



NUS

National University
of Singapore

FACULTY OF LAW

PART A BAR COURSE 2011

EVIDENCE LAW

READING LISTS & NOTES

Scope and Teaching of the Course

This course focuses on Singapore evidence law. We will concentrate on the relevant Singapore statutory provisions and cases. Materials drawn from other jurisdictions may also be referred to.

Selected Bibliography of Singapore Texts and Reference Works on the Law of Evidence

The most up-to-date textbook is:

- Jeffrey D Pinsler, *Evidence and the Litigation Process* (LexisNexis, 2010, 3rd ed)

The student edition is available at the NUS co-op bookstore at the Bukit Timah campus.

Other texts and reference works include:

- Chin Tet Yung, *Evidence*. (Butterworths, 1988)
- *Halsbury's Laws of Singapore* (volume 10: Law of Evidence). (Butterworths, 2006 reissue).
- *Butterworths' Annotated Statutes of Singapore* (Evidence Act: volume 5) (1997).
- Certain aspects of the law of criminal evidence (eg, admissibility of statements of accused persons) are also dealt with in the Criminal Procedure Code, on which see Tan Yock Lin, *Criminal Procedure*, 2 volumes (Butterworths, 2006, looseleaf edn, updated to 2005)
- Of historical interest: James Fitzjames Stephen, *Introduction to the Indian Evidence Act* (Calcutta : Thacker, Spink & Co., 1872). Stephen drafted the Indian Evidence Act on which the Singapore Evidence Act was based. Indian reference works on evidence law include: *Sarkar's Law of Evidence* (Nagpur : Wadhwa and Co, 16th edn, 2007) and *Ratanlal & Dhirajlal's The Law of Evidence* (Nagpur, India : Wadhwa and Co., 22nd edn, 2006).

Statutes

The main statute for this course is the Evidence Act, Cap 97 (1997 rev ed). We will also look at selected provisions of the Criminal Procedure Code 2010. These statutes are available online from 'lawnet' and also at <http://statutes.agc.gov.sg/>.

Examination

The examination will be an open-book examination. The duration of the examination is two hours. For this year, the paper will consist of two compulsory hypothetical questions.

Reading Lists etc

After this page, you will find the reading lists or notes for the topics; they arranged in the order in which they will be taught. The Examination Papers for the last two years are also included in this bundle (please note that the examination format for this year is different from those of previous years).

READING LISTS & NOTES

LECTURE 1: INTRODUCTION

LECTURER: CHIN TET YUNG

Preliminary Reading:

Jeffrey Pinsler, *Evidence and the Litigation Process, Appendix* (2010, 3 ed. Pp 921-939)

Recommended text:

Jeffrey Pinsler, *Evidence and the Litigation Process* (2010, 3 ed) (hereinafter Pinsler)

English text: Ian Dennis, *The Law of Evidence*, 4th ed 2010 (hereinafter Dennis)

1. Law of Evidence in Context

- a. Nature of the law of evidence: part of procedural (adjectival) law dealing with proof of facts in judicial proceedings
- b. Aims of the Law of Evidence and Trial Process:
Dennis, Ch 2;
- c. Forms of evidence: testimony (oral evidence), documents, 'real evidence':
Pinsler Ch 11; Dennis, Ch 12;
Statutory definition: s 3
"evidence" includes —
(a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;
(b) all documents produced for the inspection of the court: such documents are called documentary evidence;
(Note: 'Evidence' that need not be 'proved': formal admissions (s 60 EA), judicial notice (s 58-9 EA); 'evidence' that cannot be 'proved': estoppels, 'facts' in 'conclusive presumptions')
Other classification of evidence recognised in the Evidence Act: primary and secondary evidence (ss 64-5 EA) as pertaining to documentary evidence; direct evidence (s 62 EA)
- d. Sources:
 - i. The Evidence Act
 - W Twining, *The Rationalist Tradition of Evidence Scholarship*, Ch 3 **Rethinking Evidence**, 2 ed 2006, Camb UP, pp 56-61.
 - Sir James Fitzjames Stephen, *Introduction to the Indian Evidence Act 1872 (extracts)*
 - Sir James Fitzjames Stephen, *Introduction, Digest of the Law of Evidence* (12 ed, 1948) (extracts)
 - ii. The Criminal Procedure Code (2010) (specific topics will refer to the CPC provisions related to such topics – hearsay, statements to the police and law enforcement officers):
 - Relationship between Evidence Act and the CPC: *Lee Chez Kee v PP* [2008] 3 SLR 447.
 - iii. Other sources:
 1. Common law:
 - a. Jeffrey Pinsler, *Approaches to the Evidence Act: The Judicial Development of a Code* (2002) 14 SAclJ 365

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- b. *Law Society of Singapore v Tan G N Phyllis* [2008] 2 SLR 239, esp 114-129.
2. Other Statutes (specific provisions on evidence, usually for documentary or electronic records (e.g., income tax legislation) and the use of presumptions (e.g., Misuse of Drugs Act, Women's Charter)
2. Basic concepts (Relevancy, Admissibility, Weight)
- a. Anchoring concepts: 'Facts in issue' and 'Relevancy' of facts
Generally: Pinsler, Ch 1-2
See s 3 for definitions of 'evidence', 'fact', 'fact in issue'
- i. Idea of 'logical relevancy'
Dennis, para 3.2 – 3.17
J Thayer, *A Preliminary Treatise on Evidence*, Ch VI 1898 (Elbron Classics 2005)
- ii. Statutory 'relevancy': Evidence Act, s 3(2) "Relevant"
(2) One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. (And see generally, sections 5-16)
- iii. 'Extended' or 'Legal' Relevancy – evidence logically relevant may not always be admitted – see Dennis, above.
R v Blastland [[1986] AC 41
1.
- b. Admissibility and Weight
- i. 'Admissibility': Does 'relevancy' via EA entails 'admissibility'? Is it misleading to do away with the concept of 'admissibility'?
- Evidence may be given of facts in issue and relevant facts**
- 5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.**

...

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

- ii. Weight of evidence ('the weight of evidence depends on the rules of common sense' (Lord Blackburn, *Lord Advocate v Blantyre* (1879) 4 App Cas 770, 792).
- Rules of corroboration – e.g., victims of sexual offences, children, accomplices (vulnerable witnesses or tainted witnesses may require special rules relating to their evidence)
 - *XP v PP* [2008] 4 SLR 686 (this is an important case for other areas of evidence, notably standard of proof)

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3. The Judge's role

Traditional view: adversarial trial by jury – parties present evidence before judge and jury – judge decides on questions of law (admissibility) and jury on the facts (based on the evidence admitted) – judge a neutral umpire;

Singapore – judge and jury – same person (judge) – what are the implications?

- (a) Decide admissibility of evidence: s 138(2) refers to 'foundational facts' required by a rule of evidence before it can be applied: e.g., a statement to the police is only admissible if the prosecution can show that it was 'voluntary' – facts showing voluntariness have to be proved first.

Court to decide as to admissibility of evidence

138. —(1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact and the court is satisfied with such undertaking.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or required evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(b) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(c) A is accused of receiving stolen property, knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The court may, in its discretion, either require the property to be identified before the denial of the possession is proved or permit the denial of the possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The court may either permit A to be proved before B, C or D is proved or may require proof of B, C and D before permitting proof of A.

- (b) Require witness to answer questions or produce documents:

Judge's power to put questions or order production

167. —(1) The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such

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question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

(2) The judgment must be based upon facts declared by this Act to be relevant and duly proved.

(3) This section shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 123 to 133 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 150 or 151; nor shall he dispense with the primary evidence of any document, except in the cases excepted in this Act.

But see: *Hum Wen Fong v Koh Siang Hong* [2008] SGCA 28 ; *Ng Chee Tiong v PP* [2008] 1 SLR 900; *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85.

- c) Judge to give grounds of decision for fact-finding: *XP v PP* (above)
- d) Does the Judge have a power to exclude evidence which is otherwise 'relevant'? ('Discretion means that the decision maker can choose – between admitting relevant evidence or excluding it – on what grounds should her choice(s) be made?')
Read: Jeffrey Pinsler, *Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings* [2010] 22 SAclJ 335 (or Pinsler, Ch 10).

Local cases:

Cheng Swee Tiang v PP [1964] MLJ 291

Ajmer Singh v PP [1986] SLR 454

How Poh Sun v PP [1991] SLR 220

PP v Dahalan bin Ladaewa [1996] 1 SLR 783

SM Summit Holdings Ltd v PP [1997] 3 SLR 922

Wong Keng Leong Rayney v Law Society of Singapore [2007] SGCA 42 (High Court decision reported in [2006] 4 SLR 934)

Law Society of Singapore v Tan Guat Neo Phyllis [2007] SGHC 207, [2008] 2 SLR 239

Lee Chez Kee v PP [2008] SGCA 20 at para 106

English Cases:

R v Sang [1980] AC 402

R v Looseley; AG Reference (No 3 of 2000) [2001] 1 WLR 2060

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LECTURE 2: SIMILAR FACT AND CHARACTER EVIDENCE**LECTURER: HO HOCK LAI**Read: Jeffrey D Pinsler, *Evidence and the Litigation Process* (LexisNexis, 2010, 3rd ed) ch 3, ch 9

Further references:

'Halsbury's': *Halsbury's Laws of Singapore* (volume 10: Law of Evidence). (Butterworths, 2006 reissue), pp 88 et seq, paras 120.056 et seq (similar fact evidence) and pp 115 et seq, paras 120.075 et seq (character)

I. The Similar Facts Rule

1) The Common Law Position:

a) Criminal Cases

Makin v A G for New South Wales [1894] AC 57*R v Boardman* [1975] AC 421*DPP v P* [1991] 2 AC 447*R v H* [1995] 2 AC 596*R v M* [2000] 1 All ER 148

b) Civil Cases

O'Brien v Chief Constable of South Wales Police [2005] UKHL 26; [2005] 2 AC 534*Hin Hup Bus Service v Tay Chwee Hiang* [2006] 4 SLR 723*Rockline Ltd v Anil Thadani* [2009] SGHC 209

2) The Position in Singapore

a) The Evidence Act:

EA, ss 2(2), 11(b), 14, 15

PP v Teo Ai Nee [1995] 2 SLR 69,92-94*Tan Meng Jee v PP* [1996] 2 SLR 422*Lee Kwang Peng v PP* [1997] 3 SLR 278*Public Prosecutor v Mas Swan bin Adnan and another* [2011] SGHC 107

[CPC 2010, ss 265-6 (formerly, ss 373-4)]

b) Bench vs Jury Trial:

AG of Hong Kong v Siu Yuk-Shing [1989] 1 WLR 236*Wong Kim Poh v PP* [1992] 1 SLR 289*Tan Meng Jee v PP*, above at 434*Rockline Ltd v Anil Thadani*, above*Tan Chee Kieng v PP* [1994] 2 SLR(R) 577 at [8]

READING LISTS & NOTES**II. Character in Other Contexts****1) Character of Accused**

EA, ss 55, 56, 122(4)-(8)

Tsang Kai Mong Elke v PP [1994] 1 SLR 651

Tan Nguan Siah v PP [1993] 3 SLR 895

PP v Tan Chuan Ten & Anor [1996] SGHC 281

Garmaz s/o Pakhar v PP [1995] 3 SLR 701, 717-718

2) Character of Party in Civil Case

EA, s 54

Rockline Ltd v Anil Thadani, above

3) Character of Witness and Victim of Sexual Offence

a) Shaking Credit by Injuring Character: EA, ss 148(c), 150, 155, 157(a) and explanation
(On the meaning of 'credit': *Kwang Boon Keong Peter v PP* [1998] 2 SLR 592 at para 18.)

b) Immoral Character of Rape Victim: EA, s 157 (d)

(Brief references to this provision in a few cases but without analysis: eg, *PP v Liew Kim Choo* [1997] 3 SLR 699 at para 35; *Lim Baba v PP* [1962] MLJ 201.)

