

Correctional Services Department failed to use video-recording equipment to collect evidence when an inmate was suspected of violating discipline

Investigation Report

On 13 February 2019, we received a complaint from an inmate against a penal institution (“the Institution”) under the Correctional Services Department (“CSD”).

The Complaint

2. Allegedly in early February 2019, the complainant had some “verbal misunderstanding” with an officer of the Institution (“Officer A”). Subsequently, Officer A coerced him into admitting that two pieces of paper containing horse racing information and racing odds (“the Paper”) were held by him, but the complainant refused. He was then taken to the office of the Day Orderly Officer (“DOO”), where Officer A threatened him to admit that the Paper was his. The complainant then complained to the DOO, yet Officer A still insisted on bringing a disciplinary charge against him. The complainant considered Officer A to have picked on him because of their prior “verbal misunderstanding”.

The Investigation

3. We started by conducting an inquiry against CSD. Upon receipt of its reply in May 2019, we decided to launch a full investigation pursuant to The Ombudsman Ordinance.

4. On his allegation that Officer A accused him of possessing articles without authorisation, the complainant, at our request, told us in detail what had happened over the telephone in June 2019. He asserted that on the day the incident took place (the “incident day”), he was doodling on his “letter pad” before Officer A approached him. There were several pieces of paper elsewhere on the same table. They were not covered by his “letter pad”. Officer A got near him and asked him to stand up, then searched him but found nothing on him. Afterwards, Officer A picked up and checked the “letter pad” that belonged to him, then put it down and picked up those pieces of paper on the table that did not belong to him (i.e. the Paper), and said that they were his. He denied at once (he said he had no idea what was on the Paper at that moment). Nevertheless, Officer A still took him to the office of the DOO. It was only when they

were on the way to the office that Officer A told him about the Paper containing horse racing information. He denied again that the Paper belonged to him, but Officer A told him that “he makes trouble for him intentionally”.

5. Subsequently, we invited the complainant to come to our office to watch the CCTV footage provided by CSD, which recorded the incident. However, the complainant said he had already watched them during the disciplinary hearing. Besides, the footage was blurry. He needed not watch them again.

6. In July 2019, we informed CSD and the complainant of our decision to launch a full investigation. In August, we received CSD’s reply. In September, we issued our preliminary investigation result to CSD for comments. Having considered its views, we completed this investigation report in November 2019.

Our Findings

CSD’s Reply

The incident in early February

7. According to records, the complainant started serving his sentence in the Institution in October 2018. Upon completion of the induction course, he was arranged to work in a workshop of a garment factory (“the Workshop”).

8. On the afternoon of the incident day, the officer-in-charge at the Workshop was an Assistant Officer I (“Asst Officer B”). Officer A was responsible for patrolling different locations, including the Workshop.

9. According to records, Officer A had thrice patrolled the Workshop that day but had not talked to anyone during the first two patrols. He patrolled the third time upon notification by the Control Room that there was a row among three inmates (the complainant was not one of them) at the Workshop. Officer A went over with two Assistant Officers II to provide support.

10. When Officer A arrived at the Workshop, Asst Officer B reported to him how the row broke out. Officer A then asked two instructors and several other inmates in the Workshop (including the complainant) about the course of the incident. In the process, the complainant indicated to Officer A that the management of the Institution

should not institute disciplinary charges against two of the inmates involved. Officer A explained to him that the management must maintain discipline and order in penal institutions. If inmates are suspected of violating discipline and order of the Institution, the management would handle their cases in accordance with established procedures. Officer A said that the complainant indicated that he understood and did not make any other requests or complaints.

11. According to Officer A's statement, there was no "verbal misunderstanding" during his conversation with the complainant as alleged by the complainant.

12. CSD had enquired of the staff members and inmates present at the scene. All staff members and those inmates willing to assist in the investigation said that they did not hear any "verbal misunderstanding" between Officer A and the complainant.

Suspected violation of discipline by the complainant

13. On the afternoon of the incident day, the officer-in-charge at the Workshop was an Assistant Officer I ("Asst Officer C"), who together with an Assistant Officer II ("Asst Officer D") were responsible for supervising the activities of the inmates (including the complainant) of the Workshop on Meeting Ground A. Officer A was responsible for patrolling different locations, including Meeting Ground A.

