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ADMISSIBILITY OF STATEMENTS GIVEN BY AN ACCUSED PERSON TO A NON-LAW ENFORCEMENT OFFICER

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Section 258 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is the principal provision that governs the admissibility of an accused person's statement as evidence in a criminal trial in Singapore. It is trite that the provision enables statements given by an accused person to a law enforcement officer to be admissible, except where the statement was given involuntarily. But does the provision allow statements given by an accused person to someone who is not a law enforcement officer to be similarly admissible? That is the specific issue addressed in this short article.

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I. Introduction

1 Section 258 of the Criminal Procedure Code[1] ("CPC") is the principal provision that governs the admissibility of an accused person's statement as evidence in a criminal trial in Singapore. It is trite that the provision enables statements given by an accused person to a law enforcement officer to be admissible as evidence, except where the statement was given involuntarily. But does the provision allow statements given by the accused *to a person who is not a law enforcement officer*, say, for example, the accused's examining psychiatrist, to be similarly admissible? That is the specific issue addressed in this short article.

1 Cap 68, 2012 Rev Ed.

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2 For present purposes, the relevant sub-sections of s 258 are as follows:

> (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.
>
> (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.
>
> (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.
>
> …

By dint of hearsay concerns, out-of-court statements are, as a general rule, not admissible as evidence to prove the truth of the assertions in the statements.[2] Section 258 is essentially an exception to the rule *vis-à-vis* an accused person's out-of-court statements.[3] Notably as well, s 258 was introduced to the CPC during the CPC's overhaul in 2010, and is an amalgamation of s 122 of the pre-2010 version of the CPC, as well as ss 21, 24, 29 and 30 of the Evidence Act.[4] In the light of the introduction

2 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at ch 4.

3 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at para 5.001.

4 Cap 97, 1997 Rev Ed. See especially *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie editor-in-chief & Mohammed Faizal Mohamed Abdul Kadir gen ed) (Academy Publishing, 2012) at para 14.012:

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of s 258 of the CPC, these provisions in the Evidence Act were then repealed.

3 Recently, the High Court in the case of *Anita Damu v Public Prosecutor*[5] ("*Anita Damu*") doubted that s 258, specifically its sub-section (1), allows for an accused person's statement to a non-law enforcement officer to be admissible as evidence. The accused there had pleaded guilty to several offences arising from her acts of abuse against her domestic helper. The pivotal issue that would affect her sentence was whether the accused had experienced auditory hallucinations at the time of offending. The accused herself did not testify in the Newton Hearing,[6] but relied on reports from two psychiatrists. The reports stated that during the psychiatric examination, the accused had claimed to the psychiatrists that she experienced the hallucinations at the material time.

4 The lower court accepted the accused's claim based on what was disclosed in the reports, despite the Prosecution contending that the accused should have given direct evidence. On appeal, the Prosecution modified its stance and accepted that the accused's statement to the psychiatrists regarding the hallucinations was admissible under s 258(1), but sought to argue that in the light of all the evidence, the claim should in

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> Section 258 is an amalgamation of section 122 of the old CPC, as well as sections 21, 24, 29 and 30 of the Evidence Act … The rationalisation and consolidation of these disparate provisions into one omnibus provision … serves to address the disconnection of statutory provisions that are applicable for the admission of statements recorded by the police, and those recorded by other law enforcement officials. In particular, before the Code came into force, statements of accused persons recorded by police officers were admitted into evidence via section 122(5) of the old CPC. As section 122(5) of the old CPC was, from its unequivocal nomenclature, intended to apply only to statements furnished to "police officers", statements given to other law enforcement officers could only be admitted under sections 21 and 24 of the Evidence Act … With the introduction of section 258 of the Code, the admissibility of all statements made by accused persons now falls under one provision.

5 [2020] 3 SLR 825.

6 A Newton Hearing is a hearing specially convened, pursuant to s 228(5) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), during a plead guilty mention, for the court to hear any evidence to determine the truth or otherwise of matters raised before the court which may materially affect the sentence.

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the end be disbelieved.[7] The High Court, as mentioned, doubted the correctness of this reading of s 258(1).[8] However, the court's stance on this was purely *dicta*, because it found that whether the accused's claim was admissible under s 258(1) was not material to it arriving at a conclusion in the case, which was that the accused's claim should be disbelieved in any event.[9] It is also unclear whether in the court's view: (a) only statements made by an accused person to a non-law enforcement officer *and which is sought to be admitted by the accused as part of his case* (as was the situation in *Anita Damu*) is not admissible under s 258(1), or (b) all statements made by an accused person to a non-law enforcement officer are not admissible under s 258(1), even where it is the Prosecution who is trying to admit them as evidence.