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LECTURE 3 &4: RULE AGAINST HEARSAY AND EXCEPTIONS TO THE RULE**LECTURER: JEFFREY PINSLER**1 ReferencesLocal texts and reference works:Pinsler J, *Evidence, Advocacy and the Litigation Process*. (LexisNexis, 2010, 3rd ed), chaps 4 and 6.Chin TY, *Evidence*. (Butterworths, 1988), at pp 25-9, 31-8, 47-51,123-131.*Halsbury's Laws of Singapore, Evidence*, vols 10 and 10(2) (LexisNexis, 2006 reissue), 120.084-097 (generally) and 120.035 (on res gestae).*Butterworths' Annotated Statutes of Singapore (volume 5: Evidence Act)*English texts:*I H Dennis, *The Law of Evidence* (Sweet and Maxwell, 2010)Roderick Munday, *Evidence* (OUP, 2009)Peter Murphy, *Murphy on Evidence* (OUP, 2009)Colin Tapper, *Cross & Tapper on Evidence* (OUP, 2009).Andrew Choo, *Evidence* (OUP, 2006)Adrian Keane, *The Modern Law of Evidence* (OUP, 2010)

**Note on English texts: Please note that there are significant differences in the law governing hearsay in Singapore and England (primarily because of legislation introduced in England in recent years). Therefore, these English texts should be read with caution. They may be particularly useful for the discussion of conceptual issues.*

A. RULE AGAINST HEARSAY**(1) Concerns about applicable legal rules and approaches**

"The rule against hearsay is one of the most important and commonly applied rules of the law of evidence, and yet, at the same time, the least understood by students, the profession, and the judiciary." [Peter Murphy, *Murphy on Evidence* (9 ed, 2005, p 190)]

The law of hearsay in Singapore faces particular difficulties. For example:

1. **Conceptual uncertainty:** as to the nature and scope of the doctrine. What the term "hearsay" should include is a matter not just of semantic definition, but of principle and policy. There are also difficulties concerning the rationale and scope of the exceptions to the rule.
2. **Archaic provisions in Evidence Act ("EA"):** This statute is 115 years old (enacted in 1893 and based on the Indian Evidence Act of 1872). The great majority of the provisions are original. (There have been some amendments although these have been piecemeal.) Although the Law of Evidence in other countries has advanced considerably, much of the EA remains rooted in the

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19th century. For example, the issue of legitimacy in the Evidence Act is addressed by rules governing presumptions (see s 114 of the EA), although the matter is now resolvable through identification by a DNA sample.

3. **Judicial uncertainty:** The tendency of the courts over many years has been to refer to common-law decisions in deciding on the admissibility of hearsay (sometimes without reference to the statutes). This has created uncertainty in the relationship between the statutes and common law. Recent decisions have acknowledged this difficulty.

4. **Schematic uncertainty:** In criminal cases, admissibility of hearsay has to be considered under the Evidence Act ("EA") and the Criminal Procedure Code ("CPC"). Both statutes are characterised by very different schemes of admissibility. In civil cases, only the EA (and certain specific statutes) governs admissibility of hearsay. (Is it time for a more holistic treatment of the subject?)

(2) Introduction to the rule and examples**(3) Rationale of hearsay rule**

Some reasons why hearsay evidence is generally not admissible:

- Inferior evidence. Witness did not personally perceive facts he is recounting.
- Danger of miscommunication (Did witness "hear" him "say" that?)
- Possibility of fabrication.
- Court not able to observe demeanour of maker of statement. Compromises process for determining truth of evidence.
- Maker of statement not bound by oath. Penal sanctions not applicable.
- Maker of statement cannot be cross-examined.
- Easier to say things behind a person's back if he knows he will not be challenged in court.
- Trier of fact may put too much emphasis on hearsay evidence despite its unreliability (more true of juries than judges).
- Accused should only be convicted on reliable evidence. Should there be special rules in criminal cases?

(4) Nature of the hearsay rule

Lee Chez Kee v PP [2008] 3 SLR(R) 447, at [67]

Roy S Selvarajah v PP [1998] 3 SLR(R) 119, para 40

Soon Peck Wah v Woon Chye Chye [1997] 3 SLR(R) 430

(5) Elements of the rule and express assertions by statement or conduct

PP v Subramaniam [1956] 1 MLJ 220.

Choo Pit Hong Peter v PP [1995] 1 SLR(R) 834

Chandrasekera v The King [1937] AC 220

R v Gibson (1887) 18 QBD 537

(6) Implied assertions by statement

Teper v R [1952] AC 480

Walton v R (1989) 166 CLR 283 (84 ALR 59)

R v Ratten [1972] AC 378

R v Kearley [1992] 2 AC 228 (HL)

Wright v Doe d Tatham (1837) 7 Ad & E 313; 112 ER 488

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(7) Implied assertions by conduct

Wright v doe d Tatham (see above)

CPC 2010, s 269(3) (formerly s 378(4)) appears to exclude implied assertions by conduct from the scope of hearsay rule.

EA, s 8(2) concerns conduct of parties (and their agents).

(8) Where statement is tendered as evidence of maker's state of mind.

May not be relevant to issues: see *R v Kearley* (above)

EA, s 14

R v Blastland [1986] AC 41

(9) "Negative hearsay" (assertions by omission)

R v Patel [1981] 3 All ER 94

R v Shone (1983) 76 Cr App Rep 72

Sagurmull v Manraj [1900] 4 CWN ccvii

(10) Hearsay and real evidence

R v Rice [1963] 1 QB 857

R v Percy Smith 1976] Crim LR 511

R v Cook [1987] QB 417

PP v Ang Soon Huat [1990] 2 SLR(R) 246

B. EXCEPTIONS TO THE RULE AGAINST HEARSAY**(1) General introduction**

EA, s 2(2)

CPC 2010, s 268 (formerly s 377)

EA, ss 17-40, 160

CPC 2010, ss 268-277 (formerly ss 378-385).

Admissions and confessions to be covered in separate lectures

(2) Introduction to s 32 of the EA**(3) S 32(a) of the EA**

Yeo Hock Cheng v R [1938] MLJ 104

Chanderasekara (above): hearsay assertion by conduct may come within s 32(a)

Toh Lai Heng v PP [1961] MLJ 53

Common law position

(4) S 32(b) and s 34 of the EA**(5) S 32(c) of the EA****(6) S 35 of the EA**

Lim Mong Hong v PP [2003] 3 SLR(R) 88

Jet Holding Ltd. V Cooper Cameron [2005] 4 SLR(R) 417

Also see s 36 (supplementary provisions)

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Lee Chez Kee v PP [2008] 3 SLR(R) 447

Roy S Selvarajah v PP [1998] 3 SLR(R) 119

(8) Res Gestae

S 6 of EA

Mohd b. Allapitchay v PP [1958] MLJ 197

R v Bedingfield (1879) 14 Cox CC 341

Hamsa Kunju v R [1963] MLJ 228

Ratten v The Queen [1972] AC 378

R v Andrews [1987] AC 281

Chi Tin Hui v PP [1994] 1 SLR(R) 313

LECTURE 5: ADMISSIONS, CONFESSIONS AND CUSTODIAL STATEMENTS**LECTURER: MICHAEL HOR****The Evidence Act Scheme**

17. —(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

(2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

21. Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases:

(a) an admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32;

(b) an admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body relevant or in issue, made at or about the time when such state of mind or body existed and is accompanied by conduct rendering its falsehood improbable; and

(c) an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.

Illustrations

(a) The question between *A* and *B* is whether a certain deed is or is not forged. *A* affirms that it is genuine; *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(b) *A*, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. *A* may prove these statements because they would be admissible between third parties if he were dead under section 32 (b).

(c) *A* is accused of a crime committed by him at Singapore. He produces a letter written by himself and dated at Penang on that day, and bearing the Penang postmark of that day.

The statement in the date of the letter is admissible, because if *A* were dead it would be admissible under section 32 (b).

(d) *A* is accused of receiving stolen goods, knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

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A may prove these statements though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in illustration (d).

Questions:

1. Describe the Evidence Act scheme for the admissibility of “admissions and confessions”, and consider the logic of universal admissibility “against” the declarant/accused, but limited admissibility in favour of the declarant (where essentially one of the hearsay exceptions apply).
2. Compare this with the Criminal Procedure Code’s scheme of admissibility for criminal cases where admissibility is simply “admissible”, presumably for any relevant purpose, against or for the declarant:

Criminal Procedure Code 2010, s 258 (1)

Subject to subsections (2) and (3), where any person is charged with an offence, any statement made by the person, whether it is oral or in writing, made at any time, whether before or after the person is charged and whether or not in the course of any investigation carried out by any law enforcement agency, is admissible in evidence at his trial; and if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

Is there any reason of principle or policy why there should be this difference? Consider *Chan Kin Choi v PP* [1988] SGHC 96, in the context of the admissibility of exculpatory statements:

[extract]

The Voluntariness Rule (or “ITP”)**Criminal Procedure Code 2010**

258(3). The court shall refuse to admit the statement of an accused or allow it to be used in the manner referred to in subsection (1) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused grounds which would appear to him reasonable for supposing that by making the statement he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Explanation 1 — If a statement is obtained from an accused by a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will of the maker of the statement, and the court is of the opinion that such acts gave the accused grounds which would appear to the accused reasonable for supposing that by making the statement, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, such acts

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will amount to a threat, inducement or promise, as the case may be, which will render the statement inadmissible.

Questions:

1. Consider the possible reasons for the rule against involuntary statements:
 - a. That involuntary statements are unreliable: Is it our experience that coerced confessions are so unreliable that no court ought to even consider them? Is it not the case that someone can be forced into speaking the truth just as he or she can be forced to speak falsely? If indeed reliability is the ultimate criterion, why is the rule not phrased simply in terms of reliability instead of voluntariness?
 - b. That involuntary statements violate either the right to silence or the privilege against self-incrimination: To what extent can it be said that a confession extracted in the course of police interrogation can ever be “voluntary”, bearing in mind that the police have the power under the CPC to arrest, interrogate and detain suspects and witnesses, and often without the benefit of counsel? To what extent do we respect the right or privilege – consider that a suspect being questioned cannot terminate either interrogation or detention at will, that adverse inferences may be drawn against the silence of the accused during questioning (see below s123, CPC)? To what extent should we?
 - c. That involuntary statements involve police or official conduct which will taint the process with impropriety or illegality and the rule is required to allow the court to distance itself from improper police conduct: if this is the case, why does the rule not simply focus on improper official conduct? Should police impropriety be dealt with by a separate rule or discretion to exclude confessions obtained thereby? Consider that the closely related discretion to exclude improperly or illegally obtained evidence (in general, and not just confessions) has been repudiated in recent cases (*Phyllis Tan*). Consider that there has also been persistent dicta that the discretion remains for confessions (*Woo J, PP v Ismil bin Kadar*, [2009] SGHC 84, “It was also not disputed that even if the [voluntariness rule under s122(5), old CPC] does not apply, the court has a discretion to admit or to reject the statement of an accused person”)

2. Consider the ingredients used for the formulation of the voluntariness rule:
 - a. “having reference to the charge”: is there any reason why we would want to limit the voluntariness rule to “itps” having reference to the charge? Why are we not concerned about “itps” which do not have reference to the charge? Consider *Poh Kay Keong v PP* [1995] SGCA 84:

[extract]

Is it legitimate statutory interpretation to, in effect, repeal the phrase “having reference to the charge”?
 - b. “person in authority”: why are we not concerned about “itps” emanating from persons not in authority? Is it inevitably the case that persons not in authority have no capacity to issue convincing “itps”? Or are we really concerned about “official” behaviour after all?

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- c. advantage or evil of a “temporal nature”: what about consequences of a “celestial” or spiritual nature – eg “if you do not confess I shall summon a Pontianak (go look this up yourself) to haunt you in your dreams”?

