

Postgraduate Diploma in IT Forensics

Week 2 of Module 5: Collecting Digital Evidence & Presentation in Court (Addendum)

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1 Prologue

1.1 Help

- Blue means I am a link; please click me.

1.2 Contact info

- Personal email
 - hayson.tse

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2 Independent Police Complaints Council

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2.1 Newsletter Issue 25/2019

2.1.1 Case 1 : Procedural impropriety in crime investigation resulting in the dismissal of charges

2.1.1.1 Background

The salesperson of a clothing store called the police for assistance as the salesperson suspected that the Complainant (COM) attempted to swap for genuine branded clothes fraudulently from the store by using counterfeit clothes and those which were not eligible for exchange. The salesperson believed that COM had used similar ways to deceive the store on six different occasions in the preceding two months. The District Intelligence Section (DIS) attended the store and arrested COM for “Deception”. Complainee 1 (COMEE 1), a Police Constable of DIS, and his team conducted a search at COM’s residence in the presence of COM and COM’s father. COM’s father used his mobile phone to record the conversation between COM and COMEE 1 during the house search. The audio recording revealed that, before questioning COM about the source of the clothes found and seized in her bedroom, COMEE 1 did not caution COM in advance as required in the police procedures. COM did not make any admission when being questioned. Following the house search, COMEE 1 however recorded on his notebook and COM’s cautioned statement that he had cautioned COM immediately before questioning

how she got the clothes found in her bedroom. Complainees 2-4 (COMEES 2-4), including a Police Constable, a Woman Police Constable and a Sergeant of District Investigation Team (DIT) respectively, then took over the case for further investigation. COM secretly used her mobile phone to record the conversation COMEES 2-4 had with her. The voice record which lasted for approximately 50 minutes revealed that at the beginning of their conversation, COMEES 2 and 3 repeatedly asked COM how she deceived the store to exchange for genuine clothes but COM claimed that she purchased and exchanged the clothes in a proper way.

COMEE 4 later joined in the conversation and told COM that if she persistently refused to cooperate, he would consider arresting COM's parents as COMEE 4 stated that he was not sure whether they were involved in the incident. COMEE 4 told COM that she would only be sentenced to a fine. After a prolonged interrogation, COM finally admitted having obtained the clothes from the store by deceptive means. COMEES 2 and 3 then conducted a Video Recorded Interview (VRI) with COM in which COM admitted the offence under caution. According to the police record, immediately before conducting the VRI with COM, COMEE 3 spent an unreasonably long period of time of 70 minutes on taking fingerprints from COM. There was not any record of the above improper interrogation of COM prior to the VRI. It was believed that the purported time spent on taking fingerprints was inaccurately recorded to cover up COMEES 2-4's interrogation. COM was subsequently charged with "Obtaining Property by Deception" and "Attempted Obtaining Property by Deception". During the trial, COM pleaded not guilty and raised allegations concerning the improprieties of the COMEES in handling the case. The Defence presented two audio clips recorded by COM and COM's father respectively in support of her allegations. Taken into account the information transpired from the audio recordings, the Prosecution offered no further evidence. The court dismissed all charges against COM.

2.1.1.2 CAPO's investigation

Thereafter, CAPO resumed the complaint investigation and obtained a statement from COM in which COM alleged, among other things, that COMEE 1 had failed to caution her during the house search [Allegation 1: Neglect of Duty] and that COMEES 2-4 had threatened and induced her to admit the offence [Allegation 2: Misconduct]. When interviewed by CAPO, COMEES 1-4 denied the allegations and claimed that they could not recognize any of the voices on the two audio recordings provided by COM and her father. CAPO was of the view that the authenticity of the audio recordings was in doubt and there was no independent evidence to support the allegations. CAPO initially classified all allegations as "Unsubstantiated".

2.1.1.3 IPCC's observation

In the light of the seriousness of the allegations, this case was put under the close scrutiny of IPCC's Serious Complaints Committee (SCC). Upon thorough examination of the two audio recordings and the relevant police records, IPCC had no doubt about the authenticity of the two audio recordings on which the persons believed to be COMEEs had stated to COM their names, ranks and investigation units as well as the details of COM's arrested offence, which matched with the identities of COMEEs and the crime case details. It transpired from the audio recordings that it was highly likely that COMEE 1 did not caution COM before asking COM about the clothes found in the house search and that COMEEs 2-4 had seemingly induced and threatened COM to admit the offence. As the two audio recordings unveiled sufficient evidence to support COM's allegations, IPCC requested CAPO to reclassify the allegations concerned as "Substantiated". On Allegation 1, COMEE 1 should have cautioned COM before asking questions as the answers could implicate COM. More importantly, COMEE 1 should not record in his notebook and COM's cautioned statement that he had cautioned COM before questioning her about the clothes found during the house search which in fact he had not. COMEE 1 should be given "Warning with DRF entry" for this serious procedural impropriety.