5 Furthermore, the court did not appear to have had the benefit of submissions from parties on this particular issue. Yet, this issue will likely need to be confronted squarely in other cases, and would thus be of interest to criminal practitioners.[10]

6 It is thus opportune to reconsider this issue from scratch. Given that this is ultimately an issue of statutory interpretation (of s 258(1)), it is necessary to arrive at a conclusion by applying the three-step framework set out in *Tan Cheng Bock v Attorney-General*:[11]

> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
>
> (b) Second, ascertain the legislative purpose or object of the statute.
>
> (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

7 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [20]–[21].
8 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [38]–[41].
9 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [42].
10 See *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 for an example of a case which applied the position taken in *Anita Damu v Public Prosecutor* [2020] 3 SLR 825.
11 [2017] 2 SLR 850 at [37].

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II. Ordinary meaning of section 258(1)

7 There are three key observations arising from the plain text of s 258(1). First, the provision is very broadly framed. It permits the admissibility of *any* statement made by an accused person:

(a) whether made orally or in writing;

(b) made at any time;

(c) whether before or after the accused is charged; and

(d) whether or not in the course of any investigation carried out by any law enforcement agency.

The provision does not expressly exclude admissibility of statements made to a non-law enforcement officer. There are only two situations explicitly provided where an accused person's statement would not be admissible under s 258(1). This is where the statement was given to a police officer but the officer was below the rank of sergeant,[12] and where the statement was given by the accused involuntarily.[13]

8 Second, if s 258(1) is read to exclude admissibility of statements made to a non-law enforcement officer, the qualifying phrase "whether or not in the course of any investigation carried out by any law enforcement agency" would appear to be rendered otiose. This is because it is hard to conceive of any situation where an accused person would be making a statement to a law enforcement agency, other than in the course of an investigation by a law enforcement agency. Logically, the inclusion of the qualifier makes sense only if the provision also covers statements made by an accused person outside of an investigation, that is, to a person who is not (or is not acting as) a law enforcement officer. The presumption that "Parliament shuns tautology and does not legislate in vain" is generally a strong one,[14] and therefore s 258(1) should be read to exclude from its scope statements made to a non-law enforcement officer only if there is other very clear material supporting that narrow interpretation.

12 See s 258(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
13 See s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
14 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38].

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9 However (and third), a contextual reading of s 258 lends further support to the broad reading of s 258(1). Section 258(6)(*a*) states that:

> Notwithstanding any other provision in this section —
>
> (*a*) where a person is charged with any offence in relation to the making or contents of any statement made by him *to any officer of a law enforcement agency* in the course of any investigation carried out by the agency, that statement may be used as evidence in the prosecution.
>
> [emphasis added]

This sub-section is concerned specifically with a case of an accused person making a statement to a law enforcement agency, and is phrased explicitly to make that clear as such ("to any officer of a law enforcement agency"). In contrast, no such restriction is expressed in s 258(1). Indeed, as highlighted above,[15] s 258(1) is stated to apply to any statement made by an accused person, whether or not in the course of any investigation.

10 In sum, the ordinary meaning of s 258(1) appears quite clearly to be that it extends to any statement made by an accused person to a person who is not a law enforcement officer.

III. Legislative purpose of section 258(1)

11 The legislative purpose of s 258(1), as regards this specific issue, may be gleaned from extrinsic material such as the explanatory statement to the Bill introducing the revised CPC in 2010. It was stated that "[c]lause 258 relates to the admissibility of accused's statements. Where any person is charged with an offence, any statement made by him at any time is admissible in evidence at his trial".[16]

12 This is also consistent with the Minister's speech introducing the provision in Parliament, where it was explained

15 See para 7 above.
16 See Explanatory Statement to the Criminal Procedure Code Bill (Bill 11 of 2020).

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that the purpose or object of s 258 is to "[extend] the protection of the admissibility test to *all statements made by an accused person*, whether made to a Police officer, above the rank of sergeant or otherwise" [emphasis added].[17] Accordingly, if anything, the legislative purpose underlying s 258 confirms the above ascertained ordinary meaning of s 258(1), which is that it extends to statements made by an accused person to a person who is not a law enforcement officer.

13 There are two reasons for why one might read s 258(1) differently. First, in his speech, the Minister had underscored that "[section] 258 does not change the law".[18] As pointed out above,[19] s 258 was an amalgamation of s 122 of the previous version of the CPC and several since repealed provisions of the Evidence Act. By way of background, s 122 of the old CPC allowed the admitting of any statement given by an accused person to a police officer. Section 21 of the Evidence Act, in the context of criminal proceedings and subject to certain exceptions, allowed the Prosecution to admit an admission by an accused person against him, but did not allow the accused to admit an admission as evidence for himself. As others have put it, the Prosecution can rely on s 21 to admit inculpatory hearsay statements from the accused but the accused cannot rely on it to admit wholly exculpatory hearsay statements for himself, save in certain narrow circumstances.[20] If s 258 was indeed intended not to change the law, there may be reason to think that it should not be read expansively to allow the admission of all statements by an accused person, regardless of whom the statements were made to.