3. Consider these potentially problematic situations in which the voluntariness rule has had to be applied

PP v Ismil bin Kadar [2009] SGHC 84, Woo J:

[extract]

Questions:

1. Does the pronouncement that the itp must be objectively established (“objective limb”) mean the person in authority must have intended what was said or done to be an itp? What if the interrogator said something which he or she thought was quite innocent, but was mistakenly perceived by the suspect to have been an itp? Does it matter if the mistaken perception was reasonable? If we are concerned primarily with reliability, why do we insist on an objective limb – surely an imagined itp impacts on reliability in the same way as a real one?
2. How does “oppression” fit into the wording of the voluntariness rule – where is the itp? If the essence of oppression is that it “so affects the mind of the person being interrogated that his will crumbles and he speaks when otherwise he would have remained silent”, would it not be reasonable to assume, at least for some suspects, that the power of the police to arrest, interrogate and detain the suspect indefinitely, in itself would be sufficient to make his will not be speak “crumble”? If the real concern is that courts should not put a “clog” on the proper exercise of the investigative powers of the police, then is it really the privilege against self incrimination we are concerned with? Are not here more concerned with propriety rather than the will of the suspect? What does “robust” but proper interrogation mean – what if the suspect was questioned continuously from 12 midnight to 6am by successive teams of interrogators? How do we, or the police, know what the proper exercise of the powers of interrogation might be?
3. Is the situation of a drug user suffering from withdrawal symptoms really a situation of potential involuntariness, or one where the suspect did not really make a statement at all?
4. Consider the burden of proof for the issue of voluntariness:

Ismail bin Abdul Rahman v PP [2004] SGCA 7

[extract]

Question:

In the context of police interrogation where only the suspect and the police are witnesses, how ought the contradictory testimonies of the suspect (that itp was made) and of the police (that it was not) to be resolved? Is it quite enough for the prosecution to discharge its supposed burden of proof to demonstrate the all the police witnesses were consistent in their denial of itp? If the circumstances of a police interrogation is entirely predictable and entirely in the control of the police, is it not reasonable to require the police to support their account of the interrogation by some independent means such as audio or video recording,

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or the presence of defence counsel? Is it sensible for the appellate court to rely so much on the trial judges “assessment of witness credibility”?

Criminal Procedure Code 2010

258(4). If a confession referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.

Question:

Why do you think that it was necessary to spell this out? If the itp has been “fully removed”, is it not patently clear that the statement would not have been “caused” by the itp (s258(3))? Could it have been to forestall the “temptation” to treat the voluntariness rule as a check on impropriety?

Criminal Procedure Code 2010

258(3)Exp2. If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made in any of the following circumstances:

- (a) under a promise of secrecy, or in consequence of a deception practised on the accused for the purpose of obtaining it;
- (b) when the accused was intoxicated;
- (c) in answer to questions which the accused need not have answered whatever may have been the form of those questions;
- (d) where the accused was not warned that he was not bound to make the statement and that evidence of it might be given against him; or
- (e) where the recording officer or the interpreter of an accused's statement recorded under section 22 or 23 did not fully comply with that section.

Questions:

1. Why was it thought necessary to make provision for (b) and (c) – what conceivably could have been the itp in those situations?
2. Why was it necessary to make provision for drunkenness? Is it the situation now that drunkenness cannot be taken into account in determining involuntariness, or that drunkenness can be taken into account, but in itself cannot amount to involuntariness? How can it be conceivable that drunkenness in itself might be thought to be an itp?
3. Why should a promise of secrecy or deception be exempted from the voluntariness rule? Are inducements in these specific forms more likely to produce statements which are reliable? Or could it be because a promise of secrecy or deception is somehow less “improper” or objectionable than other kinds of inducements?

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4. Consider *Mazlan bin Maidun v PP* [1992] SGCA 90:

[extract]

How convincing is the court's distinction between factual misrepresentation (which is exempted from the voluntariness rule) and a "positive misrepresentation" of rights (which is not) in its attempt to interpret the meaning of "deception"? If the court is concerned about the accused having said things which he would or might not have otherwise said, how does it matter whether the deception is legal or factual? Notice that the appeal is not really to reliability but the privilege against self incrimination (or perhaps the right to silence) – note that elsewhere in the judgement, the court also held that the privilege was not a fundamental rule of natural justice and that the police have no duty to inform the accused of his privilege embodied in s121(2) – why should the court all of a sudden be concerned about the accused speaking when he would otherwise not have?

5. Consider also section 23(4) CPC 2010 (below) which purports to expressly exempt the adverse inference warning (23(1) CPC 2010) from the operation of the voluntariness rule. On what principle is this exception made? Are itps in the nature of 23(1) warnings more likely to produce reliable (but forced) confessions? Is the exception better explained by an uncertain commitment to the privilege against self-incrimination, and if so why should reliability concerns suddenly become subordinate?
6. Consider the historical context in which the original (s29 Evidence Act, repealed) provision was drafted – *ie* when statements made whilst under police custody or after the commencement of investigations were completely inadmissible. Could it be that the drafters never contemplated that these exemptions would ever be used if the persons extracting the statements were police officers?

Criminal Procedure Code 2010

258(6)(c) when any fact or thing is discovered in consequence of information received from a person accused of any offence in the custody of any officer of a law enforcement agency, so much of such information as relates distinctly to the fact or thing thereby discovered may be proved.

Questions:

1. Why should the discovery of something "in consequence of" an involuntary statement be admissible? Consider *PP v Chin Moi Moi* [1994] SGHC 279 [Note that this provision was formerly found in s 27, Evidence Act, now repealed]:
- [extract]
2. Is it, on principle, correct to make an involuntary statement admissible, albeit to the limited extent allowed by subsequent discovery, apparently on the sole basis of reliability? Does it make any difference if torture and inhumane treatment was used to obtain the statement?

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Would admissibility not be a form of condonation of the torture? Consider *Lam Chi-ming v The Queen* [1991] 2 AC 220:

[extract]

Was the doctrine of subsequent discovery the child of a misconception of the English common law? Does its continued existence mean that the sole purpose of the voluntariness rule is to preserve reliability to the exclusion of the privilege against self-incrimination and the need to have civilized treatment of suspects? How does it square with the apparent emphasis on the privilege against self incrimination in cases like *Mazlan bin Maidun* (above), where a statement was ruled inadmissible, apparently on the ground of violation of the privilege against self-incrimination?

The Legal Framework of Police Statements: A Brief History

Criminal Procedure Code 2010

258(2) Where a statement referred to in subsection (1) is made by any person to a police officer, no such statement shall be used in evidence if it is made to a police officer below the rank of sergeant.

Evidence Act, repealed

Confession by accused while in custody of police not to be proved against him

26. Subject to any express provision in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against the person.

Criminal Procedure Code, old, repealed

Admissibility of statements to police.

CPC 122. —(1) Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence other than a statement that is a written statement admissible under section 141.

Criminal Procedure Code 2010

Power to examine witnesses [formerly s121, old CPC]

22. —(1) In conducting an investigation under this Part, a police officer may examine orally any person who appears to be acquainted with any of the facts and circumstances of the case —

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- (a) whether before or after that person or anyone else is charged with an offence in connection with the case; and
- (b) whether or not that person is to be called as a witness in any inquiry, trial, or other proceeding under this Code in connection with the case.
- (2) The person examined shall be bound to state truly what he knows of the facts and circumstances of the case, except that he need not say anything that might expose him to a criminal charge, penalty or forfeiture.
- (3) A statement made by any person examined under this section must —
 - (a) be in writing;
 - (b) be read over to him;
 - (c) if he does not understand English, be interpreted for him in a language that he understands; and
 - (d) be signed by him.

Criminal Procedure Code 2010

Cautioned statements [formerly 122(6), old CPC]

23. —(1) If, during an investigation, a person (referred to in this section as the accused) is charged with an offence or informed by a police officer or any other person charged with the duty of investigating offences or charging offenders that he may be prosecuted for an offence, he must be served with and have read to him a notice in writing as follows:

“You have been charged with [or informed that you may be prosecuted for] —
(set out the charge).

Do you want to say anything about the charge that was just read to you? If you keep quiet now about any fact or matter in your defence and you reveal this fact or matter in your defence only at your trial, the judge may be less likely to believe you. This may have a bad effect on your case in court. Therefore it may be better for you to mention such fact or matter now. If you wish to do so, what you say will be written down, read back to you for any mistakes to be corrected and then signed by you.”

- (2) If an accused, after the notice under subsection (1) is read to him —
 - (a) remains silent; or
 - (b) says or does anything which intimates his refusal to give a statement,
 the fact of his remaining silent or his refusal to give a statement or his other action must be recorded.
- (3) A statement made by an accused after the notice under subsection (1) is read to him must —
 - (a) be in writing;
 - (b) be read over to him;
 - (c) if he does not understand English, be interpreted for him in a language that he understands; and
 - (d) be signed by him.
- (4) No statement made by an accused in answer to a notice read to him under subsection (1) shall be construed as a statement caused by any threat, inducement or promise as is described in section 258(3), if it is otherwise voluntary.

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(5) A copy of a statement recorded under this section must be given to the accused at the end of the recording of such statement.

Admissibility of accused's statements [formerly, s122(5), old CPC]

258. —(1) Subject to subsections (2) and (3), where any person is charged with an offence, any statement made by the person, whether it is oral or in writing, made at any time, whether before or after the person is charged and whether or not in the course of any investigation carried out by any law enforcement agency, is admissible in evidence at his trial; and if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

Inferences from accused's silence [formerly 123, old CPC]

261. —(1) Where in any criminal proceeding evidence is given that the accused on being charged with an offence, or informed by a police officer or any other person charged with the duty of investigating offences that he may be prosecuted for an offence, failed to mention any fact which he subsequently relies on in his defence, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, the court may in determining —

- (a) whether to commit the accused for trial;
 - (b) whether there is a case to answer; and
 - (c) whether the accused is guilty of the offence charged,
- draw such inferences from the failure as appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(2) Subsection (1) does not —

- (a) prejudice the admissibility in criminal proceedings of evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct for which he is charged, in so far as evidence of this would be admissible apart from that subsection; or
- (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from that subsection.

Power of Magistrate to record statements [formerly 121, old CPC]

280. —(1) A Magistrate may record a statement made to him at any time before a trial begins.

(2) The statement must be recorded in full, and a question asked by the Magistrate and the answer given to him must be clearly shown as being a question and answer.

(3) The Magistrate must not record the statement if, on questioning the person making it, he does not believe it was made voluntarily.

(4) The Magistrate must make a note at the foot of this record as follows:

"I believe that this statement was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it. The maker of the statement has admitted that it is correct and contains a full and true account of what he/she said.

(Signed) A.B.

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Magistrate”.”.

(5) If the person making the statement does not understand English, the proceedings must be interpreted for him in his own language or in a language he understands, and the note referred to in subsection (4) must be signed by the Magistrate and by the interpreter.

(6) Taking and recording a statement disqualifies the Magistrate who has taken and recorded it from trying the case.

(7) If an accused’s confession recorded under this section is presented to a court as evidence, but the court finds that the Magistrate recording the statement did not fully comply with this section, it must take evidence as to whether the accused duly made the statement recorded and, if it is satisfied of that, it must admit the statement in evidence if the error has not prejudiced the accused’s defence on the merits.

Mohamed Bachu Miah v PP [1992] SGCA 56

[extract]

Questions:

1. Consider the history of admissibility of police statements, from complete inadmissibility, to admissibility subject to voluntariness and Schedule E, to admissibility subject only to voluntariness qualified by the allowance of the “threat” of adverse inferences from silence. How is this trend to be explained or justified? Is it because police statements have become progressively more reliable? Is it because convictions were unduly difficult without them – note that India has preserved the original rule of inadmissibility, and that in Singapore until 1960 police statements were inadmissible? Does this development tell us anything about our commitment to the privilege against self incrimination or our understanding of the standards of police propriety?
2. Note the expansive wording of the principal admissibility provision for police statement (s259(1), formerly s122(5)) – “any statement, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not” – apparently means that the only hurdle to admissibility is the voluntariness rule. Subject to what the court ultimately decides about the existence of a discretion to exclude police statement on other grounds (perhaps of impropriety), it would appear that it matters not what the police do or do not do in the context of police interrogation. It also means that the police are at liberty to extract as many statements as it wants from a suspect at any time – presumably until the trial actually begins. In practice, police statements are either “122(6)” [now 258(1)] or “cautioned” statements (of which there can only be one – taken after the suspect is charged or “officially informed”), or “121” or “long” statements (of which any number can be extracted before or after the suspect is charged). Note that the now discarded Schedule E would have prohibited the taking of further statements after the (equivalent of) the 122(6) statement is taken. Note also that there are no known rules governing the treatment of the suspect during detention and interrogation – eg rest periods, length of interrogation, refreshment, right to counsel. Compare this situation with the legislative reforms in the UK in the 1980s which prescribed detailed rules about detention and interrogation – called the “Codes of Practice” – breach of

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which triggers an express judicial discretion to exclude statements obtained thereby. What do you think are the reasons behind this divergence of attitudes towards the regulation of police interrogation?