As for Allegation 2, the audio recording revealed that COMEEs 2-4 had interrogated COM. She admitted the offence in the subsequent VRI. COMEEs 2-4 had undoubtedly breached the "Rules and Directions for the Questioning of Suspects and the Taking of Statements" which require all police officers to remind the arrested persons of their right to remain silent and to obtain statements from the suspect on the basis of voluntariness, without fear of prejudice, hope of advantage or oppression. The time reported for fingerprinting was also likely an inaccurate record to cover up COMEEs 2-4' interrogation. IPCC therefore requested CAPO to reclassify Allegation 2 against COMEEs 2-4 as "Substantiated". Given that the improper interrogation is a serious misconduct, a Disciplinary Review should be conducted against COMEEs 2-4.

After an SCC's Query and discussions between IPCC and CAPO, CAPO subscribed to the above IPCC's recommendations. IPCC thus endorsed the investigation result of the case.

2.2 Newsletter Issue 24/2018

2.2.1 Case 1 : Three police officers failed to properly investigate a theft case which resulted in failure to track down the suspect

2.2.1.1 Background

While shopping in a supermarket, the Complainant found his personal belongings in the trolley had gone missing and thus reported this case to the police. The

case was handled by three police officers (Complainees 1-3). The Complainee 1 (COMEE 1) was the officer in charge of the case (Inspector) whereas the other two officers (COMEEs 2-3) were the investigating officers, i.e. Team Sergeant and Police Constable respectively. About a year after the incident, as the Complainant had not received any update or case result, he then called the Police via phone for enquiry. An Inspector, who was the successor of COMEE 1, told the Complainant that his case had been curtailed.

Dissatisfied with the Police's investigation approach and result, the Complainant lodged a complaint with CAPO. He claimed that while reviewing the supermarket CCTV footage, he realized that the suspect took his bag and used the suspect's own membership card to check out at the cashier. As a result, the Complainant

2.2.1.2 CAPO's investigation

Regarding Allegation 1, when interviewed by CAPO during complaint investigation, COMEE 3 claimed that he reviewed the CCTV footage and found that it did not capture the face of the suspect clearly but only the use of the membership card by the suspect at the cashier. In addition, COMEE 3 was informed by the manager of the supermarket that one membership card account can be used by several persons and the supermarket could not provide transaction records and customer information of the membership cards. Based on the above situation, COMEE 3 considered that the lines of investigation had been exhausted and made recommendation to COMEEs 1-2 for curtailment of the case. Both of them agreed with COMEE 3's views, as they considered that even if the card user at the material time could be identified, the chance of a successful prosecution was low. Therefore, they agreed to curtail the investigation.

After investigation, CAPO revealed that if police provided the location and time of the membership card transaction, the membership card company could retrieve the personal particulars of the card user from their transaction records and provide relevant information to the police for investigation purpose. COMEE 3 told CAPO that he misunderstood the operation of the supermarket's membership card and hence failed to further investigate and confirm the suspect's identity from the membership card company. CAPO considered that COMEE 3, who failed to investigate the case properly and had subsequently misled COMEEs 1-2, should bear the main responsibility. Therefore, CAPO classified the allegation 1 against COMEE 3 as "Substantiated" and he would be given an advice without Divisional Record File (DRF) entry. On the other hand, as COMEE 1 had only served for four years in the Force and COMEEs 1-2 were mainly misled by COMEE 3, allegation 1 against COMEEs 1-2 should be classified as "Unsubstantiated".

Regarding Allegation 2, according to the record of police documents, COMEE 1

had issued an investigation result letter to the Complainant after the case was curtailed and no delay was found during the process. Therefore, CAPO classified the allegation 2 as “No Fault”.

2.2.1.3 IPCC’s observation

IPCC agreed with CAPO’s classifications on allegations 2, but disagreed with its classification on allegation 1. IPCC opined that COMEEs 1-2, who were supervisors to COMEE 3, should provide proper guidance to him and thus should bear equal responsibilities for the case. Considering COMEE 1 has already served the Force for several years and was in the rank of Inspector, he should have adequate experience. Moreover, his short service could not be a valid excuse to exonerate his negligence in making a wrong decision to curtail the case prematurely. Being the officer in charge of the case, it was basic and essential for COMEE 1 to conduct some background check on the available evidence, such as checking the actual operation of the membership card programme and how the transaction records and personal data could be obtained from the membership card company. If he had handled the case in a proper manner, provided appropriate guidance to COMEEs 2-3, and tried to exhaust all lines of enquiry, the chance of tracking down the suspect would be higher.

As an experienced officer who served the Force for 20 years, COMEE 2 should be able to identify that the lines of enquiry had not been exhausted at the material time. However, he believed it would be difficult to track down the identity of the suspect and agreed to curtail the investigation on the grounds that there could be more than one user for one membership card account.

The IPCC considered that COMEE 2 drew the conclusion hastily before trying his best to collect all the available evidence. Thus, the IPCC was of the view that COMEE 2 also failed to handle the case properly.

Based on the above reasons, the IPCC recommended that the allegation 1 against COMEEs 1-2 should be re-classified as “Substantiated”. CAPO accepted the above recommendations and re-classified the allegation 1 against three officers as “Substantiated”. Three COMEEs were given advices without DRF entry.

