter be instituted in respect of such offence against the person to whom the offer to compound was made.

(e) Charge

The purpose of a charge is to provide the accused person with an opportunity to know the alleged offence against him and an opportunity to prepare his defence. It also guides the court as to what evidence to expect in the forthcoming trial. The charge therefore has to be clear and contain sufficient particulars so as to provide good notice of the alleged offence.

[27]Osborn's *A Concise Law Dictionary*.

One distinct offence is to be placed in one separate charge.[28] If this rule is contravened, the charge is said to be duplicated and the effect is an irregularity. If there is a miscarriage of justice, for example, when the accused is misled or prejudiced by the duplicated charge, the irregularity cannot be cured and the trial will be a nullity.[29]

Another rule states that one charge is to be tried in a single trial.[30] The rationale for this rule is the avoidance of a confusion of issues and law involved. The multiplicity in offences may prejudice the minds of the court or jury, and may embarrass the accused. A contravention of this rule is called a misjoinder of charges and the effect is the annulment of the trial.[31]

There are exceptions provided in the CPC to the general rule regarding joinder of charges. There are instances where joinders are possible and allowed. The rationale behind these exceptions is that the danger of embarrassment to the accused or the confusion of issues or law is lessened in those special circumstances. Section 164 refers to offences of the same kind, committed within 12 months, and a joinder of a maximum of 3 charges; section 165 refers to offences committed in one series of acts which form one transaction; section 166 refers to offences which are unclear although the facts are clear.

The *Essential (Security Cases) (Amendment) Regulations* 1975 (ESCAR) provides an exception to the CPC too. In regulation 10, many charges may be joined irrespective of whether the offences are of the same kind or not, committed within 12 months or more, exceeding three charges, or whether the offences are committed in one transaction or not.

The *BANFIA* has a similar exception in section 107. It provides that a person may be charged with and tried at one trial for any number of such offences in the Act committed within the space of any length of time. The purpose behind this exception, it is submitted, is to avoid many protracted and lengthy trials, since such trials will involve numerous documents and exhibits and many officers from the Bank.

[28]CPC, section 163.
[29]See Mimi Kamariah Majid, *Criminal Procedure in Malaysia* (1987), 248-250.
[30]CPC, section 163.
[31]*Criminal Procedure in Malaysia, op.cit.*

(f) Bail

There is no special provision regarding bail in the *BANFIA*. The general law therefore applies. According to the First Schedule of the CPC, offences punishable with imprisonment of less than 3 years or with fine only are bailable offences. These are offences where the accused person may be allowed bail as of right. They may have to provide sureties though. If the offences are punishable with imprisonment for 3 years and upwards, the offences are non-bailable. Here, the court has a discretion whether to grant bail or not. Among the factors the court will consider will be whether the offence is serious, whether the accused will tamper with witnesses, whether there is a likelihood that the accused will continue committing the offence, the time he will spend in prison and the time taken for the trial to begin. In determining the amount of bail, the court should consider all these factors but the amount shall not be excessive. If the accused fails to attend court, the bail may be forfeited after a show cause proceeding against the bailors.

(g) Sentencing

The offences in the *BANFIA* are mainly provided in sections 103 and 104 therein. Section 103 states that the accused "shall *on conviction* be liable to be punished" with imprisonment not exceeding the term set out in the Fourth Column of the Fourth Schedule or with a fine, or with both such imprisonment and fine.

Several questions may be raised. Is a conviction necessary before either imprisonment or fine is imposed? If it is necessary, it will follow that the court has the discretion not to convict and thereupon release the person/offender on a good behaviour bond under section 173A of the CPC. This section requires that the court considers the age, health, mental condition of the offender and the trivial nature or extenuating circumstances of the offence. A conviction must not have been recorded. If satisfied with all those factors, the court may either admonish the offender or release him on a good behaviour bond, commonly referred to as a "binding over". Is this the intention

of the legislature? Does the legislature provide wide powers in the *BANFIA* purportedly to nab offenders and yet when it comes to sentencing, it may be appropriate to deal with the offenders in such a lenient way?