3. Note also that the only kind of statements made after arrest and detention in the pre-1960 period which were admissible were “Magistrate’s statements” under s124 [now 280, CPC 2010] are now extinct. What do you think accounts for the unpopularity of such statements today? Is this mode of taking statements not the ideal solution to the problem of the court trying to decide what actually happened when statements are taken?

The Saga of Co-Accused Statements

Criminal Procedure Code 2010 (formerly s30, Evidence Act)

258(5) When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.

Explanation.—“Offence” as used in this section includes the abetment of or attempt to commit the offence.

(a) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said “*B* and I murdered *C*”. The court may consider the effect of this confession as against *B*.

(b) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B* and that *B* said: “*A* and I murdered *C*”.

This statement may not be taken into consideration by the court against *A* as *B* is not being jointly tried.

Ramachandran a/l Suppiah v PP [1993] SGCA 47

[extract]

Chin Seow Noi v PP [1993] SGCA 87

[extract]

Lee Chez Kee v PP [2008] SGCA 20

[extract]

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Questions:

1. Why should the confession of a co-accused be an exception to the rule against hearsay? Are such statements more reliable? Is it because of “necessity”? Or is there some policy connected with the desirability of joint trials? Note the limiting words of section 30 [now 259(3)] – joint trial, same offence (or cognate offences), confession (and not just admissions) – which theory best explains their existence? If indeed it is the joint trial rationale, why is a joint trial thought to be so important that the normal rules of evidence have to be suspended? Why is it not possible to conduct a joint trial without the admissibility of co-accused confessions as against the accused?
2. How would you explain the judicial “ding-donging” concerning the issue of whether a co-accused confession can, without more, form the basis of a conviction? Where do you stand on this, and why?

The Saga of Previous Inconsistent Statements

Evidence Act

Cross-examination as to previous statements in writing

147. —(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without such writing being shown to him or being proved;

(3) Where in any proceedings a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of this section, that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(4) Where a person called as a witness in any proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings.

(5) Where a document or any part of a document is received in evidence by virtue of subsection (4), any statement made in that document or part by the person using the document to refresh his memory shall by virtue of that subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(6) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of this section regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.

(7) Notwithstanding any other written law or rule of practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement which is admissible in evidence by virtue of this section shall not be capable of corroborating evidence given by the maker of the statement.

Somwang Phattanaseng v PP [1992] SGCA 21

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We do not think that the principle of law is in any doubt: a previous statement made by an accused which has been used to impeach his credit, is only admissible for that limited purpose, *ie* to impeach his credit, and not as substantive evidence of the content thereof.

PP v Sng Siew Ngoh [1995] SGHC 266 (apparently approved by the CA in *Chai Chien Wei Kelvin v PP* [1998] SGCA 64
[extract])

Questions:

1. Why should previous inconsistent statements of a witness be an exception to the rule against hearsay?
2. Should previous inconsistent statements be used only for the purpose of impeaching the credit of a witness (ie cancelling out his or her testimony in court), or should they be full-fledged evidence capable of proving the truth of assertions therein? Do you agree that the distinction between the two kinds of use – impeaching credit and as substantive evidence – is “too subtle”?
3. How would you resolve the apparent contradiction between s122(2) CPC which allows previous inconsistent statements extracted in the course of police investigation only for the purpose of impeaching credit, and s147(3) (which applies to inconsistent statements in general) which declares that such statements can be used as substantive evidence? Why should the logic of 147(3) trump the logic of 122(2)?
4. Note the expanding concept of an “inconsistent” statement:
PP v Heah Lian Khin [2000] SGHC 154

When the witness falsely claims to have no recollection of the material events, he contradicts the essence of his previous statement which contains a detailed account of the facts. Such a witness is no different from a witness who gives false oral evidence. Both have essentially refused to provide a truthful account in court. The previous statement constitutes a valuable source of evidence which could enable the court to ascertain the truth. To exclude such statements by a rigid and semantic construction of the phrase “previous inconsistent or contradictory statement” would not promote the objectives of s 147(3) EA. On the contrary, it imports an unwarranted restriction of the use of the previous inconsistent statement and, in effect, circumvents and defeats the intention of Parliament.

Why should it matter whether the witness genuinely or falsely claims he or she has forgotten? If indeed witness silence at the trial is considered to be testimony “inconsistent” with the previous statement, why do we even bother with requiring the declarant to be in court at all?

5. Note that in other decisions, the court has held that the voluntariness rule does not apply to 147(3) statements (*Thiruselvam s/o Nagaratnam v PP* [2001] 2 SLR 125) and that the accused has no right to discovery of potential 147(3) statements which might be in favour of the accused (*Rosli bin Othman v PP* [2001] 3 SLR 587). Were these decisions right or desirable?
6. Why should hearsay used to “refresh memory” be admissible (as an exception) to prove the truth of the assertions therein?

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Previous Consistent Statements**Evidence Act****Former statements of witness may be proved to corroborate later testimony as to same fact**

159. In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Question:

Why should 159 statements be an exception to the rule against hearsay? Why should they be admissible only to corroborate testimony and not as substantive evidence? Note that we shall revisit 159 in the context of corroboration rules.

All Together Now!

Consider the total impact of these exceptions to the hearsay rule in the context of police statements:

Accused statements admissible s122(5) [now 258(1)], CPC

Co-accused statements admissible s30 [now 258(5)]. CPC

Previous inconsistent statement of witness admissible s147(3), EA

Previous consistent statement of witness admissible s159, EA

Should the rule against hearsay be more or less stringently applied in the context of police statements?

Reference

Hor, "The Confessions Regime in Singapore" [1991] 3 Malayan Law Journal lvii [This is unfortunately not available online]

Hor, "The Confession of A Co-Accused" [1994] Singapore Academy of Law Journal 366

Hor, "Co-accused Confessions: The Third Anniversary" [1996] Singapore Academy of Law Journal 323

Hor, "Previous Inconsistent Statements: Fairness, Statutory Interpretation and the Future of Adversarial Justice" [2002] Singapore Academy of Law Journal 248.

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LECTURE 6: IMPROPERLY OBTAINED EVIDENCE AND ENTRAPMENT**LECTURER: MICHAEL HOR***Cheng Swee Tiang v PP*

High Court, 3 Judges (see s252(3) CPC), [1964] MLJ 291

Wee Chong Jin CJ, FA Chua J concurring:

[extract]

Questions:

1. Consider the implications of decision by the Solicitor-General not to support the conviction:
 - (a) why do you think this decision was taken?
 - (b) should this have any bearing on the authority of the pronouncement on illegally obtained evidence? Does populating the High Court bench with 3 Judges affect the authority of the decision?
2. The majority appeared to have relied on the Privy Council decision of *Kuruma v The Queen* [1955] 1 AC 197. Here are some key excerpts:

In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

...

No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused....If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.

- (a) Are the twin propositions not contradictory – if the test is to disregard how the evidence was obtained, then why should there be a discretion to disallow evidence obtained by a trick?
 - (b) What conception of “unfairness” underlies the “*Kuruma/Cheng* discretion” to exclude improperly obtained evidence? Is it “unfairness” only in the sense of an unreliable conviction, or is some broader conception of fairness – perhaps “fair play” or the idea that everyone must abide by the rules - meant?
3. Why do you think *Kuruma/Cheng* opted for a “discretion” to exclude improper evidence? Consider the “rule” alternatives of i) improperly obtained evidence is never to be excluded, or ii) improperly obtained evidence is always to be excluded.

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4. If we decide in favour of a *Kuruma/Cheng* discretion, how are we to resolve the “two conflicting interests”:

(a) the interest of the State (in allowing improperly obtained evidence) “to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground”. How important is it to the cause of the preservation of law and order that improperly obtained evidence be allowed?

i) consider that in *Cheng* itself, the State did not defend the conviction, and the accused was acquitted – to no apparent detriment to law enforcement.

ii) do you think that the interest of the State is significantly different in, first, a situation of *entrapment* – where State impropriety is in the procurement or contribution to the commission of a crime, and secondly, a situation where the impropriety lay in the *method of obtaining evidence*, after a crime has been committed? Are you more inclined to allow or disallow improper evidence in either context?

iii) in the case of entrapment (impropriety before the commission of the crime), how important is it to law enforcement that illegal or improper methods be employed? Similarly, in the context of obtaining evidence after the alleged commission of the crime, how important is it that the court should overlook impropriety or illegality on the part of law enforcement officials? Do law enforcement officials really need to resort to illegal or improper means in order to deal satisfactorily with crime?

b) the interest of the accused (in disallowing improperly obtained evidence) in being “protected from illegal invasions of his liberties by the authorities”:

i) From the perspective of *the accused*, can it not be said that he or she has a right to law enforcers behaving legally, and that the only satisfactory remedy for the breach of such a right is to exclude evidence obtained thereby. Why is this thought to be the commensurate remedy – why should the remedy not lie in a civil suite against the offending law enforcement officers, or perhaps in a private prosecution against them? How cogent is this “protective” rationale for exclusion of improper evidence?

ii) From the perspective of incentivizing the behaviour of *law enforcers*, can it be convincingly argued that the real reason to exclude evidence obtained as a result of unlawful law enforcement activity is that it is the only way that the courts can meaningfully disincentivise them from behaving in that manner? Should it be the business of the courts to “discipline” law enforcement officials? If not, whose business is it? Should we scrutinise alternative means of disciplining wayward law enforcers – eg internal disciplinary proceedings, possibility of criminal prosecution against them. How strong is the “disciplinary” rationale for excluding improper evidence?

iii) From the perspective of *the courts*, can it be argued that the moral authority and integrity of the Judiciary will be tarnished or adversely affected, if the judges were to turn a blind eye (by allowing evidence obtained thereby) to improper or illegal law enforcement methods. Is it sensible for the

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courts to maintain that they are not concerned, or at least primarily so, with how evidence is obtained? On what basis is such a clear line between trial and pre-trial process to be drawn – why are Judges not to supervise the legality of pre-trial processes? Assess the “judicial integrity” rationale for the exclusion of improper evidence.

(c) balancing prosecution interest vs accused interest:

i) consider Wee CJ’s refusal to accede to a submission that there be a presumptive exclusion – ie that improper evidence be normally excluded, unless there are special circumstances why it ought to be admitted. Should there be a principle of presumptive inclusion instead? Or should there be no presumption at all? How then is a court to exercise the discretion to exclude (or include)?

ii) consider Ambrose J’s analysis:

The evidence was not obtained oppressively, by false representations, by a trick, by threats, by bribes, or anything of that sort ...

It is one thing to lay a trap for catching a man who has every intention of assisting in carrying on a public lottery and quite another thing to instigate a man to assist in carrying on a public lottery when he has not evinced any intention to do so....

there are some offences the commission of which cannot be found out in any other ways

Why was the pretended wish to buy illegal lottery not considered to be a “false representation”? Is the line between “laying trap/every intention of committing crime” vs “instigating/no prior intention of committing crime” a sensible one to draw -what of instigating someone who had some sort of half-wish to commit a crime? On what basis does a court decide that there are some offences which cannot be found out but by illegal means?