2.2.2 Case 4: Four police officers conducted a house search without search warrant or Complainant’s consent

2.2.2.1 Background

An informant made a report to the Police that a suspicious male (Complainant) was kicking at the door of his neighbour’s flat. Four police officers (Complainees

1-4) responded to the scene and found that the door lock to the flat was damaged and the Complainant was inside the unit. Upon request from the police officers, the Complainant opened the iron gate to let them enter for investigation. The Complainant explained to the police officers that he was a friend of the owner of the flat who was currently hospitalised. He stated that the owner allowed him to live in the flat temporarily for a few months then and was able to present the iron gate key to the flat as a proof only. After inquiry, the police officers confirmed that the owner of the flat was indeed hospitalised. However, they were not able to speak to the owner directly to follow up on the Complainant's version.

Since they still had doubt about the Complainant, in addition to the damage of the main door, the Complainees (COMEEs) decided to conduct search on the Complainant and in the flat. After searching in a wardrobe in the flat and a tote bag on the sofa, the police officers found a bag of suspicious white powder and a spring loaded knife stashed in the Complainant's bag. The police officers then arrested the Complainant and charged him with "Criminal Damage", "Possession of Dangerous Drugs (PDD)" and "Possession of Prohibited Weapon (POPW)". When it was brought to court, the Judge adjourned the case pending the examination results of the suspected white powder and the spring loaded knife by Government Chemist. During this period, the Complainant was remanded in custody of the Correctional Services Department.

Six weeks later, the test result confirmed that the bag of white powder did not contain any dangerous drugs. In addition, the Police had got in touch with the owner of the flat and confirmed the Complainant's version. After reviewing the case, the Police decided to proceed with the charge of "POPW" only. The Complainant pleaded not guilty in court. During the trial, the Judge criticized the Police for conducting a search of the flat without a warrant. He stated that the Police did not arrest the Complainant for any offence which called for police power to look for evidence in the flat. In this connection, the Judge considered that the Police's search action on that day was not legal and the spring loaded knife seized could not be presented as a valid exhibit. Therefore, the Complainant was acquitted.

Upon conclusion of the court case, the Complainant approached CAPO and alleged that COMEE 2 had seized a bag of corn flour from the kitchen in the flat. Suspecting the white powder as heroin, he arrested the Complainant for the offence of "PDD" [Allegation 1: Fabrication of Evidence], and COMEEs 1-4 had treated him impolitely in the course of the enquiry [Allegation 2: Impoliteness].

2.2.2.2 CAPO's investigation

Regarding Allegations 1 and 2, CAPO had tried to contact the Complainant to obtain his statement and to follow up on the complaint case. However, the Com-

plainant did not respond to CAPO's requests. Since the available evidence did not point to any definite findings, CAPO classified both allegations as "Not Pursuable".

2.2.2.3 IPCC's observation

The IPCC agreed with CAPO's classifications on allegation 1 and 2. However, IPCC had reservations on the action taken by COMEEs 1-4 when handling the case. Particularly, the search in the Complainant's flat was not legal. Therefore, the IPCC considered that CAPO should register a new "Substantiated Other Than Reported (SOTR)" count of "Unnecessary Use of Authority (UUOA)" against COMEEs 1-4.

CAPO opined in their reply to IPCC that there was no impropriety in the search actions taken by the COMEEs on the ground that (i) the four police officers arrived at the scene and found that the door to the flat was damaged. It was reasonable to believe that the Complainant had committed an offence, such as "Burglary"; (ii) though the Complainant claimed that the owner of the flat knew him and had given him permission to live in the flat for a few months, the police could not get in touch with the flat owner at the material time to confirm the Complainant's claim. There was a possibility that he entered the flat for unlawful purpose as he acted furtively. It was also necessary for the four police officers to conduct a search on the Complainant to ensure he did not possess any article for burglary; and (iii) since applying for a warrant from court would take time and might give the Complainant an opportunity to escape, the four police officers must take immediate action to search the Complainant's flat.

The IPCC disagreed with CAPO's argument. The IPCC opined that the four police officers arrived at the scene to investigate in a criminal damage offence instead of a burglary case. The Complainant did his utmost to explain to the police officers his reason to be in the flat. At that time, the Complainant also presented the key to the flat as a proof. Therefore, it was a bit far-fetched for the Police to suspect the Complainant as a burglar. In most cases, when the Police must conduct search in private premise, prior consent must be sought from the owner of the flat or the residents. If no consent was granted, the Police must apply for a search warrant from court. In this case, however, the Police failed to conduct a house search in accordance with the proper procedures. Their action was considered inappropriate. As a result, the IPCC held the view that CAPO should register an SOTR count of UUOA against COMEEs 1-4, and requested for a working level meeting with CAPO to discuss this complaint case.

After deliberation, both the IPCC and CAPO agreed that COMEE 1 was the highest-ranking officer at the scene that day. Considering his work experience, he

should not allow and order his subordinates to conduct the search without prior consent or a search warrant. Therefore, COMEE 1 should be held accountable for this mistake. As agreed by CAPO, an SOTR count of UUOA had been registered against COMEE 1, who was given advices without Divisional Record File (DRF) entry.