14 Crucially, however, the point by the Minister that s 258 does not change the law must be read in its proper context. In particular, this point was made specifically in relation to

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17 *Parliamentary Debates, Official Report* (18 May 2010), vol 87 at col 416 (K Shanmugam, Minister for Law and Second Minister for Home Affairs).

18 *Parliamentary Debates, Official Report* (18 May 2010), vol 87 at col 416 (K Shanmugam, Minister for Law and Second Minister for Home Affairs). See also *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [40]–[41].

19 See para 2 above.

20 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at paras 5.02–5.10.

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Explanation 2 of s 258, which stipulates that if a statement is otherwise admissible, it would not be rendered inadmissible merely because it was made in certain circumstances, for instance, where the statement was made when the accused was intoxicated or that there was some procedural irregularity in the recording of a statement. This can be seen by the Minister's topic statement, immediately before making the point that s 258 does not change the law:[21]

> *I should also comment briefly on Explanation 2 to clause 258 of the Bill, which has been the source of some degree of debate (and I think, confusion) during the public consultation and working group phases.*
>
> Explanation 2 is a reproduction of section 29 of the Evidence Act (which is now ported to the Code). Its purpose is simply to clarify that the sole test of admissibility is the absence of threat, inducement or promise as set out in clause 258. This reflects the position taken by our Courts. Thus, and I emphasise this – there is no change in the law as a result of the amendments. The only addition is sub-clause (e) to clause 258, and the main change is that the test of voluntariness is now applied to all statements and that is an extension of the rights.
>
> However, I note from an article in the TODAY newspaper of 17th May, entitled 'Criminal lawyers concerned over clause in proposed Criminal Procedure Code', that both Mr Subhas Anandan and Mr Edmond Pereira are quoted on this clause. Mr Anandan is concerned that a part of the law on what is admissible evidence is being 'further entrenched'. Mr Pereira has said that clause 258 was a 'talking point', among the changes to the CPC. But as I have stated earlier, clause 258 does not change the law. It does not detract from the rights of the accused. clause 258 simply brings over a similar provision in the Evidence Act – which is already the law, and that extends it to all statements. The change is the addition of sub-clause (e). Thus, there is no real 'further entrenching' of this aspect of the law on what is admissible evidence. The law is set out in black and white in the Evidence Act and that is the law that the Courts have been applying all these years. And to the extent that this clause 258 is a talking point, it may be that its current avatar in the Evidence Act has perhaps been overlooked. We had explained these points to relevant stakeholders, as well as the Law Society.

21 *Parliamentary Debates, Official Report* (18 May 2010), vol 87 at cols 416–417 (K Shanmugam, Minister for Law and Second Minister for Home Affairs).

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> I understand now that the ACLS accepts that the real test of section 258 is whether there was a threat, inducement or promise operated and whether such threat, inducement or promise operated on the accused person at the material time, and that deception is therefore technically irrelevant. I can understand arguments that such a provision should be qualified. But it is difficult to understand arguments that object to the CPC essentially replicating a provision from the Evidence Act.
>
> [emphasis added]

15 In short, the Minister's reminder that s 258 does not change the law was in specific relation to Explanation 2. It was not in relation to whether s 258 extends to an accused person's statement to a person other than a law enforcement officer, or whether it permits an accused person to admit an exculpatory statement. As argued above, the ordinary meaning of s 258(1), as confirmed by extrinsic material, is that it permits the admission (by either party) of any statement made by an accused person to a non-law enforcement officer.

16 The second potential cause for concern to reading s 258(1) expansively is that it would allow the admission of entirely self-serving statements made by an accused person to a non-law enforcement officer, and such statements are generally unreliable.[22] This is certainly a valid concern, but the appropriate way to deal with such statements is not to depart from the purposively arrived at meaning of s 258(1), but rather, to either:[23]

> (a) admit the statement (as permitted under s 258(1)) but accord minimal or no weight to it if the circumstances so require; or

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22 See *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [41]. The High Court cited several cases for the proposition that "[w]holly exculpatory hearsay statements cannot in general be tendered as proof of the truth of the assertions stated therein even in criminal proceedings". However, on a closer reading of these cases, it is unclear whether the respective courts in these cases are saying that such statements cannot be admitted as evidence in the first place, or merely that they can be admitted as evidence but no or little weight should be accorded to them for the purposes that the party admitting them as evidence is seeking. In any event, these cases were not decided under s 258 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

23 See *Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557 at [54]–[55].

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(b) admit the statement (as permitted under s 258(1)) but exercise the court's discretion to exclude evidence which probative value is outweighed by its prejudicial effect, by virtue of the sheer unreliability of the statement, if the circumstances do show as such.

IV. Conclusion

17 All considered, the *dicta* stated in *Anita Damu* will probably benefit from a reconsideration at a future opportunity. As suggested above, the ordinary meaning of s 258(1) of the CPC, as confirmed by extrinsic material, is that it permits the admission (by either party) of any statement made by an accused person to a non-law enforcement officer, as evidence in a criminal trial.[24]

24 Subject of course to the qualifications in ss 258(2) and 258(3).

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