5. Assess the primary point of Ambrose J’s dissent – ie that it is illegitimate to import rules of common law in the face of the enactment of the Evidence Act. In particular, he said:

“The Singapore Evidence Ordinance and certain rules of evidence to be found in other Singapore Ordinances, *form a complete code for Singapore*: and the English rules of evidence, save so far as they are embodied in a Singapore Ordinance, have no application whatsoever in Singapore”.

Is this pronouncement correct in the light of section 2(2):

All rules of evidence not contained in any written law, *so far as such rules are inconsistent* with any of the provisions of this Act, are repealed

Can it not be said that common law rules of evidence may yet survive the Act if they are not inconsistent with a provision of the Act? Which provision might be inconsistent with a *Kuruma/Cheng* discretion? Was the Act ever intended as a “complete code”?

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How Poh Sun v PP

Court of Appeal, Yong CJ, Lai and Rajendran JJ, [1991] SGCA 22

Yong CJ

[extract]

Questions:

1. Consider the meaning of the *Sang/How* approach:

Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.

(a) There is no discretion to exclude evidence on the ground of improper procurement:

i) Was the *Kuruma* pronouncement – that there was indeed such a discretion – misunderstood, or was it simply that *Sang* disagreed with *Kuruma*? Does it matter that *How* made no mention at all of *Cheng*?

ii) On what basis does the *Sang/How* approach adopt the attitude that a court is “not concerned with how evidence is obtained (unless it had a bearing on the forensic impact on the accuracy of fact-finding at the trial)?

Consider this elaboration by Lord Diplock in *Sang*:

It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.

Does the *Sang/How* approach rest on the foundation that there are other more satisfactory remedies or responses to police impropriety? How effective are civil proceedings and internal disciplinary processes in policing the police?

Consider also Lord Scarman's views:

The role of the judge is *confined to the forensic process*. He controls neither the police nor the prosecuting authority. He neither initiates nor stifles a prosecution. Save in the very rare situation, which is not this case, of an abuse of the process of the court (against which every court is in duty bound to protect itself), *the judge is concerned only with the conduct of the trial*. The Judges' Rules, for example, are not a judicial control of police interrogation, but notice that, if certain steps are not taken, certain evidence, otherwise admissible, may be excluded at the trial. The judge's control of

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the criminal process begins and ends with trial, though his influence may extend beyond its beginning and conclusion. It follows that the prosecution has rights, which the judge may not override. The right to prosecute and the right to lead admissible evidence in support of its case are not subject to judicial control.

Is there some reason why the judicial role is to be confined to the forensic (fact-finding) process? If the judges' control of the trial process impacts on the pre-trial process, is the rigid distinction between trial and pre-trial process sustainable? In particular, if we came to the conclusion that the only satisfactory way of disincentivising police impropriety is to put in place a discretion to exclude evidence obtained thereby, why is it not the judges' business to be concerned about the pre-trial process?

(b) There is a discretion to exclude i) admissions and confessions, and ii) evidence obtained from the accused after the commission of the offence, on grounds of improper procurement which have no bearing on the forensic accuracy of the trial

Lord Diplock, *Sang*, explained this exception in this manner:

My Lords, I propose to exclude, as the certified question does, detailed consideration of the role of the trial judge in relation to confessions and evidence obtained from the defendant after commission of the offence that is tantamount to a confession. It has a long history dating back to the days before the existence of a disciplined police force, when a prisoner on a charge of felony could not be represented by counsel and was not entitled to give evidence in his own defence either to deny that he had made the confession, which was generally oral, or to deny that its contents were true. The underlying rationale of this branch of the criminal law, though it may originally have been based upon ensuring the reliability of confessions is, in my view, now to be found in the maxim *nemo debet prodere se ipsum*, no one can be required to be his own betrayer or in its popular English mistranslation "the right to silence." That is why there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair. Outside this limited field in which for historical reasons the function of the trial judge extended to imposing sanctions for improper conduct on the part of the prosecution before the commencement of the proceedings in inducing the accused by threats, favour or trickery to provide evidence against himself, your Lordships should, I think, make it clear that the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law.

Is there any principled distinction between confessions and evidence analogous to confessions obtained after the commission of the offence (for which a discretion to exclude on the grounds of impropriety exists) and either evidence not analogous to confessions, or evidence obtained before or during the commission of the offence (for which no such discretion exists)?

If indeed the *Sang* exception for violations of *nemo debet* (ie the privilege against self-incrimination) is merely a historical vestige of the judicial role in the bad old days, then does any contemporary reason exist for the privilege itself? If no strong contemporary rationale exists for the privilege, can

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we expect judges to take the discretion to exclude seriously? Are there rights and interests more important than *nemo debet* which might be protected by the power to exclude improper evidence – eg right to have law enforcers respect the law, right not to be subject to illegal law enforcement practices?

What might evidence analogous to confessions mean?

(c) The Sequel to *Sang*:

In 1984, both Lords Scarman and Fraser (who were party to *Sang*) sponsored legislation in the House of Lords to confer on the courts a discretion to exclude unlawfully obtained evidence unless the prosecution could show that overriding interests of justice required the admission of such evidence. When legislation was enacted under the Police and Criminal Evidence Act 1984, this provision was passed into law (see generally Michael Zander, *The Police and Criminal Evidence Act 1984*, 1990. Sweet and Maxwell, pg 197-204):

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

This is considered by most to have been a statutory reversal of *Sang*, and a restoration of the “misunderstanding” of *Kuruma*, and presumably a rejection of the view that judges should only care about the forensic accuracy of the trial. Has the line between trial and pre-trial process been largely erased by these developments?

Should all this have had a bearing on how *How* ought to have been decided?

(d) The Sequel to *How*:

A few years later, Yong CJ was to revisit the embrace of *Sang* in *SM Summit Holdings v PP*, [1997] SGHC 255, HC:

[extract]

Questions:

I. What exactly was the “*Summit* exception” to *Sang*?

i) What is the difference between illegality or impropriety which “merely induces” the accused to commit the offence, and illegality which itself constitutes an essential ingredient of the offence? Why ought this distinction to result in admission of evidence in one case and exclusion in the other? Compare:

A. undercover narcotics officers instigating a suspected supplier to sell illicit drugs to them (mere inducement)

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B. undercover narcotics officers instigating a suspected distributor to buy illicit drugs from them, and then handing over illicit drugs to the suspected distributor (essential ingredient of offence)

Why should either kind of illegality be particularly malignant?

ii) How significant was it that the “enforcer” was a private organization and not an official law enforcement official? Should the private or public nature of the illegality mean that we should lean towards either admissibility or exclusion?

iii) Should it matter that the improperly obtained evidence was being sought to be used in the context of justifying a search warrant, as opposed to being used to support a criminal conviction?

iv) How important is it that Summit may not have thought that the master CDs given to them were illegitimate?

II. Why is the *Kuruma/Bunning/Collins* conception of a discretion to exclude illegally obtained evidence “unworkable”?

- i) if uncertainty or subjectivity were to make a discretion unworkable, what kinds of discretions would be considered workable. Eg the exercise of prosecutorial or sentencing discretion is not an exact science, and different decision-makers might well decide differently – does that make either discretion “unworkable”? It is not odd that 3 major common law jurisdictions – UK, Australia and Canada – have opted for an unworkable discretion?
- ii) is the “bright-line” difference between “mere inducement” and “essential element of the offence” a more satisfactory solution?

III. A High Court of 3 Judges in *Law Society v Tan Guat Neo Phyllis* [2007] SGHC 207 disagreed with *Summit Holdings*:

[extract]

Law Society v Tan Guat Neo Phyllis

[2007] SGHC 207, Chan CJ, Phang and Ang JJ

[extract]

Questions:

1. Should we be concerned that a) this pronouncement is technically unnecessary for the disposal of the case and therefore obiter, and b) it is a High Court decision, and therefore technically of the same authority as *Cheng Swee Tiang* and *Summit Holdings*, and of lower authority than *How Poh*

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Sun, a Court of Appeal decision? Was it permissible for a High Court, albeit of 3 judges, to declare that a Court of Appeal decision was wrong?

2. Consider the possible responses that are on the table:

Criminal Law Responses

- i) illegality as a substantive defence - as in the US
- ii) illegality as a mitigating factor - as in the English common law (*Sang*)

Evidential Responses

- iii) illegality as automatic exclusion of evidence obtained thereby, as in the US, (or a version of it in *Summit*)
- iv) illegality triggering a judicial discretion to exclude evidence - as in *Cheng/Kuruma/s78 PACE*, *Bunning v Cross* (Australia), *Collins* (Canada)

Procedural Responses

- v) illegality as grounds to stay a prosecution – as in the English common law (*Loosely*)

Constitutional Responses

- vi) illegality rendering the decision to prosecute and abuse of prosecutorial discretion (*Phyllis*)
- vii) illegality rendering the trial unfair (European Court of Human Rights – *Teixeira, Ramanauskas*)

I. On what basis should illegality not be a substantive defence, but something which ought to be allowed to be considered in mitigation? What if it is an offence for which no mitigation is possible?

II. Which do you prefer, exclusion of evidence – which would still allow conviction if other untainted evidence is available, or responses such as substantive defence, stay and judicial review – which would automatically result in a failure to convict the accused.

III. How is a stay of prosecution different from a judicial review order quashing a decision to prosecute?

IV Was it right of the court to have focused on the “institutional” aspects of constitutional law – ie demarcating the prosecutorial and judicial sphere – and not on the human rights implications of illegal law enforcement? Consider these pronouncements of the European Court of Human Rights, *Ramanauskas v Lithuania*, 5 Feb 2008:

[extract]

Can you mount an argument that as the Constitution of Singapore also confers a right to a fair trial, we should adopt a conception of fairness along the lines of European Court jurisprudence?

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3. Consider the Court's holding on the preclusion of a discretion to exclude illegal evidence on the ground of inconsistency with the "overarching principle" of the Evidence Act that all relevant (used in the modern sense) evidence is admissible subject only to any rule of exclusion found in the Evidence Act. If this is correct, then what could section 2(2) possibly mean – presumably all rules of evidence not found in the Evidence Act (or other legislation) would be inconsistent with this overarching principle? How else can section 2(2) be interpreted?

4. Consider the Court's decision to favour the Australian position of *Ridgeway* (that there is no power to stay a prosecution on the basis of pre-trial illegality) over that of the UK in *Loosely* (that there is such a power).

i) Why should the court be concerned only about illegitimate prosecutorial motivations, and not about illegitimate law enforcement methods – is one or the other more or less likely to bring the process of the court into disrepute? Is *Ridgeway* acceptable in Australia because the court already has a discretion to exclude illegal evidence – unlike Singapore?

ii) Was the Court at liberty to disagree with *Loosely*? If the power to stay a prosecution is not a rule of "evidence", then why does section 5 of the Criminal Procedure Code not apply to bind a Singapore court to follow the law in force in England:

As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in Singapore the law relating to criminal procedure for the time being in force in England *shall be applied* so far as the procedure does not conflict or is not inconsistent with this Code and can be made auxiliary thereto.

iii) Why should the constitutional separation of prosecutorial and judicial power rule out a discretion to stay proceedings on the ground of abuse of process? Why does the power to stay an illegitimately motivated prosecution not breach this constitutional separation of powers? Is our constitutional system materially different from that of the UK – if our system is based on the "Westminster model", and presumably the government of the UK still is, then is the Court saying that the House of Lords in *Loosely* had violated a fundamental tenet of the Westminster model, perhaps without realizing it?

5. Consider the Court's ultimate choice of judicial review on the basis of abuse of prosecutorial discretion.

i) Why is this path not similarly a transgression of the constitutional separation of judicial and prosecutorial power (as was a power to stay a prosecution)?

ii) Do you expect judicial review on the basis of abuse of prosecutorial discretion to produce the same result as a power to stay a prosecution on the grounds of illegal law enforcement behaviour? Would a judge on an application for judicial review not have to consider whether it was an abuse of prosecutorial discretion to have brought charges under such tainted circumstances? Can it be predicted that circumstances which would move a court in the UK to stay a prosecution would also move a Singapore court to declare a prosecution to have been unreasonably brought?

iii) The court categorized the situations in which it would intervene into two – in bad faith for an extraneous purpose, and where there is a contravention of constitutional rights.