In addition, the IPCC opined this case also highlighted that, during investigation of similar cases, there is room for improvement in the examination of suspected dangerous drugs. The Complainant was arrested for allegedly “PDD”, “Criminal Damage” and “POPW” and kept in custody with bail refused (since he had no fixed residence) for six weeks before the Government Chemist confirmed whether the suspected white powder contained any dangerous drugs and examined the prohibited weapon. The situation was considered unsatisfactory. Detention is a measure where freedom of the suspect will be temporarily restricted. The examination later proved that the white powder did not contain any dangerous drugs. The Complainant was deprived of his liberty for six weeks which might lead to procedural injustice. In order to prevent the occurrence of similar incidents, the IPCC had met with CAPO on several occasions to discuss possible optimisation measures. During these meetings, the IPCC has recommended improvements to the police procedures, which included recommending the Police to work closely with the Government Laboratory to conduct urgent preliminary examinations for suspected dangerous drugs. This would speed up the process to ascertain if the seized exhibits contained any dangerous drugs to avoid detaining the suspect for a prolonged period. The Police agreed to strengthen the training of officers in handling similar cases and to remind them to work together with the Government Laboratory with an aim to obtain preliminary test results in a speedy manner.

Though the examination of whether the exhibits contained dangerous drugs or not was not one of the allegations in this complaint case, to discharge the function under section 8(1)(c) of the IPCCO, the IPCC strived to make timely recommendations to the Police whenever a deficiency was identified in the police practices or procedures while vetting the Reportable Complaint reports. The IPCC Secretariat will monitor improvement-related matters via “Post-endorsement Issues Follow-up” with CAPO. The Council will also discuss the implementation progress of the recommended improvements at quarterly Joint Meetings with the Police to ensure their proper follow-up with a view to further enhance the service quality of the Police.

2.3 Newsletter Issue 23/2018

2.3.1 Case 2: Failed to properly store exhibits

2.3.1.1 Background

Based on intelligence, the Police suspected that the Complainant had published child pornography on the Internet. After investigation, a crime officer arrested the Complainant for “Possession of Child Pornography” and “Publishing Child Pornography” at his home, where three computers were seized. As no child pornography could be found in the computers upon preliminary examination at the scene, the crime officer decided to pass them to the Technology Crime Division (TCD) for forensic examination. Upon seizing the computers as exhibits at the scene, the officer attached “anti-tamper” tapes to them. Before sending the computers to TCD, he placed them under his desk in the office.

After examination by TCD, approximately 60,000 photos and 630 video clips of child pornography were found to have been saved in the computers. As a result, the Police charged the Complainant with the above two offences. During the trial, the Complainant denied committing the offences and indicated that the Police had mishandled his computers. The Complainant argued that the seized computers were not stored properly so that someone might have planted the child pornography photos and video clips on them. The Court commented that though the handling of the exhibits by the Police was unsatisfactory, it would be improbable to plant such a large quantity of child pornography on the computers without being noticed. Hence, the Complainant was convicted.

Subsequently, the Complainant approached CAPO and alleged that the crime officer (Complainee) had led to his computers being tampered. [Allegation: Neglect of Duty].

2.3.1.2 CAPO’s investigation

CAPO was of the view that the Complainee had taken reasonable steps to safeguard the exhibits by promptly sticking the “anti-tamper” tapes on them when they were seized at the scene. Should anyone tamper with the computers in the course of delivery and storage, the “anti-tamper” tapes would leave marks on these exhibits. When the Complainee handed the computers to TCD, he confirmed that the “anti-tamper” tapes remained intact. At the hearing, the Judge also clearly pointed out that the computers had not been tampered, and excluded the possibility that someone could have planted the pornography. Based on these two points, CAPO classified the allegation as “No Fault”.

2.3.1.3 IPCC’s observation

The IPCC considered that though the Court clearly indicated that the exhibits had not been tampered with, it did comment that the exhibit handling process was unsatisfactory. According to the Police General Order, all exhibits should be stored in the Property Office. However, the Complainee did not follow the correct

procedures for storing the exhibits in the Property Office. Instead, the computers were placed under his desk for several days before they were sent to the TCD.

The IPCC agreed with CAPO in classifying the allegation of “Neglect of Duty” as “No Fault”. However, the IPCC was of the view that the Complainee failed to handle the exhibits properly, offering the Complainant a chance to argue that someone had planted the child pornography in his computers. Therefore, the IPCC recommended that an additional “Substantiated Other Than Reported” count of “Neglect of Duty” be registered against the Complainee. After Queries, CAPO finally subscribed to IPCC’s view, and the Complainee was given an advice without DRF entry.

2.3.2 Case 3: Inappropriate handling of exhibits

2.3.2.1 Background

The Complainant was hired by a food company to sell seafood and would enjoy a 10% share of daily profit as remuneration. The employer (shop owner) - with support from the accountant, alleged that the Complainant failed to return a profit of over HK\$80,000 to the company after deducting his remuneration. Suspecting the Complainant might have embezzled the company’s property, the shop owner made a report to the Police. When conducting preliminary enquiries, the investigating officer (Complainee) did not collect the Accounting Records (Accounts) as an exhibit. He made copies of the six pages from the Accounts covering the company’s revenue records for the period concerned, and returned the Accounts to the shop owner. After in-depth investigation, the Complainant was finally arrested and charged with “Theft”.