14. According to the statements of Asst Officer C and Asst Officer D, Officer A arrived at Meeting Ground A soon after 1 pm on the incident day. He started to patrol the area after signing the record at the staff desk, while Asst Officer C and Asst Officer D stayed at the desk to handle their duties. Therefore, neither of them had witnessed how Officer A discovered the complainant's suspected violation of discipline. They did not hear or witness Officer A threatening the complainant, either.

15. In his statement, Officer A said that he saw the complainant acting suspiciously when he patrolled Meeting Ground A on the incident day. The complainant was using a blue notepad in his hands (*viz.* the "letter pad" mentioned in para. 4) to cover some pieces of paper on the table. So, he went over to check. When he reached where the complainant was, he picked up the blue notepad on the table and the three pieces of paper underneath, and found on one piece some writings suspected to be horse racing information and racing odds. He then asked the complainant if the pieces of paper belonged to him. The complainant admitted to possessing them. Officer A then

instructed the complainant to follow him to the office of the DOO for further investigation.

16. On arriving at the office of the DOO, Officer A immediately checked the horse racing information and racing odds that day, and found that they matched those written on the Paper. As the Paper was an article possessed by the complainant without authorisation, the complainant was suspected of having breached prison discipline. Officer A, therefore, reported the complainant's misdeed to the DOO, a Principal Officer ("Officer E").

17. Officer E examined the Paper and confirmed that there was information about horse racing and racing odds that day. He considered there to be *prima facie* evidence of the complainant having violated discipline. Officer E then inquired of the complainant, but the latter did not answer his questions. Officer E indicated to the complainant that a disciplinary charge would be brought against him for possession of unauthorised articles. The complainant indicated understanding. Officer E then arranged for his movement to the special unit for separate confinement, pending adjudication.

18. Afterwards, Officer E reported to the acting Chief Officer on duty, ("Chief Officer F") about the complainant's violation of discipline. Upon scrutiny of all relevant documents, Chief Officer F considered there to be *prima facie* evidence and agreed to bringing a disciplinary charge against the complainant.

19. Chief Officer F stated that in the process of handling the matter, he did not see or hear Officer A threatening the complainant, and the complainant did not lodge any complaints with him about the disciplinary charge to be taken against him.

20. Officer A denied all of the complainant's allegations that he had searched the complainant at the scene of the incident, threatened the complainant and asked him to admit that the Paper was held by him, told the complainant that "he makes trouble for him intentionally", and picked on the complainant by reporting against him to the management (see para. 4).

21. CSD had questioned the inmates at the scene, and could not find from the statements of those who were willing to testify that there had been anything extraordinary on Meeting Ground A on the day when the incident happened.

22. The events relevant to this complaint in the course of the disciplinary hearing on the complainant's alleged violation of discipline are listed below.

- (1) After the complainant had pleaded not guilty, Officer A was twice summoned to testify and to be cross-examined by the complainant. The key points of the cross-examination included: the details of how Officer A discovered on Meeting Ground A that the complainant possessed the Paper; why Officer A did not switch on his Video Speaker Microphone ("VSM") on the incident day; and given that inmates were normally not allowed to possess green pens and the words on the Paper were written with a green pen, why Officer A still thought that the Paper belonged to the complainant.
- (2) An inmate who might have helped the Adjudicating Officer understand what had happened that day was summoned to testify. He attended the hearing but was unwilling to give evidence.
- (3) At the request of the complainant, the Adjudicating Officer allowed four clips of video footage to be played. The footage was captured on the incident day by the CCTV cameras installed on Meeting Ground A. Afterwards, the Adjudicating Officer pointed out to the complainant that two clips of the footage had failed to capture Officer A, the complainant and the course of the incident; another captured the moment Officer A entered Meeting Ground A till his departure with the complainant. Nevertheless, the CCTV camera concerned was installed at a location far from the scene of the incident, so the images of Officer A and the complainant were blurry and their gestures indistinct in general. The remaining footage also showed how Officer A entered Meeting Ground A, then left with the complainant. However, that CCTV camera did not cover the scene of the incident, i.e. the location where the complainant was sitting. The complainant indicated that he understood and agreed to the above observations and comments of the Adjudicating Officer.
- (4) The Adjudicating Officer asked the complainant to give a submission regarding the charge. The complainant said he needed time to think about what to say. The Adjudicating Officer agreed to adjourn the case.