Another question relates to the use of the phrase "shall be liable". Cases have held that this phrase means that imprisonment or fine are not mandatory.[32] If the accused is convicted, he may be released on a good behaviour bond for 3 years under section 294 of the CPC. Here, again the court considers similar factors as provided in section 173A, except that a conviction is mandatory. Only if imprisonment is thought proper, will the maximum provided for a specific offence be the limit. Likewise, with regard to fines. The question here is, is this effect intended by the legislature or drafters of the *BANFIA*? If this is the case, one may query the wisdom of even commencing such prosecutions. These may be appropriate cases for the PP to exercise his discretion not to prosecute or institute proceedings.

If Parliament's intention is to have imprisonment and/or fine imposed, the words "on conviction" have to be removed, and "shall be liable" has to be rephrased to "shall be punished with". Alternatively, as in some later statutes, Parliament may insert a new subsection explaining that sections 173A and 294 of the CPC shall be excluded.

Imprisonment: Since more than one charge may be tried in one trial, the prison sentence may be imposed on all or any of them. If more than one prison sentence are imposed, and if it is the Magistrate's Court which hears the case, the total period cannot exceed 20 years.[33] If it is the Sessions Court or High Court, there is no limit. If it involves more than one sentence of fine, and if it is the Magistrate's Court which hears the case, the total shall not exceed $20,000, that is, twice the amount which that court in the exercise of its ordinary jurisdiction is competent to inflict.[34] The other courts are free to impose any amount of fines.

Prison sentences may be ordered to take effect either consecutively or concurrently. Normally if the offences are

[32] *Criminal Procedure in Malaysia*, 287-290.
[33] *Subordinate Courts Act*, section 102.
[34] *Ibid.*

committed in one transaction, the sentences should run concurrently. If deterrence is the aim of the sentencer, they may run consecutively. Single prison sentences may take effect retrospectively from a particular date, be it the date of arrest, date of commencement of trial or date of conviction.

Imprisonment may be the main sentence or it may be in default of payment of a fine. According to section 103(1) proviso of the *BANFIA*, where the person found guilty of an offence under the Act is a body corporate, the punishment of imprisonment shall not apply to it. Queare: if a fine is imposed and the body corporate cannot pay or refuses to pay, what is the Bank's remedy?[35] It may be suggested that perhaps a provision similar to section 16A(4) of the *Employees' Provident Fund Act* 1951 be added to the *BANFIA* so that the director or manager of the body corporate may be imprisoned in default of payment of a fine. But, then again since imprisonment as the main sentence is prohibited, it may be that imprisonment in default of a fine was also intended to be prohibited.

Cases have decided that offences involving persons who are in trust of property or money must involve imprisonment. Fines are inadequate because the offenders will use fruits of their crime to buy freedom out of the courts.[36]

Fines: The principles governing fines are provided in cases and the CPC.[37] If the amount of fine is not stipulated, then the court should not impose an excessive amount. If the statute provides a maximum amount, the court has a discretion to impose any amount below that maximum. The court cannot impose a large sum as fine simply because the offender has rich friends who may help him pay the fine. The court should not impose an excessive amount if that means he cannot afford to pay and therefore has to be imprisoned. This is because the practical effect of such excessive fines is to sentence the offender to a further period of imprisonment.

[35]See *PP* v *Pontian Bas Berhad* [1988] 2 MLJ 530.
[36]*PP* v *Khairuddin* [1982] 1 MLJ 331; *R* v *Pugh & Rendell* (1981) Cr.L.R. 270; *Mohamed Abdullah Ang* v *PP* [1988] 1 MLJ 167.
[37]Section 283.

The court may allow time for the payment of the fine. It may direct payment of the fine to be made by instalments, or issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender. The court may direct that in default of payment of fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other term of imprisonment. The court also may direct that such person be searched and that any money found on him when so searched or which, in the event of his being committed to prison, may be found on him when taken to prison, shall be applied towards the payment of such fine. The surplus, if any, shall be returned to him.

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