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I. Consider these examples:

An example of such abuse is where the court process is being used to try the defendant on a criminal charge in order to harass him or teach him a lesson when the Prosecution has no or insufficient evidence to justify the charge, or for some extraneous purpose other than to convict and punish the defendant as an offender. Another example might be where the defendant has been promised immunity from prosecution by the prosecuting authorities in exchange for assisting the police in their investigations. Yet another example might be where the defendant is charged with a more serious charge (without any or sufficient evidence to support it) in order to pressure him to plead guilty to a charge for a less serious offence.

If indeed there were evidence of an intent to harass, or prosecution for an extraneous purpose, or an intent to prefer a more serious charge than is warranted, why is it necessary to show that there was insufficient evidence to support the charge preferred? Should the test not be whether or not the same charge would have been preferred, if at all, if there had not been such an extraneous purpose – regardless of the sufficiency of evidence? Why would it be wrong to confer immunity in exchange for assisting the police – would it also apply to reducing a charge?

II. Why must there be a contravention of “constitutional rights” - why does the source of the right matter? Does the court mean that constitutional rights must be violated by the prosecution itself, or is the court saying that a breach of constitutional rights in the pre-trial process will do? Eg what do we do with statements or evidence extracted from the accused in breach of his constitutional right to counsel?

Is an argument based on breach of equal protection bound to fail in that there will always be a justifiable reason to distinguish the person entrapped and the person entrapping him? Or can it be argued that the targeted individual has been singled out unjustifiably to be subject to state entrapment – when other individuals are not? Does this dovetail with the European Court’s requirement of an existing disposition to commit crimes?

Can it be argued that, consistently with European jurisprudence, the use of illegitimate enforcement methods can render a trial unfair, and therefore in breach of the constitutional right to a fair trial? Assess the situations in which the European Court would hold that the right to a fair trial has been breached on account of illegitimate enforcement – do you agree? Note that we have come full circle with the terminology of “fairness” (the term originally employed in *Kuruma/Cheng*). In what sense does illegitimate pretrial process render a trial unfair? Does the Singapore constitution confer a right to a fair trial?

iv) The court also declared that it would intervene only in “very exceptional” situations because the prosecutorial power is a constitutional one. Why should the source of the power matter – if the power had been conferred in the Criminal Procedure Code only and not in the Constitution, should cases be decided differently? Note that the European Court of Human Rights has on a number of occasions declared illegitimate enforcement to have violated the right to a fair trial.

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LECTURE 7: EVIDENTIAL UNCERTAINTY: BURDEN OF PROOF AND CORROBORATION**LECTURER: MICHAEL HOR****The Context and the Principle***XP v Public Prosecutor*

[2008] 4 SLR(R) 686; [2008] SGHC 107, HC(Appellate), VK Rajah JA, 4 July 2008

[extract]

Parliamentary Debates 2008-08-25

The Minister for Law (Mr K Shanmugam):

[extract]

QuestionsOn the Presumption of Innocence

1. Why should the presumption of innocence be “the cornerstone of the criminal justice system and the bedrock of the law of evidence”? What is wrong is a “presumption of guilt”? Consider this articulation of the rationale for the presumption of innocence (Brennan J, *Winship* USSC (1970) 397 US 358):

The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction . . . Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Does society not also have at stake “interests of immense importance”, especially where the alleged offence is grave and significantly injurious in some manner to society and its sense of safety? Why do “the needs of many” not “outweigh the needs of the few” (Spock, *The Wrath of Khan*, 1982)? Is it really true that the presumption of innocence is “indispensable to command the respect and confidence of the community”? Does “the community” differ from jurisdiction to jurisdiction in this respect – can socio-cultural peculiarities account for differences in the indispensability of the presumption of innocence?

Consider also the potential argument that the inequality of resources – the full force of the Government vs the individual – might also be a reason for the presumption of innocence.

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2. What should be the content of “the presumption of innocence”? Must it inevitably mean that guilt must be proven “beyond reasonable doubt”? Consider the definition of “proved” in the Evidence Act (s 3(3)):

A fact is said to be “proved” when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

This provision does not, on its face at least, draw any distinction between proof in a criminal prosecution and proof in a civil proceeding. Can we safely discount the possibility that the intent was to equate the burden of proof in criminal and civil cases, and to set the common bar at proof on a balance of probabilities instead?

What do you make of these pronouncements of Lord Diplock in *Ong Ah Chuan* [1980] SGPC 6:

[extract]

Does the Privy Council not deny the very existence of the principle of proof beyond reasonable doubt (and the presumption of innocence) in Singapore constitutional and criminal jurisprudence – does “material ...logically probative of facts sufficient to constitute the offence” not include situations in which the evidence is far from proof beyond reasonable doubt? Does Rajah JA not contradict the Privy Council by holding that the presumption of innocence (now apparently a term no longer “misleading”) is a “cornerstone” and “bedrock” of the criminal justice system in Singapore? Is *Ong Ah Chuan* no longer good law in this respect?

Consider these possibilities:

prosecution must prove guilt beyond a reasonable doubt,

prosecution must prove guilt on a balance of probabilities,

accused must disprove guilt on a balance of probabilities,

accused must disprove guilt beyond a reasonable doubt

Which of these is more consonant with our statutory and constitutional provisions and case-law; and which commends itself to you as a matter of principle or policy?

3. What exactly is proof “beyond reasonable doubt”? What is line between “no doubt” (certainty), “fanciful doubt” (shadow of a doubt) and “reasonable doubt”? Is it possible or helpful to define, describe or reduce the concept of “reasonable doubt” any further?

4. What do you make of the debate between the Attorney-General/Minister of Law and VK Rajah JA/members of the public (there were several letters to the press) over the implications of an acquittal? While there is indeed no doubt that there can be an acquittal although the accused might in truth be “factually guilty”, do you agree with VK Rajah JA that that possibility is no longer relevant and to be discounted for all governmental purposes, or with the AG/Minister that we should still

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take it into account for collateral issues like compensation for defence costs? Does the presumption of innocence bite only with respect to the question of conviction and acquittal, but with respect to nothing else? For example, can the possibility of “factual guilt” be taken into account if the acquitted accused wishes to apply for a job - the accused in this case eventually resigned from his teaching position, what if he sought reappointment as a teacher? What exactly is thought to be wrong about a system of compensation for defence costs which follows presumptively, save in exceptional situations, on an acquittal – Can the government not afford it? Are there really “many who may in fact have gotten away on a technicality” – can you think of just one recent example? Why was no apparent consideration given to the fact that the accused might well have been put to great expense to defend himself or herself? Why should the question of criminal costs be different from civil costs, which normally follow “the cause” – ie the loser compensates?

On Corroboration

1. What exactly is the law (or practice) on the need for corroboration of witness testimony, which is normally contradicted by the accused?

Consider these provisions which seem to point to a “discretionary” system (apparently favoured by Rajah JA) where there are no special rules or practice, and the only device necessary is the rule of proof beyond reasonable doubt:

Section 136, Evidence Act:

No particular number of witnesses shall in any case be required for the proof of any fact.

Section 135(2), Evidence Act:

Any rule of law or practice whereby at a trial it is obligatory for the court to warn itself about convicting the accused on the uncorroborated testimony of an accomplice is hereby abrogated.

Now consider these provisions which seem to indicate that there is something more at play than just proof beyond reasonable doubt, perhaps a mandatory warning, or even a mandatory corroboration “rule”:

Section 159, Evidence Act:

In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

READING LISTS & NOTES**Section 147(7), Evidence Act:**

Notwithstanding any other written law or rule of practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement which is admissible in evidence by virtue of this section [previous inconsistent statement] shall not be capable of corroborating evidence given by the maker of the statement.

Section 24(1), Prevention of Corruption Act (also section 13, Kidnapping Act):

In any trial or inquiry by a court into an offence under this Act or under sections 161 to 165 or 213 to 215 of the Penal Code [corruption offences] or into a conspiracy to commit, or attempt to commit, or an abetment of any such offence the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the court as corroborating the testimony of any witness in the trial or inquiry that the accused person accepted or obtained or agreed to accept or attempted to obtain any gratification and as showing that the gratification was accepted or obtained or agreed to be accepted or attempted to be obtained corruptly as an inducement or reward.

Section 261(1), Criminal Procedure Code 2010:

Where in any criminal proceeding evidence is given that the accused on being charged with an offence, or informed by a police officer or any other person charged with the duty of investigating offences that he may be prosecuted for an offence, failed to mention any fact which he subsequently relies on in his defence, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, the court may in determining —

- (a) whether to commit the accused for trial;
- (b) whether there is a case to answer; and
- (c) whether the accused is guilty of the offence charged,

draw such inferences from the failure as appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

Section 6(1), Seditious Act:

Notwithstanding anything to the contrary in the Evidence Act, no person shall be convicted of an offence under section 4 [of sedition] on the uncorroborated testimony of one witness.

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2. Consider the these contexts:

a) Sedition:

Why should sedition, exceptional amongst all offences, require corroboration as a rule? Why is the principle of proof beyond reasonable doubt thought to be insufficient for this set of offences?

b) Accomplices:

Why was there once (apparently) a mandatory warning against conviction on uncorroborated accomplice evidence? Why was it abrogated? What is position post-abrogation – does any regime or protocol exist at all – see the “unusually convincing” formula for sexual offences below? What accounts for the change – have accomplices become more reliable, or have judges become better able to deal with uncorroborated testimony?

c) Victims of sexual offences:

Consider Rajah JA’s summary

there is no formal legal requirement for corroboration (see s 136 of the Evidence Act), nor is it a strict rule that judges must remind themselves of the danger of convicting based on the testimony of one complainant. However, there is good reason for the case law-devised reminder that a complainant's testimony must be unusually convincing in order to prove the Prosecution's case beyond a reasonable doubt without independent corroboration

...

Since the warning is not a rule of law and as s 136 of the Evidence Act expressly does away with the formal, legal need for corroboration, a judge who concludes that a witness's testimony is unusually convincing will not be bound to formally direct himself as such. If the appellate court disagrees on the evidence that the witness was unusually convincing, or finds a reasonable doubt notwithstanding the ostensible credibility of the testimony, then the conviction will be set aside because a reasonable doubt exists, and *not because* the judge did not remind himself of the standard.

Is there a contradiction between the existence of a “case law-devised reminder” and the position that even if a judge does not issue the reminder, no consequences are to follow? If the all we need is the touchstone of proof beyond reasonable doubt, then why did case law bother to devise the additional “unusually convincing” test? What possible additional content can the unusually convincing test add to the standard of proof beyond reasonable doubt?

Consider that there was no statutory abrogation (akin to s135(2) for accomplice testimony) of whatever corroboration regime that might have existed in the past for victims of sexual offences. Should this mean that it was the statutory intent to change the accomplice rule but to leave victims of sexual offences to the existing law (of mandatory warnings?)

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d) Child witnesses:

Consider this summary in *B* [2002] SGHC 290

In the situation where the complainant of sexual abuse is a child, the manner in which the court should treat the evidence of the child witness is no different from that accorded to the evidence of an adult witness. In other words, the court can only convict the accused on the uncorroborated testimony of the child complainant if the court is satisfied that the child's evidence is so reliable or unusually compelling

...

In determining the reliability of the evidence in question and hence the corresponding weight to be accorded to it, the court should always assess the evidence in the light of all the circumstances of each case as well as the accumulated knowledge of human behaviour and common sense. Consequently, where the assessment of the overall reliability of the evidence of a child witness is concerned, it is prudent for the court to be mindful that children, depending on their level of intellectual maturity, may occasionally confuse fantasy with reality.

If the testimony of a child witness is to be treated no differently from that of an adult witness, why is it then necessary to state that it would be prudent for the court to be mindful of a child witness' intellectual maturity? What if the trial judge actually treats the child witness no differently from an adult witness and makes absolutely no mention of the age of witness in the grounds of decision?