- (5) One day, the complainant was summoned to the Court of Appeal. He won the appeal and was acquitted at once. The Adjudicating Officer, therefore, announced that the hearing would be adjourned *sine die*.

Officer A failed to switch on his VSM

23. CSD's guidelines stipulate that its staff can use the video function of a VSM for collecting and obtaining evidence of incidents that occur inside or outside correctional facilities to facilitate the investigation into and prosecutions against violation of discipline or criminal offences, as well as complaints against CSD. Before switching on a VSM, the officer concerned should consider the nature of the incident, the environment and the dignity of the person(s) to be recorded, and the purpose of using it must be to collect and obtain evidence about incidents that would threaten the security of correctional facilities or maintenance of custodial discipline. For instance, they can record incidents that involve bodily violence or confrontations, or those that threaten the security of correctional facilities, or confrontational scenes outside penal institutions, incidents relating to the detection of contraband items, or any other incidents that may lead to disciplinary or legal actions against inmates.

24. While the guidelines specify that VSMs can be used in incidents that may lead to disciplinary actions against inmates, CSD does not require that its staff must use their VSMs in such incidents or that the management of penal institutions must obtain the footage captured by VSMs as evidence before disciplinary charges can be brought against inmates who have breached discipline. VSM footage can be presented as exhibit in a disciplinary hearing, but is not indispensable.

25. In response to our investigation into the case, Officer A provided a written statement, in which he indicated that he found the complainant acting suspiciously that day (i.e. he at once used the blue notepad in his hand to cover some pieces of paper on the table), so he approached him to find out what was happening. As the whole incident just happened suddenly, Officer A considered that he had to act quickly to prevent a breach of prison order and discipline. So, he did not switch on his VSM immediately. When the complainant admitted that the Paper was held by him (see para. 15), he at once instructed the complainant to follow him to the office of the DOO for further investigation. Officer A added that at that moment, he just suspected that the information on the Paper was horse racing information and racing odds, so he did not switch on his VSM.

26. CSD asserted that the management of the Institution did not act on intelligence that day. Officer A just happened to discover the complainant's suspected violation of discipline while conducting patrols. It was reasonable of him not to have switched on his VSM.

Inmates cannot possess green pens

27. The complainant claimed that the words on the Paper were written in green and Officer A did not find any green pens on him during the body search that day. Besides, inmates are normally not allowed to possess green pens. So, it was unreasonable of Officer A to claim that the Paper belonged to him.

28. CSD explained that although inmates are normally allowed to possess blue pens, they can apply to the penal institution for possessing a green pen on a need basis (e.g. to facilitate learning). The management will consider approval based on the merits of individual cases.

29. CSD further elaborated that if an inmate had been authorised to possess a pen other than a blue one, they can take those non-blue pens with them upon transfer to another institution.

30. In addition, among the articles that CSD staff can bring into an institution are pens/ball pens with a plastic shaft. There is no restriction on the ink colour.

31. According to records, the complainant had never applied for permission to possess a green pen during incarceration in the Institution. In the year before the incident, the Institution had not received any applications from inmates for permission to possess a green pen. Nevertheless, CSD considered that its staff or inmates transferred to the Institution might have brought a pen other than a blue one into the Institution, so it could not rule out the possibility that an inmate might have found a green pen dropped unknowingly by a staff member or another inmate. Furthermore, the suspected breach of discipline committed by the complainant was unauthorised possession of the paper. CSD considered that whether the complainant possessed a green pen or whether the words on the paper were written by him was not crucial to his breach of discipline. Also, it was not impossible for the complainant to possess a green pen without authorisation (see paras. 29 - 31). The Institution, therefore, had *prima facie* evidence to bring a disciplinary charge against the complainant.