Upon arresting the Complainant, the Complainee took a further statement from the shop owner and seized the Accounts as an exhibit. After sealing the Accounts into an exhibit bag, he locked it inside his drawer in preparation for the trial. During this process, however, the Complainee did not carefully examine the six-page photocopy covering the company’s revenue records and failed to notice the alteration made in one of the pages.

During the trial, the Complainant’s defence counsel challenged that there were discrepancies between the photocopy of the Accounts provided by the Police and the original exhibit (i.e. some alternations were found in the original Accounts). Despite being the only one having access to the Accounts, the shop owner denied having any knowledge of the discrepancies in the documents. After the trial, the Count ruled that there was a case to answer and considered that the shop owner’s statement was incredible. Due to the benefit of the doubt, the Court acquitted the Complainant.

The Complainant was dissatisfied with the Complainee's failure to appropriately handle the case exhibit and did not verify the photocopies of the Accounts with the original document upon seizing the exhibit. Therefore, he lodged an "Allegation – Neglect of Duty" to the CAPO.

2.3.2.2 CAPO's investigation

After investigation, CAPO considered that the Complainee failed to verify the exhibit against the photocopies of the Accounts he made earlier; and improperly kept the sealed exhibit in his locked drawer instead of depositing it in the Property Office. Therefore, CAPO classified this allegation as "Substantiated" and suggested a penalty of "Advice without DRF entry".

2.3.2.3 IPCC's observation

Whilst agreeing to CAPO's classification for the allegation, having taken into account the Complainee's long service and experience in the Force, IPCC considered that the penalty of "Advice without DRF entry" was insufficient in addressing the seriousness of the case. After deliberations, CAPO subscribed to IPCC's view and gave the Complainee a "Warning without DRF entry".

2.4 Newsletter Issue 19/2016

2.4.1 Mentally Incapacitated Person

2.4.1.1 Highlights of the case

This case demonstrates the meticulous and holistic approach that the IPCC has taken in examining the available evidence in its totality to assess CAPO's findings. The Complainant (COM), a mentally incapacitated person (MIP), was intercepted on the street and subsequently arrested for "Murder". Police investigation then revealed that COM might have an alibi defense, and that further enquiries would have to be conducted in this regard. Whilst the alibi evidence was being gathered, the Superintendent (SP) in charge of the case decided to hold a stand-up briefing to inform the public of COM's arrest, and eventually charged COM with the offence of "Manslaughter" after COM had been detained for almost 48 hours. Shortly after COM was charged, the SP was informed that COM's alibi was established. COM was eventually released on Police bail a few more hours later.

COM's elder brother later lodged a complaint on COM's behalf with 11 allegations ("Neglect of Duty (NOD)", "Misconduct", "Fabrication of Evidence" and "Unnecessary Use of Authority (UUOA)") against various officers. After investigation, CAPO found that a Sergeant (SGT) had put forward to COM some leading

questions during a cautioned interview. The SP, a Chief Inspector (CIP) and a Station Sergeant (SSGT) had caused undue delay in investigating into COM's alibi. Hence, CAPO classified those allegations as "Substantiated". For the remaining allegations, CAPO classified them as either "No Fault" or "Unsubstantiated". In addition, CAPO registered three counts of "Substantiated Other Than Reported (SOTR)" (NOD) and an "Outwith" matter for some procedural and documentation errors made by different officers. IPCC disagreed with some "No Fault" and "Unsubstantiated" classifications and considered that some actions taken in the criminal investigation were inappropriate. In response to the IPCC's queries, CAPO:

- reclassified an "NOD" allegation about failure to arrange medical care for COM from "Unsubstantiated" to "Substantiated";
- reclassified an "UUOA" allegation about lengthy detention from "Unsubstantiated" to "Substantiated";
- reclassified a "Misconduct" allegation about the inappropriate stand-up briefing from "No Fault" to "Not Fully Substantiated";
- registered an additional "SOTR" count of "UUOA" for the Police's inappropriate decision to charge COM with "Manslaughter";
- registered two more "SOTR" counts of "NOD" and two more counts of "Outwith" matters to address the officers' mistakes in their handling of COM during the criminal investigation;
- escalated the penalties against the officers concerned; and
- informed IPCC that the Police has formed a designated working group to enhance the existing procedures for handling MIP who are suspects of criminal investigations.

2.4.1.2 Case Background

An old man (Victim) died after being assaulted by an unknown male at the basketball court at Mei Tin Road, Shatin. The incident was seen by two witnesses, who reported the incident to the Police. The case was investigated by the CIP under the supervision of the SP.

Based on the description given by the witnesses, the SGT and a Police Constable (PC 1) intercepted COM for enquiry on the street near the crime scene. According to the SGT and PC 1, COM, when questioned on the spot, admitted having pushed the Victim and hence they arrested him for "Murder". Further enquiry at the scene revealed that COM was an inmate of a rehabilitation centre (the Centre) and had some medicines (tranquillizers to help him sleep) on him. PC 1 called the Centre and learnt that COM might be at the Centre at the offence time. COM's elder brother was contacted to go to the police station to accompany COM. After arriving at the police station, PC 1 took a post-recorded cautioned statement from

COM.

