

## ADMISSIBILITY AND THE DISCRETION TO EXCLUDE EVIDENCE

### In Search of a Systematic Approach

In 2012, two new provisions were introduced to the Evidence Act which empower the courts to exclude evidence of hearsay and expert opinion in the interests of justice. Additionally, the Court of Appeal has recently affirmed that the courts may exercise an independent discretion to exclude evidence in criminal cases where the probative value of an accused person's statement is overridden by its prejudicial effect. This article examines these developments and argues for a clearer and more comprehensive statutory scheme governing the court's discretion to exclude admissible evidence in civil and criminal cases.

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### I. Introduction

1 Recent statutory and judicial developments have had an important impact on the court's discretion to exclude admissible evidence in both criminal and civil proceedings. In *Muhammad bin Kadar v Public Prosecutor*<sup>1</sup> ("Kadar"), the Court of Appeal confirmed that the courts do have a discretion to exclude admissible evidence in criminal proceedings where its probative value is outweighed by its prejudicial effect ("the probative value/prejudicial effect balancing test").<sup>2</sup> *Kadar* raises the issue of the scope of the discretion to exclude and the principle(s) that should govern its operation. Should the probative value/prejudicial effect balancing test endorsed in this case be generally applicable or is it only a single factor to be considered in specific circumstances? As this test is not expressed by the Evidence Act<sup>3</sup> (the primary statute on the law of evidence), what is its source? In his speech to Parliament, in relation to the Second Reading of the Evidence

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1 [2011] 3 SLR 1205.

2 The development of this test is considered in the course of this article.

3 Cap 97, 1997 Rev Ed.

(Amendment) Bill 2012,<sup>4</sup> the Minister for Law (“the Minister”) referred to the court’s “inherent jurisdiction”<sup>5</sup> to exclude evidence.<sup>6</sup> Although the Court of Appeal in *Kadar* referred to the court’s inherent jurisdiction, it classified the court’s power to reject evidence as an “exclusionary discretion”.<sup>7</sup> If the courts have an inherent jurisdiction to exclude evidence, it should be asked whether this is a general doctrine or one that is subject to the confines set by the case law (such as the probative value/prejudicial effect balancing test affirmed in *Kadar*). In the interests of certainty, and considering the importance of ensuring that admissible evidence that is compromised by its unreliability is rejected, would it be appropriate to enact a new provision in the Criminal Procedure Code 2010<sup>8</sup> (“the CPC 2010”) to clarify the basis and scope of the discretion?

2 These issues also resonate in the sphere of the new statutory discretions introduced by the Evidence (Amendment) Act 2012.<sup>9</sup> Sections 32(3) and 47(4) of the Evidence Act<sup>10</sup> (“the EA”) enable the court to reject otherwise admissible hearsay and expert opinion evidence if it would not be in the interests of justice to admit it. These are the first discretionary provisions to be introduced to the EA, and they apply to both civil and criminal proceedings. Although they have been justified as a necessary response to the expansion in scope of the admissibility provisions governing hearsay and opinion evidence,<sup>11</sup> they do raise conceptual and practical difficulties. The absence of guidelines or principles concerning the exercise of the discretion means that the courts will have to identify the objectives and priorities of these provisions and formulate their own criteria. Distinctions may have to be made between civil and criminal proceedings because of the need for precautions against injustice in the latter sphere. The question arises as to whether the limitation of the discretion to exclude evidence within the scope of ss 32(3) and 47(4) ignores the need for a discretion to exclude evidence admissible under other provisions of the EA. Should there be a general discretion to exclude in the EA, one that is anchored by broad criteria so that the courts are provided with the flexibility to respond appropriately to the particular circumstances of *every* case? This leads to the further consideration of how a discretionary

4 No 2/2012. The Second Reading of the Bill took place in February 2012. The Evidence (Amendment) Act 2012 (Act 4 of 2012) came into force in August 2012.