Our Comments

32. The complainant alleged that this complaint stemmed from his prior “verbal misunderstanding” with Officer A. Officer A claimed in his statement that he did talk with the complainant on the incident day (see para. 10), but denied that there had been any “verbal misunderstanding” during their dialogue. In the absence of independent corroborative evidence, this Office could not ascertain what had actually happened that day, and therefore, could not make any comments. Yet, we consider that whether there had been “verbal misunderstanding” has no direct bearing on the crux of this case, i.e., whether in this case of suspected violation of discipline by the complainant, Officer A had threatened and picked on the complainant, and even brought a disciplinary charge against him improperly.

33. We have scrutinised carefully the two clips of footage (no sound was recorded), mentioned in paragraph 22 (3), which captured both Officer A and the complainant at the time when the incident took place, and found that the images matched the descriptions in the paragraph. Broadly speaking, the images did not capture or could not show clearly the demeanour of the complainant, what he had placed on the table, and what Officer A had done when he reached the location of the complainant. In other words, the footage could not help us ascertain what had actually happened, or judge whether Officer A had behaved improperly as alleged.

34. Regarding the words written in green on the Paper and the fact that the complainant had not been authorised to possess a green pen, we agreed that these might help with the complainant’s claim that the Paper did not belong to him. Yet, we agreed with CSD that they were not critical to this case. Whether anyone had written on the Paper and whether the paper was in the complainant’s possession at the time when the incident happened had no direct relationship. Besides, neither Officer A’s nor the complainant’s account of the incident could lead us to accept either side of the story. In this light, The Ombudsman could not reach a conclusion on the complainant’s complaint against Officer A.

Other Observations and CSD’s Response

35. The complainant complained against Officer A for threatening and picking on him, and bringing a disciplinary charge against him improperly. It is often hard for us to find out the truth for such one-on-one accusations when the complainees deny and there is no independent corroborative evidence (e.g. independent third-party testimony

or clear audio-visual recording). In this case, CSD had installed CCTV cameras at the scene of the incident and one of which in particular should have been able to capture clearly the people there. It was unfortunate that due to its narrow coverage, it had failed to record the area where the table and chair, at which the complainant was sitting, were placed.

36. CSD claimed that it was reasonable (see para. 26) that Officer A had not videotaped the course of the incident that day (see para. 25). This Office could not agree to this claim. According to CSD's guidelines, "the purpose of using a VSM must be to collect and obtain evidence about incidents that would threaten the security of correctional facilities or maintenance of custodial discipline." Incidents that can be recorded on video, as laid down in the guidelines, include "any other incidents that may lead to disciplinary or legal actions against inmates". We consider the complainant's suspected violation of discipline a matter subject to disciplinary action, and was, therefore, obviously an incident that could be videotaped. Although Officer A explained that he did not switch on his VSM because the incident happened suddenly, we could not see from the CCTV footage any urgent circumstances that had inhibited Officer A from turning on his VSM.

37. In light of the observations elaborated in the above two paragraphs, this Office had, in the course of investigation, recommended that CSD: (1) adjust and widen the coverage of the CCTV system in the Institution; and (2) remind staff that they must use their video recording equipment when taking actions that may lead to disciplinary actions or legal sanctions against inmates for the purpose of collecting evidence, unless the circumstances do not allow them to do so.

38. On the second recommendation, CSD responded that it had already formulated guidelines on using the video-recording function of VSM (see para. 23). The current practice has proved to be effective and there is no need to require staff to switch on their VSM whenever they take actions that may lead to disciplinary or legal actions against inmates for collecting evidence. It further pointed out that this recommendation was not feasible for the following reasons:

- (1) The battery of the VSM currently provided to CSD staff can only support continuous video-recording of about 1 hour and 20 minutes. And a VSM only has a 32 GB memory, which can only store about 7.5 hours of footage. In other words, the current configuration of the VSM does not allow protracted video-recording.