Again, unlike accomplices, the regime for child witnesses was never the subject of any statutory abrogation. Is this significant?

e) Eye-witness identification

Consider the adoption of the *Turnbull* regime for identification evidence in *Heng Aik Ren Thomas* [1998] SGCA 47:

[extract]

Why is it that uniquely for identification evidence the elaborate *Turnbull* regime is thought to be almost compulsory – “failure to follow ...is likely to result in a conviction being quashed”? Why is the touchstone of proof beyond reasonable doubt thought to be insufficient for identification evidence?

3. Where it is really a situation of “oath against oath” – ie the testimony of, say, the alleged victim of a sexual offence is contradicted by the testimony of the accused, and there is no corroboration for either testimony – how can a trial judge ever come to the conclusion that there is nonetheless proof of guilt beyond a reasonable doubt? In the absence of corroborative evidence, on what basis can a judge ever say that one witness is to be preferred over the other? What is wrong with a general rule that there cannot be a conviction which is founded solely on the uncorroborated (and contested) testimony of a prosecution witness (or co-accused)?

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Criminal Burdens: Exceptions to the Presumption of Innocence

Evidence Act:

103. —(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

105. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

(a) A prosecutes B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

107. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code (Cap. 224), or within any special exception or proviso contained in any other part of the Penal Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

Illustrations

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances, bringing the case under section 335, lies on A.

108. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

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(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

3. (3) A fact is said to be “proved” when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Jayasena v The Queen [1970] 1 AC 618, PC Ceylon (adopted in Singapore, eg *Vijayan v PP* [1975] SGCA 5), Lord Devlin; for our purposes the Evidence Act of Singapore does not differ materially from the Evidence Ordinance of Ceylon.

[extract]

Questions:

On “Exceptions” in the Penal Code

1) Consider the core holding that the word “prove” (and cognate expressions) in the Evidence Act can only mean “the legal burden” of establishing the case (on a balance of probabilities), and never “the evidential burden” of adducing some evidence in support of the case (which has the potential of amounting to reasonable doubt):

a) Does the definition of “prove” in s3 preclude an “evidential burden”?

b) Has the Privy Council got its history correct? Consider this near contemporaneous (the Indian Evidence Ordinance was enacted in 1872) account of Professor Thayer of Harvard Law School, *A Preliminary Treatise on Evidence at the Common Law*, p355, 1898:

In legal discussion, this phrase, “the burden of proof,” is used in several ways. It marks, (1) The peculiar duty of him who has the risk of any given proposition on which parties are at issue, — who will lose the case if he does not make this proposition out, when all has been said and done. In saying “the peculiar duty,” I mean to discriminate this duty from another one, called by the same name, which this party shares with his adversary. (2) It stands for the duty last referred to, when discriminated from the other one; that is to say, the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion. (3) *There is an undiscriminated use of the phrase, perhaps more common than either of the other two, in which it may mean either or both of the others.*

2) Is *Jayasena* consistent with the clear holding that the accused bears only an “evidential burden of production” if he or she raises the defence of alibi? Consider *PP v Ramakrishnan v PP* [1998] SGHC 273:

if the defence was one of alibi, I took the view that s 105 would operate such that the appellant must bear the evidential burden of production (and not the legal burden of

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persuasion which is on a balance of probabilities) to raise the issue of alibi. In *Syed Abdul Aziz v PP* [1993] 3 SLR(R) 1, the Court of Appeal stated as follows at [35]:

It was also submitted that the learned trial judges had misapplied the burden of proof on the Prosecution when the defence of alibi is raised. The burden of proving the guilt of an accused is with the Prosecution. Where the accused raises an alibi, the burden of proving the alibi is on the accused but this is only an evidential burden and all that the defence has to do is to raise a reasonable doubt (see *Yau Heng Fang v PP* [1985] 2 MLJ 335 ; *Illian v PP* [1988] 1 MLJ 421). The learned trial judges have in their grounds specifically referred to *Woolmington v The Director of Public Prosecutions* [1935] AC 462 and to the duty on the Prosecution to prove the prisoners' guilt beyond reasonable doubt. Although the learned trial judges did not say so in so many words, it is clear to us that they accepted that in order to raise an alibi the defence need only raise a reasonable doubt. We therefore reject the submission that the learned trial judges had misapplied the burden of proof.

34 Therefore, the Prosecution would still retain the burden of proof beyond reasonable doubt, with the result that an acquittal must follow from reasonable doubt that the appellant might have been elsewhere at the material time.

3) Is there any reason why the “legal burden” of persuasion (on a balance of probabilities) *should* be cast on an accused who pleads provocation or self-defence? For example, in a prosecution for murder, an accused person who admits killing the victim but who argues that it was done by accident need only raise a reasonable doubt – what principle or policy drives a different rule for an accused person who pleads self-defence instead?

4) If the presumption of innocence has a constitutional status, can *Jayasena* withstand constitutional scrutiny?

PP v Kum Chee Cheong [1993] SGCA 95

[extract]

Mary Ng v R [1958] MLJ 108, PC Singapore

[extract]

Questions

On “Exceptions” in general and “Especial knowledge”

1. How is the court to determine whether or not a fact is “especially within the knowledge” of the accused for the purpose of s 108? In what sense is the fact of insurance coverage (*Kum Chee Cheong*) especially within the knowledge of the accused, but not the fact that the representation made by the accused (*Mary Ng*) was false?

2. Is especial knowledge a good reason to cast the burden of persuasion on the accused to disprove on a balance of probabilities? Is it a good reason to cast the “evidential” burden of adducing or producing evidence? Why should the court countenance “implied” reversals of the (persuasive) burden of proof – why should the court not simply rule that legal burdens of persuasion rests with the prosecution unless statute expressly provides otherwise? Can 107 and 108 withstand constitutional scrutiny?

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3. Is *Kum Chee Cheong* correct in apparently unifying the criterion for reversal of burdens in s 107 (exception and proviso) and s 108 (especial knowledge)?

PP v Yuvaraj [1969] 2 MLJ 89, PC Malaysia, cited with approval in Singapore.

[extract]

Ong Ah Chuan v PP [1980] SGPC 6

[extract]

Questions

On Presumptions

1. Consider the reasoning in *Yuvaraj*. If considerations of “public policy” entitles the court to create two different standards of “proof” – beyond reasonable doubt for criminal prosecutions and on a balance of probabilities for civil cases, why was it illegitimate for the court to create yet another standard – that of raising a reasonable doubt, perhaps on the basis that a reasonable man, in a criminal prosecution, would give the accused the benefit of the doubt and act on the supposition that a fact exists, if there is sufficient evidence to raise a reasonable doubt?

Consider also, especially for civil proceedings, the possibility of intermediate standards of proof:

Eg 1 where fraud is alleged, the party alleging must do “more” than proof on a balance of probabilities (*Tan Yoke Kheng v Lek Benedict* [2005] SGCA 27, what in US jurisprudence is called the “clear and convincing” standard;

Eg 2 where an equitable set-off is claimed, something less than the usual proof on a balance of probabilities is sufficient (*Cooperative Centrale v Motorola* [2010] SGCA 47). If something less than the usual proof on a balance of probabilities can be countenanced for a equitable set-offs (because “a court of equity would impose such an equitable set-off in the presence of slight evidence to ameliorate the harshness of the strict legal requirement of proof “), why can it not be so for rebutting criminal presumptions, where it might be argued, there is a similar if not greater need to ameliorate the harshness of strict legal requirements?

2. Do you agree with *Yuvaraj* that construing a statutory presumption to cast only an evidential burden of production was unacceptable because it would give “no sufficient effect” to the presumption? Note that *Yuvaraj* is probably no longer acceptable in the UK where statutory presumptions may now be “read down” to impose only an evidential burden of production, because a reversal of the legal burden of persuasion would “impermissibly [infringe] the presumption of innocence”: *Sheldrake* [2005] 1 AC 264.

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3. Why precisely did the Privy Council in *Ong Ah Chuan* believe the drug presumption to be constitutionally acceptable:

- that the presumption of innocence required the existence of merely probative evidence?
- that the fact triggering the presumption (possession) was itself illegal?
- that such reversal of onus provisions are a common feature?
- that illicit drugs are unusually dangerous to society?
- that the Canadian legislation provided for a presumption without a specified minima? Note that the Canadian provision concerned was subsequently found to be an unconstitutional violation of the presumption of innocence: *Oakes*, [1986] 1 SCR 103.
- that “innocent” accused persons (who in fact did not intend to traffic in those drugs) will be able to rebut the presumption?

Are any, or any combination, of these reasons a convincing justification for making an exception to the presumption of innocence?

4. Consider these dicta in *Tan Kiam Peng v PP* [2007] SGCA 38:

[extract]

Do you agree with the Court of Appeal that:

- a) “truly innocent persons” will be able to rebut presumptions such as these? What if the truly innocent accused is able only to raise a reasonable doubt, but not prove on a balance of probabilities? If an innocent accused will always be able to rebut such presumptions, then is it the case that the presumption of innocence and the principle of proof beyond reasonable doubt serves no useful function at all?
- b) on what basis does the Court hold the view that without the drugs presumptions, there would be a “frustration of the general policy of the act” resulting in social ills and tragedy? Does the Court imply that any jurisdiction which has successfully kept illicit drugs under control invariably have presumptions in their drugs legislation?

References:

On Corroboration

Hor, “Corroboration: Rules and Discretion in the Search for Truth” [2000] Singapore Journal of Legal Studies 509.

READING LISTS & NOTES**On Burden of Proof**

Hor, "The Burden of Proof in Criminal Justice" (1992) 4 Singapore Academy of Law Journal 267.

Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] Singapore Journal of Legal Studies 365

These are listed here because they might throw some light on the way the material was organised, and not because of they are inherently more worthy than other works. Please feel free to consult other articles (easily searchable on Lawnet) and the relevant chapters in the usual monographs.

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LECTURE 8: TESTIMONY AND PRINCIPLE OF ORALITY**LECTURER: MICHAEL HOR*****Competence, Compellability, Privileges***

Pinsler, Ch 11, Sect D (pp 380-386)

1. Who is competent? (Who CAN testify?)
 - (a) Evidence Act, s 120-1:

Central Concept: Understanding questions put to witness and capacity for giving rational answers: *Kee Lik Tian v PP* [1984] 1 MLJ 306
 ‘Tender years’: *R v Hayes* [1977] 1 WLR 234
 ‘Extreme old age, disease etc’: *Chai Kor Pee v PP* [1965] 2 MLJ 208 (deaf & dumb)
 - (b) Spouses as Witnesses

Civil Cases: s 122(1)
 Criminal Cases: s 122(2)
 - (c) Criminal Cases – the Accused

S 122(3): competent for himself or co-accused (person jointly charged with him) but incompetent for the prosecution
2. Compellability (Who MUST testify)
 - a. General rule: competency entails compellability – *Ghouse b Haji Kader Mustan v R* [1964] MLJ 36;
 - b. Exception: Accused persons – competent but not compellable
 - i. In joint trials, competent for themselves and co-accused, but not compellable: *Lee Teck Wah v PP* [1998] 1 SLR(R) 726;
 - ii. Co-accused to be distinguished from accomplices – who can give evidence for the prosecution, but there must be caution re such evidence: *Sharom b Ahmad & Anor v PP* [2000] 2 SLR (R) 541. See s 135, s 116(b) Evid Act.
 - c. Spouse of Accused/co-accused: should a spouse be allowed to choose whether to testify against his/her accused wife/husband? General rule applies – competency entails compellability. Cf privilege for marital communications below.
3. Oaths and Affirmation
 - a. Summoned competent witnesses must either take an oath or affirm: Oaths & Declarations Act (Cap 211, 2001 Rev Ed), s 4(1)(a); where the witness is a Hindu or Muslim or of a religion that does not regard oaths as binding, or where there is a conscientious objection to take an oath, the witness must affirm: s 5(a) (b) Oaths & Declarations Act;
 - b. Children as witnesses: s 6 Oaths & Declarations Act

Caution in lieu of oath or affirmation

6. Where a person required by section 4 or any other written law to take an oath ought not, in the opinion of the court or person acting judicially, to take an oath or make an affirmation by reason of immaturity of age, he may, instead of taking an oath or making an affirmation, be cautioned by the court or person acting judicially to state the truth, the whole truth, and nothing but the truth.

