

In *DPP v Hawkins* (1988) 88 Cr App R 166, [1988] Crim LR 741 it was held that when a police officer makes an arrest which he is lawfully entitled to do so if it was impractical to state the ground of arrest, it is the officer's duty to maintain the arrest until it is practicable to inform the arrested person of that ground. The resistance of the offender is an example of such situations. In *The Queen v Ku Kat-sui* [1989] 2 HKC 526, it was held that the police officers were justified for delaying to tell the defendant, who was illegal immigrant from China and was unable to understand Cantonese, the reason for his arrest until he had been secured against flight. See also *HKSAR v Tam Chun-yin and Others* [2001] HKCU 158 (unreported, HCMA 548/1998, 28 February 2001). If the arrested person already knew the reasons for his arrest before he was arrested, or if he himself created a situation which made it practically impossible to inform him of the reasons for his arrest, then even if the police officer at the time of arrest did not tell him why he was being arrested, the arrest was still lawful: *HKSAR v Ip Kenneth* [2006] 2 HKLRD 433, [2006] HKCU 636.

In *Chiu Luen Public Light Bus Co Ltd v Persons Unlawfully Occupying or Remaining on the Public Highway and others* [2014] 6 HKC 298, Au J stated at paras 125–127 that a police officer is empowered in law to arrest any person who he reasonably believes or suspects of being guilty of criminal contempt.

#### [50.04] Detention

According to *Oxford Dictionary of Law* (5th Ed, Oxford University Press, 2002) p 147, the term is defined as 'depriving a person of his liberty against his will following arrest'.

#### [50.05] Apprehend

See [10.07] of the *Annotated Ordinances of Hong Kong: Police Force Ordinance (Cap 232)* (LexisNexis, 2018 Reissue).

#### [50.06] Reasonably suspects

An essential factor in deciding if the arrest, apprehension and seizure of properties are lawful pursuant to this section is whether there is a reasonable ground for suspicion.

In *Yeung May Wan & Ors* [2005] 2 HKLRD 212, [2005] HKCU 551, the Court of Final Appeal said that a police officer may exercise his power of arrest where he reasonably believes that the arrested person would be charged with a relevant offence; and where he reasonably suspected that person of being guilty of a relevant offence. The standard set by s 50 required the officer who effectuated the arrest, 'to have formed, at the time of arrest, a genuine suspicion that the offence in question had been committed, having in mind the material elements of that offence, and there must be objectively reasonable grounds for that suspicion...his reasonable suspicion might properly be based upon hearsay sources...'.<sup>②</sup>

Bingham LJ in *Chapman v DPP* (1989) 89 Cr App R 190 stated 'Reasonable suspicion was the source from which all a police constable's powers of summary arrest flow.' In *O'Hara v Chief Constable* [1997] AC 286 the test was described

as simple but practical: ‘In part it is a subjective test. Because he [police officer] must have formed a genuine suspicion in his own mind...In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he formed....The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer.’

Lord Devlin in *Hussien v Chong Fook Kam and Another* [1970] AC 942 said ‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking...It means that there is an executive discretion.’

A reasonable suspicion means a reasonably informed suspicion, must exist at the time of arrest, and it cannot be legitimate to make an arrest in the hope that a reasonable suspicion may be formed subsequently (see *Pang Yiu Hung Robert v Commissioner of Police and Ngai Shui Kei* [2002] 4 HKC 579, [2003] 2 HKLRD 125).

Further, a reasonable suspicion is not the same as showing a prima facie case. Suspicion itself will not justify an arrest. There must be a factual basis for it for a kind which a court would adjudicate to be reasonable: *Hussien v Chong Fook Kam* [1970] AC 942 at 949. There must be objective evidence to support such a belief or suspicion: *HKSAR v Li Tai Kam & Others* [2010] HKCU 293 (unreported, CACC 373/2008, 3 February 2010). See *Halsbury’s Laws of Hong Kong* (2nd Edn) Vol 42 on Police and Emergency Services [300.080].

#### **[50.07] Without any warrant**

The power to arrest without warrant is a common law power vested in a police officer and a private citizen where a breach of peace has occurred; where there was a threat of a breach of the peace was being renewed, or where the person making the arrest reasonably and honestly believes that such a breach will be committed in the immediate future. (See *R v Howell* [1982] QB 416).

In *Sham Wing Kan v Commissioner of Police* [2017] 6 HKC 265, [2017] 5 HKLRD 589 at para 47, a case where it concerned whether it was constitutional for a police officer to search without warrant the digital content of a mobile phone, Au J sitting in the Court of First Instance stated that on a proper construction, s 50(6) only empowers the police officer to search without warrant the digital content of mobile phone in exigent circumstances, and that is constitutional.