5 An alternative expression is the court’s “inherent power”.

6 *Singapore Parliamentary Debates, Official Report* (14 February 2012), vol 88 at cols 45 and 56 (K Shanmugam, Minister for Law).

7 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [52]–[53].

8 Act 15 of 2010.

9 Act 4 of 2012; the Act came into force in August 2012.

10 Cap 97, 1997 Rev Ed; as amended.

11 *Singapore Parliamentary Debates, Official Report* (14 February 2012), vol 88 at col 45 (K Shanmugam, Minister for Law).

mechanism can effectively operate in conjunction with the rules of admissibility and thereby enhance the integrity of the trial process.

## II. Recent judicial developments

3 In recent years, the courts have had to grapple with difficult issues pertaining to the discretion to exclude evidence that is improperly obtained from an accused person. While statutory law operates to exclude an involuntary statement,<sup>12</sup> it does not expressly provide the courts with the power to exclude improperly obtained voluntary statements. The different positions taken by the courts over the preceding five decades have been addressed elsewhere.<sup>13</sup> In *Law Society of Singapore v Tan Guat Neo Phyllis*<sup>14</sup> (“*Phyllis*”), the High Court, having concluded that any discretion it might have to exclude evidence did not arise on the facts (because of the absence legal impropriety),<sup>15</sup> took the opportunity to clarify (“for the guidance of the courts in future cases”) whether the Singapore courts have the discretion to exclude admissible evidence.<sup>16</sup>

4 There is no doubt about the High Court’s conclusion in *Phyllis* that a court has no discretion to exclude evidence merely on the basis that it has been obtained by improper means.<sup>17</sup> The judgment was less clear about the status of the common law probative value/prejudicial effect balancing test, which was restated by Lord Diplock in the first limb of his formulation in *R v Sang*<sup>18</sup> (“*Sang*”) (and is referred to in *Phyllis* as “the *Sang* formulation”).<sup>19</sup> Having pointed out that the overarching principle in the EA is that “all relevant evidence is admissible unless specifically expressed to be inadmissible”,<sup>20</sup> the High Court in *Phyllis* considered that as the probative value of entrapment evidence must exceed its prejudicial effect, it is admissible. Consequently, it concluded that “the *Sang* formulation is, in practical

12 See the Criminal Procedure Code 2010 (Act 15 of 2010) s 258(3).

13 See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) ch 10.

14 [2008] 2 SLR(R) 239. The impact of *Law Society of Singapore v Tan Guat Neo Phyllis* has been considered in at least two articles. See Ho Hock Lai, “National Values on Law and Order’ and the Discretion to Exclude Wrongfully Obtained Evidence” [2012] JCCL 232; Jeffrey Pinsler J, “Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings” (2010) 22 SAcLJ 335.

15 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [52].

16 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [52].

17 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [150].

18 [1980] AC 402.

19 Note, however, that the “*Sang* formulation” (which was the answer of the House of Lords to a certified question put before it: *R v Sang* [1980] AC 402 at 437) consists of two different limbs. The second limb is briefly addressed in para 19 below.

20 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

terms, consistent with the EA and in accordance with the letter and spirit of s 2(2),<sup>[21]</sup> and is therefore applicable in the Singapore context”.<sup>22</sup> This pronouncement could be read to mean that the *effect* of the probative value/prejudicial effect test in relation to improperly obtained evidence of the actual commission of the offence (for example, the evidence of the police officers who had entrapped the accused) is the same as the position under the EA.<sup>23</sup> Such evidence is admissible and is not subject to the discretion to exclude which is not expressed in the EA.