Quaere: Is the exhortation sufficient or is there a duty to ascertain whether the child understands the meaning of telling the truth, or is it sufficient if the

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judge simply ascertains whether the child is competent, and then exhorts him to tell the truth?

- c. Accused not allowed to give unsworn statements: s 291, CPC 2010 (but where he is unrepresented by counsel, he may address the court without being sworn or affirmed in circumstances where if he were represented, his counsel could do so.)

4. Privilege (Who can refuse to answer questions while in the witness box)

Pinsler, Ch 15 (Privilege & Immunity) esp pp 575-592

- a. Generally a witness cannot decline to answer questions asked of him in the witness box unless the judge rules that he can refuse to answer. However, certain witnesses could refuse to answer by exercising a 'privilege' – the following privileges are covered in this course: privilege against self-incrimination (especially in relation to the accused), marital communications privilege and 'privileges' claimed by state ministers or officials (sometimes referred to as 'public interest immunities'). Another set of important privileges in terms of practice are legal professional privilege, and 'without prejudice' claims (these will be dealt with separately in greater detail in another part of the course). Also dealt with in another part of the course is the privilege against self-incrimination, as this is linked with the topic of right to silence.
- b. Private privilege: marital communications – s 124 Evid Act:

Communications during marriage

124. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

Lim Lye Hock v PP [1994] 3 SLR(R) 649 (cf. *Ghouse bin Haji Kader Mustan v R* [1946] MLJ 36. (See Ho HL, 'Spousal Testimony on Marital Communications as Incriminating Evidence' [1995] 2 SJLS 236.); Loss of privilege: *Rumping v DPP* [1964] AC 18

- c. Public Policy: State immunities from disclosure

- i. Affairs of State

Evidence as to affairs of State

125. No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the Department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister.

- ii. Official Communications

Official communications

126. —(1) No public officer shall be compelled to disclose communications made to him in official

confidence when he considers that the public interest would suffer by the disclosure.

(2) No person who is a member, an officer or an employee of, or who is seconded to, any organisation specified in the Schedule to the Official Secrets Act (Cap. 213) shall be compelled to disclose communications made to him in

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official confidence when he considers that the public interest would suffer by the disclosure.

Both these 'privileges' are rarely litigated upon: see **Zainal bin Kuning and Others v Chan Sin Mian Michael and Another [1996] 3 SLR 121; [1996] SGCA 47; Chan Hiang Leng Colin and others v Public Prosecutor [1994] 3 SLR(R) 209; [1994] SGHC 207**. In both these cases, the court took the initiative to refer to the 'privileges' even though the relevant Ministers and officials did not file any affidavits claiming such 'privileges'. The view seems to be that it is up to the party requesting the documents to justify disclosure.

iii. Informers

Information as to commission of offences

127. —(1) No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

(2) No revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue or the excise laws.

Explanation. — "Revenue officer" in this section means any officer employed in or about the business of any branch of the public revenue or in or about the business of any Government farm.

Informers are also protected in specific statutes: see s 23 Misuse of Drugs Act (Cap 185, 2001 Rev Ed); *Mohd Emran b Mohd Ali v PP* [2008] 4 SLR 411; [2008] SGHC 103.

Cf the doctrine of 'public interest immunity' spawned by the English courts starting with *D v NSPCC* [1978] AC 171. English courts are far more willing to examine the claims of government ministers and officials that disclosure would not be in the public interest.

R v Chief Constable of West Midlands, Ex p Wiley [1995] 1 AC 274.

The problems of accepting a government claim that disclosure would not be in the public interest is especially difficult if such documents are needed for proving an accused's innocence: see Lord Bingham's judgment in *R v H* [2004] 2 AC 134 reviewing the English history of disclosure in criminal trials when public interest immunity concerns arise.

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LECTURE 9: LEGAL PROFESSIONAL PRIVILEGE**LECTURER: JEFFREY PINSLER****Local texts which may be useful**

Evidence and the Litigation Process (3rd Ed: 2010), chap 14; *Butterworth's Annotated Statutes of Singapore*, Vol 5, Evidence Act (1997), from p 349; *Halsbury's Laws of Singapore, Evidence* (Volume 10), pp 598-627; Chin TY, *Evidence* (1988), ch 9; and articles listed below.

Note: Some cases in this lecture outline are merely included for the purpose of illustrating specific points. The more important authorities will be emphasised in the lectures.

Brief introduction to Competence and Compellability: ss 120-122 of the Evidence Act ("EA").

Application of the EA:

- EA, s 2(1)
- *Yap Sing Lee v MCST No 1267* [2011] SGHC 24

Introduction and rationale

- *Greenough v Gaskell* (1833) 1 My & K 98
- *R v Derby Magistrates' Court* [1996] 1 AC 487
- *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367

Elements of s 128(1)

- *Balabel v Air India* [1988] 2 All ER 246.
- *Three Rivers District Council & Ors v Governor and Company of the Bank of England* (No. 6) [2005] AC 610.
- *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* [2006] 3 SLR(R) 441; [2007] 2 SLR(R) 367.
- *Smith v Daniell* 44 LJ Ch 189.
- *Minter v Priest* [1930] AC 558.
- *Re Sarah Getty v Getty Trust* [1985] 2 All ER 809.
- *Foo Ko Hing v Foo Chee Heng* [2002] 1 SLR(R) 664.
- *R v Peterborough Justices, ex parte Hicks* [1977] 1 WLR 1371.
- Chin Tet Yung, *Extending the Scope of Legal Advice Privilege* (2007) 19 SAclJ 133.
- Ho Hock Lai, *Legal Advice Privilege and the Corporate Client* [2006] SJLS 231.
- Ho Hock Lai, *Legal Professional Privilege and the Integrity of Legal Representation* (2006) 9 Legal Ethics 163.
- *Pinsler J, The Three Rivers District Council Saga: New issues of professional privilege for a Singapore court to decide* (2005) 17 SAclJ 596.

Exceptions: s 128(2)(a) and (b)

- Illustrations (a), (b) and (c),
- *Wheatley v Williams* (1836) 1 M & W 533.
- *Barclays Bank v Eustice* [1995] 1 WLR 1238.
- *Francis & Francis (a firm) v Central Criminal Court* [1988] 3 All ER 775.
- *Brown v Foster* (1857) 1 H&N 736

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- *Gelatissimo Ventures (S) Pte Ltd & Ors v Singapore Flyer Pte Ltd* [2010] 1 SLR 833

Waiver

- Sections 128(1), 130 and 131
- Order 24, rule 19 (Rules of Court)
- Also see under “Loss of Privilege” below.

Compatibility between s 128(1) and 131?

- *Alfred Crompton Amusement Machines v Commissioners of Customs and Excise (No 2)* [1972] 2 QB 102, at 129; [1974] AC 405, at 430-431 (HL).
- *IBM v Phoenix International (Computers)* [1995] 1 All ER 413.

Conflict between public interests

- *R v Barton* [1973] 1 WLR 115.
- *R v Ataou* [1988] 2 All ER 321.
- *R v Craig* [1975] 1 NZLR 597.
- *Carter v The Managing Partner, Northmore Hale Davy & Leake & Ors* [1995] 183 CLR 121.
- *R v Derby Magistrates' Court* [1996] 1 AC 487.
- *Carter v The Managing Partner, Northmore Hale Davy & Leake & Ors* [1995] 183 CLR 121.
- *R v McClure* [2001] 1 SCR 445.
- *R v Brown* (2002) 210 DLR (4th) 341.
- *R v Dunbar & Logan* (1982) 138 DLR (3d) 221.
- Tapper, *Prosecution and Privilege* (1996) 1 E & P 1.
- Pinsler J, *New Twists in Legal Professional Privilege: Communications for the Purpose of Litigation and Between the Lawyer and Client* [2002] 14 SAclJ 248.

Loss of privilege

- *Calcraft v Guest* [1890] 1 QB 759.
- *Goddard v Nationwide Building Society* [1986] 3 WLR 734.
- *Lord Ashburton v Pape* [1913] 2 Ch 469.
- *ITC Film Distributors v Video Exchange* [1982] Ch 431.
- *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd & Ors* [2009] 1 SLR(R) 42
- *Gelatissimo Ventures (S) Pte Ltd & Ors v Singapore Flyer Pte Ltd* [2010] 1 SLR 833
- *Butler v Board of Trade* [1971] Ch 680.
- *Istil Group Inc v Zahoor* [2003] EWHC 165; [2003] 2 All ER 252.

Litigation privilege

- *Ventouris v Mountain* [1991] 1 WLR 607.
- *Waugh v British Railways Board* [1980] AC 521.
- *Wee Keng Hong Mark v ABN Amro Bank NV* [1997] 1 SLR(R) 141.
- *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* [2006] 3 SLR(R) 441; [2007] 2 SLR(R) 367.
- *Brink's Inc & Anor v Singapore Airlines Ltd & Anor* [1998] 2 SLR(R) 372.
- Articles by Chin TY, Ho Hock Lai and J. Pinsler cited above.

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LECTURE 10: OPINION EVIDENCE**LECTURER: HO HOCK LAI**Read: Jeffrey D Pinsler, *Evidence and the Litigation Process* (LexisNexis, 2010, 3rd ed), ch 8A. Lay OpinionCategories under the EA

s 49: Opinion as to handwriting with which lay person is acquainted.

s 50: Opinion as to existence of right or custom.

s 51: Opinion as to usages, tenets, etc.

s 52: Opinion as to relationships between people.

s 53: Grounds of opinion.

Statement of opinion made as a way of communicating relevant facts*R v Davies* [1962] 1 WLR 1111*Sherrard v Jacob* [1965] NI 151*Graat v R* [19892] 144 DLR (3d) 267.

CPC 2010, s 277(3)

Julia Amanda Renata Amesbury (m.w.) v Singleton Marc Alexander and Another [2004] SGDC 120B. Expert OpinionScope of s 47(1) EA*Leong Wing Kong v PP* [1994] 2 SLR 54*Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] SGCA 1; [2008] 2 SLR 491*Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 16Qualifications of expert*PP v Muhamed bin Sulaiman* [1982] 2 MLJ 320*PP v Chong Wei Kian* [1990] 3 MLJ 165Necessity/justification for expert evidence*Ong Chan Tow v R* [1963] MLJ 160*PP v Tubbs* [2001] 4 SLR 75*Lowery v R* [1974] AC 75*R v Turner* [1975] QB 834. See also *Chou Kooi Pang v PP* [1998] 3 SLR 593 (drug offence case), at [11]-[12] and [16]-[17]*DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159'Ultimate issue'*DPP v ABC Chewing Gum*, above, at 163-164*R v Stockwell* (1993) 97 Cr App Rep 260, at 265-266Evaluation of expert testimony and conflicting expert testimony*Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd* [1984] 2 MLJ 202 at 208; [1984-1985] SLR 381

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Tengku Jonaris Badlishah v PP [1999] 2 SLR 260

Muhammad Jefry v PP [1997] 1 SLR 197

Saeng-Un Udom v PP [2001] 3 SLR 1, at [25]-[27]

Sakthivel Punithavathi v PP [2007] 2 SLR 983

Poh Soon Kiat v Desert Palace Inc [2009] SGCA 60; [2010] 1 SLR 1129

Khoo Bee Keong v Ang Chun Hong [2005] SGHC 128

Mühlbauer AG v Manufacturing Integration Technology Ltd [2010] SGCA 6; [2010] 2 SLR 724

Civil procedural aspects: O. 40 and O. 40A, Rules of Court (available from the Supreme Court website: <http://app.supremecourt.gov.sg/default.aspx?pgID=97>) Read: Pinsler, above, paras 17.37, 17.54