- (2) The current guidelines stipulate that before using their VSMs to record videos, CSD staff should verbally declare to those at the scene as far as practicable. Experience showed that while conducting searches on inmates, CSD staff would often find articles suspected to be in their possession without authorisation, a violation of discipline that should be reported to the management. If verbal declarations are to be made to inmates every time before conducting a search, much longer time would be needed for the search. This would impact significantly on the daily operation of penal institutions.
- (3) Not every staff member on duty in penal institutions is equipped with a VSM. If only those officers equipped with a VSM can be deployed to conduct searches against inmates, it would have significant implications for the operation and manpower deployment of penal institutions.
- (4) In sudden incidents (such as inmates attacking other people), if staff are required to record the incident for the purpose of collecting evidence, it would violate the principle of saving lives first, and the staff may simply fail to stop the attack in time because they are too busy recording videos. The incident may escalate and result in more injuries.
- (5) To comply with the Personal Data (Privacy) Ordinance regarding the security of information, penal institutions would have to arrange extra manpower to handle the video footage captured by VSMs, thereby increasing their administrative burden.
- (6) VSMs can record close-up images. If staff are required to record all incidents of violation of discipline (such as attacks or fights), then the painful experience of victims, the course of rescue, and even other inmates or members of the public at the scene (such as those in the visiting room) may be captured at short distance. However, they may not wish to be videotaped.
- (7) Penal institutions conduct strip searches on inmates from time to time to ascertain if they possess unauthorised articles. The search may include their rectums, nostrils, ears, other external body cavities or other concealed body parts. If CSD staff have to record by video the body

parts of inmates in order to collect evidence, it may infringe on the privacy of the inmates concerned.

- (8) Penal institutions have to search the cells of inmates periodically, and inmates must show all articles in their possession to the staff for them to ascertain whether there are unauthorised articles. If video recording is required in the process, the content of the protected information under the legal professional privilege held by inmates may be captured at short distance, thus giving rise to legal issues.
- (9) If staff are required to use their VSMs to record any actions they take that may lead to disciplinary actions or legal sanctions against inmates, the institution management would collect a huge amount of footage containing the personal images of inmates or other members of the public. Besides, such footage may also capture the security facilities of the institution concerned. Since inmates or other members of the public have a right to inspect the footage that contains their images, penal institutions would have to put in considerable resource to review and consolidate the footage (such as removing third-party information) when handling requests to inspect such information. This would translate into extra administrative burden for penal institutions.

Our Final Comments and Recommendations

39. On this case, we have to stress that Officer A had been equipped with a VSM on the incident day. As seen in the footage mentioned in paragraph 22 (3), the situation did not call for instant action to save lives (see para. 38 (4)). Neither was there an attack, a fight nor a course of rescue that might involve the recording of close-up images of the painful experience of the persons concerned (see para. 38 (6)). In this light, we did not agree to CSD's viewpoint that it was reasonable of Officer A not to take a video record of the incident (see para. 36).

40. As for the justifications for CSD's objection (see para. 38 (1) – (9)) to our initial recommendation in paragraph 37, we consider them in the main justifications for video recording being infeasible or unadvisable under certain circumstances, and elaborations on the huge administrative burden resulting from the wider use of video recording. For the former (i.e. video recording being infeasible or unadvisable), we consider that it did not contradict our initial recommendation, because we agree that video recording may

be dispensed with when circumstances do not allow. For the latter (i.e. administrative burden brought about by the wider use of video recording), while we appreciate CSD's concern, we have to point out the provision under the CSD's current guidelines that "any action that may lead to disciplinary or legal actions against inmates" can be recorded by video. Under this provision, the CSD officer involved in this case could record the incident by video, but he did not. If he had done so, the video footage he captured could have been useful evidence in the subsequent controversy over disciplinary charges. This indicated that the current guidelines had given CSD staff too much discretion in deciding whether to take video records. We reckon that CSD should formulate clearer guidelines so that its staff could know better under what circumstances they should use their VSMS to take video records.

41. Having examined CSD's response, we recommend that CSD:

- (1) examine the feasibility of adjusting and widening the coverage of the CCTV system in penal institutions to prevent as far as possible any part of the inmates' usual place of activities being left out of its coverage;
- (2) review and revise the current guidelines as appropriate so that its staff could know better under what circumstances video recording should be made, and their video-recording equipment could be better utilised. This can also enhance its staff's ability to collect evidence when they take actions that may lead to disciplinary or legal actions against inmates.

42. This Office would follow up with CSD on the above recommendations until they are fully implemented.

Office of The Ombudsman
November 2019