5 An alternative reading of the pronouncement by the High Court in *Phyllis* is that it had endorsed the *Sang* formulation as a principle of Singapore evidence law. Earlier, in *Wong Keng Leong Rayney v Law Society of Singapore*,<sup>24</sup> the Court of Appeal had acknowledged the existence of the probative value/prejudicial effect balancing test but expressly left the matter to be decided by the High Court in *Phyllis*.<sup>25</sup> However, in the absence of an express power in the EA, the alternative reading of the pronouncement requires the identification of the source of the court's entitlement to exclude evidence.<sup>26</sup> After *Phyllis*, the courts were resolute in emphasising the literal application of the EA and the non-applicability of extraneous principles. In *Lee Chez Kee v Public Prosecutor*<sup>27</sup> (“*Lee Chez Kee*”), the Court of Appeal emphatically declared that the High Court in *Phyllis* “persuasively ruled that apart from the confines of the EA, there is no residual discretion to exclude evidence which is otherwise rendered legally relevant by the EA”.<sup>28</sup> This position was reiterated by the High Court in *Public Prosecutor v Mas Swan bin Adnan*<sup>29</sup> (a case concerning similar fact evidence) when it construed ss 14 and 15 of the EA<sup>30</sup> independently of the probative value/prejudicial

21 Section 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) preserves the common law only to the extent that it is consistent with the Act.

22 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

23 The Chief Justice justified his own previous decision in *Ajmer Singh v Public Prosecutor* [1987] 2 MLJ 141 on this ground (the case concerned the improper taking of a blood sample): “For the same reason, the decision in *Ajmer Singh* ... is consistent with the EA as it was essentially an application of *Sang*” (*Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126]).

24 [2007] 4 SLR(R) 377.

25 [2007] 4 SLR(R) 377 at [27]. The Court of Appeal was unable to determine the matter because the parties had not addressed the court on the admissibility provisions in the Evidence Act and the related policy considerations.

26 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at [19]–[20].

27 [2008] 3 SLR(R) 447.

28 [2008] 3 SLR(R) 447 at [106]. See also *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] 2 SLR(R) 587 at [24]; *Mohamed Emran bin Mohamed Ali v Public Prosecutor* [2008] 4 SLR(R) 411 at [19].

29 [2011] SGHC 107 at [107].

30 Evidence Act (Cap 97, 1997 Rev Ed).

effect test in the *Sang* formulation.<sup>31</sup> In its most recent judgment in *Kadar*, the Court of Appeal affirmed *Phyllis* as standing for the proposition that a court does have discretion to exclude evidence if its probative value is outweighed by its prejudicial effect (as stipulated in the *Sang* formulation). It characterised this power as an “exclusionary discretion”<sup>32</sup> and cited academic comment to the effect that it arises from the court’s inherent jurisdiction.<sup>33</sup> The view that the court has the discretion to exclude evidence on the basis of its inherent jurisdiction was subsequently expressed by the Minister in the course of the Second Reading of the Evidence (Amendment) Bill 2012.<sup>34</sup>

### III. The impact of *Muhammad bin Kadar v Public Prosecutor*

6 In *Kadar*, the first and second appellants (Muhammad and Ismil, respectively) appealed to the Court of Appeal against their convictions for murder in the course of a robbery.<sup>35</sup> While Muhammad’s conviction was affirmed, Ismil’s appeal was allowed on the basis that, *inter alia*, the High Court ought to have exercised its discretion to exclude the first two statements that were made to a senior station inspector pursuant to s 121 of the CPC.<sup>36</sup> The inadmissibility of these statements and the “irresolvable doubts” concerning the reliability of his other statements<sup>37</sup> meant that the Prosecution had failed to prove Ismil’s presence at the scene of the crime. Although the Prosecution changed its position in the course of the appeal by submitting that Ismil was guilty of robbery with hurt rather than murder, this charge also failed in the light of the Court of Appeal’s findings on the evidence.<sup>38</sup> The conclusion of the Court of Appeal is highly significant. Apart from clarifying the High Court’s judgment in *Phyllis* to the effect that the courts are empowered to exclude evidence as a matter of discretion in specific circumstances, *Kadar* showed how the doctrine could ensure reliability by supplementing the legal test for voluntariness in the proviso to

31 Though the court pointed out that the test corresponded to the terminology of both sections: *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [107].