On the same night, police officers searched COM's residence. However, one of the officers failed to caution COM before asking him further questions. After the search, the SP and CIP held a stand-up briefing to the press about arresting a male in connection with the case on the ground floor outside the building where COM resided. Later, an Inspector (IP) and the SGT conducted a cautioned video recorded interview (VRI) with COM, who however was unable to give comprehensible answers to questions asked by the IP. The SGT continued to ask COM some leading questions, and invited COM to demonstrate how he had pushed the Victim onto the floor, despite the unclear answers given in the earlier part of the VRI. At night time on the following day, the SSGT found that, according to the records of the Centre, COM was taking medicine at the Centre during the offence time with a staff member of the Centre (the Centre Staff) attending to him. The SSGT then made an appointment with the Centre Staff for statement taking.

Next morning, the CIP reported the above to the SP. In the afternoon, a statement was taken from the Centre Staff. The SP, however, decided to charge COM with "Manslaughter". COM had been detained for almost 48 hours at that time. Shortly after the charge was laid, the SP was informed that COM's alibi was confirmed in the Centre Staff's statement. A few hours later, the SP decided to drop the charges against COM and released COM on police bail after his mother arrived at the police station. COM's elder brother, on behalf of COM, lodged the instant complaint with 11 allegations against various police officers [Allegations 1 to 11], including failure to arrange an appropriate adult to be present at the scene, fabrication of COM's admission, failure to arrange medication and medical treatment, asking leading questions during the VRI, inappropriate stand-up press briefing, inducement for admitting the offence during house search, delay in investigation and lengthy detention of COM.

2.4.1.3 CAPO's Investigation

After investigation, CAPO considered that the crime team had failed to take the earliest opportunity to verify COM's alibi. Hence CAPO classified Allegation 9 (NOD – causing undue delay in the investigation) as "Substantiated". Disciplinary review would be initiated against the CIP and the SSGT whereas a "warning with Divisional Record File (DRF) entry" would be issued to the SP.

Moreover, CAPO classified Allegation 8 (Misconduct – the SGT's asking leading questions in the VRI) as "Substantiated"; and proposed the SGT be "warned without DRF entry".

As to the remaining allegations, CAPO classified them either as "No Fault" or

“Unsubstantiated”.

CAPO also found that (i) the CIP and PC 1 had failed to pass the medicine found on COM to the Duty Officer for safekeeping in accordance with the relevant police guideline; and (ii) PC 1 had made wrong notebook records in relation to the number of items seized during the house search, and failed to properly record his reassurance of COM’s understanding of the ending declaration of the post-recorded cautioned statement. CAPO therefore registered three “SOTR” counts of “NOD” against them [Allegations 12 to 14]. In addition, an officer (PC 3) was found to have made a mistake in his police notebook in relation to the time of serving water on COM at the police station and thus CAPO registered it as an “Outwith” matter.

2.4.1.4 The IPCC’s Observations

Upon examination of the case, the IPCC has the following observations:-

Allegation 1 [NOD] – concerning the failure of the SGT and PC 1 to arrange an appropriate adult to be present at the scene (CAPO’s classification: “No Fault”)

- The IPCC considered that, in the absence of any independent evidence to show COM’s demeanour when he was intercepted on the street, it would be difficult to conclude if the situation should have warranted an arrangement of an appropriate adult’s presence there and then. Therefore, this allegation should be classified as “Unsubstantiated” instead of “No Fault”.

Allegation 2 [NOD] – concerning PC 1’s failure to arrange medication and medical care for COM (CAPO’s classification “Unsubstantiated”)

- COM was an MIP who needed to regularly take the medication found on him. Under such circumstances, the IPCC considers that PC 1 should arrange medication and medical care for COM after his arrest, but he failed to do so. Hence, PC 1 should be found substantiated for this allegation, instead of being separately registered in the “SOTR” count of “NOD” along with the CIP in Allegation 12 for failing to handle the medicine (the CIP remains as the officer concerned under Allegation 12 and would be subject to “Disciplinary Review”).

Allegation 6 [Misconduct] – concerning the holding of a stand-up press briefing prior to a thorough investigation (CAPO’s classification: “No Fault”)

- During police enquiry at the scene, it was revealed that COM might have an alibi defense. Although it was important to timely release the case information and development to the public for a “Murder” case, it would be more appropriate for the police to consider holding a stand-up press briefing after verifying or rebutting the alibi. The IPCC therefore considered that this allegation should be reclassified as “Not Fully Substantiated” instead of “No Fault”.

Allegation 8 [Misconduct] – concerning the SGT’s asking leading questions during VRI (CAPO’s classification: “Substantiated”, action: “warning without DRF entry”)

- Whilst agreeing to the CAPO classification, the IPCC considered that the action of “warning without DRF entry” was insufficient to address the seriousness of the allegation. It should be escalated.

Allegation 10 [UUOA] – concerning the unreasonable detention of COM for more than 48 hours (CAPO’s classification: “Unsubstantiated”)

- The IPCC disagreed with CAPO’s classification on the rationale that the alibi had already been confirmed by the Centre Staff before COM was detained for 48 hours. Therefore COM should be released earlier. Hence, this allegation should be reclassified as “Substantiated”.