However, on appeal, in *Sham Wing Kan v Commissioner of Police* [2020] HKCU 655, [2020] HKCA 186 (CA), the Court of Appeal set aside the declaration granted by Au J (as he then was), and held that the power to conduct search for a mobile phone upon arrest can be exercised if:

- (1) a warrant is obtained under s 50(7);
- (2) when it is not reasonably practicable to obtain such warrant before a search is conducted, the police officer must also have a reasonable basis for having to conduct the search immediately as being necessary:

- (a) for the investigation of the offence(s) for which the person was suspected to be involved, including the procurement and preservation of information or evidence connected with such offences; or
  - (b) for the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the police officers at the scene);
- (3) for a warrantless search conducted under (b) above, other than a cursory examination for filtering purpose, the scope of the detail examination of the digital contents of a phone should be limited to items relevant to objectives set out in sub-paragraph (b);
- (4) in addition, a police officer should make an adequate written record of the purpose and scope of the warrantless search as soon as reasonably practicable after the performance of the search and a copy of the written record should be supplied forthwith to the arrested person unless doing so would jeopardise the ongoing process of criminal investigation.

The Court of Appeal noted that given the privacy interest engaged in the search of a mobile phone, it is relevant to bear in mind the following preconditions:

- (1) the police must have a reasonable suspicion that the person arrested has committed an offence;
- (2) the scope and purpose of the search must be truly incidental to the arrest in question; and
- (3) the police officer should limit the scope of the detail examination of its digital contents to relevant items (paras 186–188).

### [50.08] Warrant

See [10.26].

In *Chan Kam Ching John Barry v Commissioner of Police* [2014] 4 HKLRD 263, [2014] HKCU 1538, Li J sitting in Court of First Instance opined that s 50(6) does not require consent from the arrested person before a search. Li J further stated that there is no unfairness for the police to use different kinds of power under different sections of the Police Force Ordinance (Cap 232) in conjunction with other ordinances during an operation.

In *Sham Wing Kan v Commissioner of Police* [2020] HKCU 655, [2020] HKCA 186 (CA), the Court of Appeal held, at paras 163–166, that a magistrate can issue a warrant under s 50(7) to authorise a search of the digital contents of a mobile phone, and the electronic data or files contained in it can be regarded as ‘documents’.

In *K v Commissioner of Police* [2020] 1 HKLRD 606, [2019] HKCU 4728, [2019] HKCFI 3048, where the police obtained the applicant’s medical records under a search warrant issued by a magistrate, and the applicant contended that the Commissioner of Police’s failure to produce the said warrant had obstructed her constitutional right of access to the courts, Lam J sitting in Court of First Instance held that the applicant does not have a free-standing right to the production

of the warrant on demand. The fact that the respondent has not produced the warrant to the applicant does not mean her right of access to the courts has been infringed.

#### **[50.09] Deportation**

Section 20 of the Immigration Ordinance (Cap 115), provides circumstances under which an immigrant may be served with a deportation order.

#### **[50.10] ... May use all means necessary to effect the arrest**

It includes the use of reasonable force in the apprehension of the offender. In *The Queen v Ku Kat-sui* (above), it was stated that the use of handcuffs in subduing an offender who started to run away when being asked for production of his identity card did not represent excessive force.

Section 101A of the Criminal Procedure Ordinance (Cap 221), provides that a person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

#### **[50.11] ... Has reason to believe that any person to be arrested has entered into or is in any place the person residing ... on demand of that police officer allow him free ingress thereto ...**

In *The Queen v Chan Oi-lin* (unreported, HCMA 107/1984, 13 April 1984), it was stated that s 50(3) has no application to the situation where police officers simply intend to enter into private premises to make investigations.

#### **[50.12] If ingress to such place cannot be obtained...it shall be lawful in any case for a person acting under a warrant...to enter such place and search...**

In *So Tsun Fung v Commissioner of Police* [2019] HKCU 4268, [2019] HKCFI 2799, Chan J sitting in Court of First Instance noted that in the context of seeking an injunction restraining the police from (inter alia) entering into precincts of a university without first obtaining a search warrant, it is contrary to common sense to require the police to identify the specific person to be arrested before entry, in the situation where the police actually witnessed the commission of the crime in question and immediately took steps to apprehend the person who he reasonably suspects of being guilty of the offence.

#### **[50.13] Reasonable cause to suspect**

See [50.06].