32 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [53].

33 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [52].

34 *Singapore Parliamentary Debates, Official Report* (14 February 2012), vol 88 at cols 45 and 56 (K Shanmugam, Minister for Law).

35 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [20].

36 Criminal Procedure Code (Cap 68, 1985 Rev Ed). *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [191] and [139]–[147].

37 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [191] and [148]–[149].

38 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [38] and [191].

s 122(5) of the CPC<sup>39</sup> (at the time of the case) and currently in s 258(3) of the CPC 2010.<sup>40</sup>

7 As pointed out by the Court of Appeal in *Kadar*, the established law is that a statement that is voluntary is admissible, even if the procedural requirements relating to the manner in which it was recorded have not been complied with.<sup>41</sup> The significance of the Court of Appeal's position in *Kadar* is that this rule is not absolute and does not prevent the court from excluding admissible evidence if its reliability has been compromised by serious failures to comply with the relevant procedures. On the facts, the breaches of the procedures laid down by s 121 of the CPC<sup>42</sup> and the Police General Orders<sup>43</sup> were "serious enough to compromise in a material way the reliability of [both statements]".<sup>44</sup> In contravention of s 121(3) of the CPC,<sup>45</sup> neither statement was read back to Ismil, he was not given the opportunity to correct either of them and both were unsigned.<sup>46</sup> Furthermore, the circumstances indicated deliberate non-compliance by the senior station inspector as opposed to carelessness or operational necessity.<sup>47</sup> The Court of Appeal referred to the significance of the Prosecution's inability to offer a plausible reason for these serious lapses.<sup>48</sup> As there were multiple breaches of the Police General Orders (described by the Court of Appeal as "flagrant"), which are intended "to ensure reliability in the records kept by police officers", there was a real concern as to whether this purpose had been achieved.<sup>49</sup> The fallibility of these statements was compounded by other factors, such as the physical symptoms of drug dependency that the accused was experiencing at the time of interrogation,<sup>50</sup> his "malleable personality"<sup>51</sup> and factual inconsistencies within the Prosecution's case.<sup>52</sup> Ismil's confessions were rendered unreliable by the collective impact of these considerations.<sup>53</sup>

39 Criminal Procedure Code (Cap 68, 1985 Rev Ed).

40 Criminal Procedure Code 2010 (Act 15 of 2010). Both provisions are considered in the course of this article.

41 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [44]–[45].

42 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [139]–[140].

43 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [141]–[145].

44 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [146].

45 Criminal Procedure Code (Cap 68, 1985 Rev Ed).

46 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [140].

47 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [140].

48 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [140].

49 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [145] and [147].

50 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [160]–[165]. This aspect of the case is considered in para 28 below.

51 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [166]–[173].

52 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [151]–[159] and [174]–[184].

53 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [185].

8 Apart from the significance of its deliberations on the scope of the court's power to exclude evidence, *Kadar* is a seminal authority on the importance of propriety in the course of investigation. The Court of Appeal emphasised that there is "an uncompromising need for accuracy and reliability" and that the court should "take a firm approach" in exercising its exclusionary discretion where impropriety may have compromised the reliability of the statement.<sup>54</sup> Although the discretion is not to be exercised simply to discipline the law enforcement authority,<sup>55</sup> intentional non-compliance and knowing disregard of the statutory procedures and the Police General Orders might be indicative of more serious breaches, which would have to be justified by the Prosecution (a deliberate breach would need to be matched by an "especially cogent" explanation, as in *Kadar*).<sup>56</sup> Ultimately, the Prosecution must "bear the burden of establishing that the probative value of the statement outweighs its prejudicial effect".<sup>57</sup> Not long after *Kadar*, the CPC 2010 came into force.<sup>58</sup> One of its new provisions, paragraph (e) of Explanation 2 to s 258(3), has an important impact on admissibility by providing that non-compliance with the procedures (under ss 22 and 23 of the CPC 2010) for recording or interpreting the statement of a person accused of a crime does not have the effect of rendering that statement inadmissible. As *Kadar* involved the exercise of the discretion to exclude statements that had been compromised by procedural failures, it will be necessary to consider whether this case continues to be compatible with paragraph (e).<sup>59</sup>