Allegation 15 [NOD (SOTR)] – concerning PC 1’s failure to accurately record COM’s response at the scene

- In PC 1’s police notebook, it was recorded that COM admitted the offence in a concise and precise manner. Although there is no independent evidence to ascertain the exact communication between COM and the two arresting officers (including PC 1) on the spot of the arrest, the IPCC considered that, given COM’s inability in answering questions clearly (as shown in the VRI), the conversation between COM and PC 1 at the scene could not be in the manner as described by PC 1 in his notebook. Hence, an “SOTR” count of “NOD” should be registered against PC 1 for his failure to accurately record what COM had said on the street.

Allegation 16 [NOD (SOTR)] – concerning the searching officer (PC 2)’s omission of cautioning COM before asking questions during house search

- The IPCC opined that PC 2 should have cautioned COM before asking him

any questions during the house search, as COM was an arrestee. PC 2, however, asked COM about which outfits he had worn at the offence time without administering caution beforehand. An “SOTR” count of “NOD” should be registered against PC 2.

Allegation 17 [UUOA (SOTR)] – concerning the SP’s charging COM with “Manslaughter”

- CAPO investigation showed that before the time of charging, COM’s alibi had already been established. Hence the SP’s decision of laying charge against COM was inappropriate. An “SOTR” count of “UUOA” should be registered against the SP. “Outwith” matter – concerning the IP’s failure to stop the VRI.
- It is observed in the VRI that COM was unable to give clear answers. Under such circumstances, the IP should have stopped the VRI before the SGT asked further questions. As the IP failed to do so, an “Outwith” matter should be registered in this regard.

“Outwith” matter – concerning omission of arranging an appropriate adult to be present during one of the custodial searches

- Upon knowing that COM was an MIP, all the investigative actions on COM were carried out in the presence of COM’s elder brother, except for one of the custodial searches conducted on COM at the Police station. An “Outwith” matter should be registered against the relevant Duty Officer (DO 2) for this negligence.

Penalty against the SP in connection with Allegations 9, 10 and 17 – concerning the delay in investigation, lengthy detention and inappropriate charging of COM (action: “warning with DRF entry”)

- COMEE 9 was the supervisor of the overall investigation of the “Murder” case and should hold the ultimate responsibility. Hence, the penalty against the SP should be escalated from “Warning with DRF entry” to “Disciplinary Review”. Further Improvements – enhancing existing procedures for handling MIP
- Currently, the laid-down police procedure only requires an appropriate adult to be present when taking a statement from an MIP, irrespective of whether the MIP was a witness or a suspect. There is no specific guideline on the handling of an MIP if he is the subject of criminal investigations. The Police should consider enhancing the guidelines with respect to conducting

criminal investigation on an MIP.

In view of the serious nature of this case and the public interest arising therefrom, this complaint investigation was monitored by the Serious Complaints Committee of the IPCC. After discussions with the IPCC, CAPO subscribed to the IPCC's views. For actions to be taken against the officers, CAPO escalated the penalty against the SGT for asking leading questions in the VRI and his accountability in the investigation from "Warning without DRF entry" to conducting "Disciplinary Review" [Allegation 8]; and the penalty against the SP for the delay in investigation, lengthy detention and inappropriate charging of COM from "Warning with DRF entry" to "Disciplinary Review" [Allegations 9, 10 & 17]. For the allegations which were reclassified as a result of CAPO's subscription of the IPCC's view [Allegations 6, 15 & 16] and the newly registered "Outwith" matters, different penalties, ranging from "Advice without DRF entry" to "Warning without DRF entry", were issued to the officers concerned (For details, please refer to the allegation summary table). In addition to the above, the Police also formed a designated working group to explore enhancement of the existing procedures for handling MIP. IPCC endorsed CAPO's findings in this case.

2.5 Newsletter Issue 9/2013

2.5.1 Fabrication of Evidence

This case illustrates the meticulous evidence-based approach adopted by the IPCC in examining a serious allegation of "Fabrication of Evidence" which was eventually found to be "Substantiated" after IPCC queries. This case also serves as a striking example in demonstrating the difference between the two standards of proof, i.e. "beyond reasonable doubt" (used in criminal proceedings) and "balance of probability" (used in civil proceedings and disciplinary hearings as well as complaint investigations).

The complainant had been arrested for "Theft" in a crematorium by a Senior Police Constable, who took a cautioned statement from him. Subsequently, the complainant made a complaint against the Senior Police Constable, alleging, among other things, that the Senior Police Constable had fabricated the content of the cautioned statement. A CAPO investigation confirmed there had been alterations on the cautioned statement by the Senior Police Constable, but a subsequent forensic examination could not determine whether the alterations had been done after the complainant had signed the cautioned statement. Moreover, after seeking legal advice, the Senior Police Constable was not prosecuted because it was considered that the case could not be proved beyond reasonable doubt. CAPO, therefore, classified the "Fabrication of Evidence" allegation as "Not Fully Substantiated", since it was considered that the available evidence was reliable but insufficient to conclusively prove the allegation. However, it is the IPCC's view that, by apply-

ing the standard of proof of “on the balance of probability”, the available evidence was sufficient and cogent to prove the allegation, which should thus be classified as “Substantiated”. CAPO subscribed to the IPCC’s views and the Senior Police Constable was to be subject to a Disciplinary Review.