#### IV. Whether the admissibility scheme of the Criminal Procedure Code 2010 contemplates the discretionary power to exclude the accused's statements

9 The former s 122(5) of the CPC<sup>60</sup> (the provision under consideration in *Kadar*) provided that a statement of a person charged with an offence to or in the hearing of a police officer of or above the rank of sergeant<sup>61</sup> "shall be admissible at his trial in evidence". It included a single proviso that rendered involuntary statements inadmissible according to specific criteria:

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54 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [60].

55 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [69].

56 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [147].

57 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [61]–[62], [140], [145] and [147].

58 The Criminal Procedure Code 2010 (Act 15 of 2010) came into force in January 2011.

59 See paras 22–24 below.

60 Criminal Procedure Code (Cap 68, 1985 Rev Ed).

61 Whenever the statement was made.

Provided that the court shall refuse to admit such statement ... 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.

10 Sections 258(1) and 258(3) of the CPC 2010 are in substantially the same terms as the former s 122(5) and its proviso, respectively. Among the presentational changes, s 258(1) substitutes the expression “is admissible in evidence at his trial” for “shall be admissible at his trial in evidence” (in the former s 122(5)). The proviso to the former s 122(5) is now formulated in s 258(3) of the CPC 2010. In *Kadar*, the Court of Appeal endorsed the view of S Rajendran J in *Public Prosecutor v Dahalan bin Ladaewa*<sup>62</sup> (“*Dahalan*”) to the effect that the terminology of s 122(5) enabled a court to exclude evidence as a matter of discretion. In *Dahalan*, S Rajendran J considered that the words “shall be admissible” (as opposed to mandatory terms such as “shall be admitted”) “vested [the court] with a discretion to admit or reject such statements”.<sup>63</sup> The learned judge decided to exercise his discretion to exclude the accused person’s statement for several reasons: he was substantially affected by drugs during the recording of his statement;<sup>64</sup> the absence of an interpreter despite the accused person’s lack of proficiency in English;<sup>65</sup> and non-compliance with various procedural requirements in s 121 of the CPC<sup>66</sup> and the Police General Orders.<sup>67</sup>

11 Several observations may be made about the High Court’s approach in *Dahalan*. First, in the adversarial system, statutory law does not generally impose on a party by compelling him to present evidence. The words “shall be admissible” in the former s 122(5) were intended to express the Prosecution’s entitlement to present admissible evidence. This is the same principle underlying s 5 of the Evidence Act,<sup>68</sup> which states: “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 [that are declared relevant].” Both s 122(5) of the CPC (currently s 258(1) of the CPC 2010) and s 5 of the EA declare the scope of evidence that is admissible and leave the matter of actual presentation in court to the

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62 [1995] 2 SLR(R) 124.

63 *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 at [26]–[27].

64 *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 at [74]–[77] and [86].

65 *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 at [78] and [86].

66 Criminal Procedure Code (Cap 68, 1985 Rev Ed).

67 *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 at [79]–[86].