2.5.1.1 Case Background

In 2010, a manager of a crematorium found some niches broken and made a report to the Police. After investigation, it was found that something inside one of the niches was missing. The case was then classified as “Theft”. In addition, CCTV footage of the subject crematorium had captured a male who resembled the complainant entering the crematorium at the time of the offence. Later, a Senior Police Constable arrested the complainant for “Theft” and took a cautioned statement from him. The case was then referred to the district investigation team for follow-up and the complainant was released on police bail that same day. Eventually, the complainant was released unconditionally after the Police sought legal advice. The complainant had lodged the instant complaint with CAPO, alleging among other things that the Senior Police Constable had fabricated the content of his cautioned statement by adding the words 「偷」 (to steal) to the statement (which had changed his denial of guilt 「我無嘢講，我淨係去過火葬場睹」 (I have nothing to say, I only went to the crematorium) to an admission 「我無嘢講，我淨係去過火葬場偷嘢」 (I have nothing to say, I only went to the crematorium to steal) without his knowledge and consent. [Allegation 1: Fabrication of Evidence]

2.5.1.2 CAPO’s Investigation

CAPO’s investigation revealed that both the complainant and the Senior Police Constable had signed on the cautioned statement to confirm its content. However, the Chinese characters 「偷嘢」 had been overwritten on the Chinese character 「睹」, and this alteration was not counter-signed by the complainant. When questioned by CAPO, the Senior Police Constable insisted that the alteration was made in the presence of the complainant, and that he had simply forgotten to ask the complainant to counter-sign.

CAPO then requested the Government Chemist to conduct a forensic examination on the cautioned statement. After examination, the Government Chemist could not determine whether the Chinese characters 「偷嘢」 had been written after the complainant had appended his signature to the cautioned statement. CAPO also sought legal advice regarding the weight of evidence for a criminal prosecution against the Senior Police Constable for his act of altering the statement. Subsequently, no charge was laid against the Senior Police Constable as it was considered that the prosecution might not be able to prove the case beyond reasonable doubt in court. In light of the forensic report and the legal advice, CAPO con-

sidered that there was some, but not sufficient, evidence to prove that the Senior Police Constable had fabricated the content of the cautioned statement. CAPO thus proposed classifying Allegation 1 as “Not Fully Substantiated”.

Regarding the act of overwriting as well as the omission to secure the complainant’s counter-signature for the alteration, CAPO considered that the Senior Police Constable had contravened the relevant provisions in the Police Manual and thus registered a separate count of “Substantiated Other Than Report” allegation of “Neglect of Duty” against him. [Allegation 2: Neglect of Duty]

2.5.1.3 IPCC’s Observation

Upon examining the case documentation, the IPCC was of the view that, notwithstanding that (a) the Government Chemist’s report was inconclusive as to when the alteration was made; and (b) the Department of Justice decided not to lay criminal charges against the Senior Police Constable because the case could not be proven “beyond reasonable doubt”, there remained sufficient evidence to prove the allegation in the context of a complaint investigation as the correct standard of proof to be adopted should be “on the balance of probability”. Applying the civil standard, the IPCC considered that the available evidence revealed from CAPO’s investigation, i.e. (i) the material wording in the Senior Police Constable’s notebook, was clearly overwritten without countersigning by the complainant who had after all signed the relevant notebook entry; (ii) the fact that the alteration had clearly changed the meaning of the whole sentence from one of denial to one of admission; (iii) that the Senior Police Constable, as an experienced police officer, had only obtained the suspect’s signature at the end of the notebook entry but not the alteration which was so materially significant as far as criminal liability was concerned; and (iv) the sentence was awkward after the alteration as the first half of it 「我無嘢講」 (I have nothing to say) was obviously inconsistent with the second half 「我淨係去過火葬場偷嘢」 (I only went to the crematorium to steal) — was more than sufficient to prove, on a preponderance of probability, that the Senior Police Constable had improperly altered the complainant’s cautioned statement from a denial to an admission. Hence, Allegation 1 should be re-classified as “Substantiated”.

CAPO eventually agreed with the IPCC’s view and re-classified Allegation 1 from “Not Fully Substantiated” to “Substantiated”. Since the registration of Allegation 2 would be contradictory to the rationale of the substantiation of Allegation 1, CAPO therefore deleted Allegation 2. CAPO also recommended initiating a Disciplinary Review against the Senior Police Constable. The IPCC endorsed CAPO’s findings in this case.

3 Epilogue

3.1 Recap

- Failure to investigate properly (failure to exhaust lines of enquiry)
- Conducting house search without search warrant
- Failure to properly store exhibits
- Photocopies of documentary exhibits differed with original
- Improperly altered the cautioned statement
- Asking leading questions during interview
- Unreasonable detention more than 48 hours
- Failure to accurately record what suspect had said on the street
- Failure to caution before asking questions
- Failure to arrange medical care
- Inappropriate stand-up briefing
- Inappropriate decision to charge a suspect
- Alteration not countersigned by suspect
- Improper interrogation before interview under caution
- Camouflaging the period of improper interrogation for taking fingerprints
- Threatening and inducing suspect
 - threatened to arrest parents
 - told suspect to admit the offence and would be sentenced to a fine