68 Evidence Act (Cap 97, 1990 Rev Ed).



parties.<sup>69</sup> Second, a principled doctrine, such as the common law discretion to exclude evidence, cannot simply arise from a vacuum created by statutory interpretation. It must have a specific source either in a legislative provision (in the EA) or in the court's inherent power to prevent injustice or in a common law principle that is clearly consistent with the EA.<sup>70</sup> With regard to the common law, it has yet to be definitively shown that the *Sang* formulation is consistent with the EA, in the sense that the latter clearly acknowledges a general discretion to exclude evidence. This proposition is the basis on which it was argued that the only source of the court's discretion to exclude evidence is its inherent power, a well-established doctrine concerning the court's responsibility to prevent injustice in the course of its process (which, not being a rule of evidence, is not subject to s 2(2) of the EA).<sup>71</sup> However, the statutory formulation of the principles governing the discretion to exclude evidence would clearly satisfy the need for clarity in the law of evidence and maintain the integrity of the EA and the CPC 2010.

12 Third, the former s 122(5) of the CPC and the current s 258(1) of the CPC 2010 was and is, respectively, intended to be comprehensive. Statements that are within the scope of these sections are admissible, subject to a single qualification that involuntary statements are excluded by the proviso to s 122(5) of the CPC and the terms of s 258(3) of the CPC 2010 (respectively). It must be reasonable to conclude that if the Legislature had intended to empower the courts to exercise a discretion to exclude admissible evidence, such a significant development would have been addressed by the inclusion of a separate provision or at least a reference to common law rules. On this point, it is significant that s 261(2) of the CPC 2010 (formerly s 123(3) of the CPC) expressly applies the common law rules concerning the effect of the accused's silence or other reaction in the face of anything said in his presence about his conduct (which is the subject of the charge against him).<sup>72</sup> Although these rules include the court's discretion to exclude evidence if its probative value is exceeded by its prejudicial effect,<sup>73</sup> they apply to a

69 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 10.37–10.39; and Jeffrey Pinsler, “Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings” (2010) 22 SAcLJ 335 at [37]–[39].

70 Pursuant to s 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed).

71 Evidence Act (Cap 97, 1997 Rev Ed). See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 10.22–10.39; and Jeffrey Pinsler, “Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings” (2010) 22 SAcLJ 335.

72 See ss 261(2)(a) and 261(2)(b) of the Criminal Procedure Code 2010 (Act 15 of 2010), which concern admissibility and the drawing of adverse inferences, respectively. The application of the common law in these circumstances was confirmed by the High Court in *Tan Khee Koon v Public Prosecutor* [1995] 3 SLR(R) 404. These areas are further considered at para 18 below.

73 See *R v Christie* [1914] AC 54.

limited category of circumstances envisaged by s 261(2) of the CPC 2010. They were and are not intended to have any impact on the admissibility of statements under s 122(5) of the former CPC and s 258(1) of the CPC 2010, respectively. Therefore, the exclusiveness of these sections is emphasised by the scheme of admissibility in the former CPC and the CPC 2010.

13 The fourth observation concerning *Dahalan* is that because the discretion to exclude admissible evidence is a general doctrine (from which more specific rules of discretion pertinent to related areas of evidence may arise), it would not have been appropriate to restrict it to the process of recording statements under s 122(5) of the former CPC (or under s 258(1) of the CPC 2010). Such a narrow approach would mean that the discretion could not be applied in other circumstances in which admissible evidence is required to be excluded to prevent an unjust decision against the accused. In *Kadar*, the Court of Appeal resolved this issue by classifying the discretion as emanating from the probative value/prejudicial effect balancing test (the *Sang* formulation), which it regarded as having been put on firm ground by the High Court in *Phyllis*.<sup>74</sup> Although as suggested by the Court of Appeal in *Kadar*,<sup>75</sup> the consideration of this principle may have been implicit in *Dahalan*, the High Court's approach in that case appears to have been determined by its interpretation of s 122(5) of the CPC, rather than a consideration of the legal elements of its discretionary power. If, as has been argued, provisions governing the admissibility of evidence should be generally interpreted as permissible rather than mandatory,<sup>76</sup> the court's power to exclude evidence (as confirmed in *Kadar*) is potentially applicable to the admissibility of evidence other than the statements of the accused. For example, s 147(3) of the EA<sup>77</sup> states that if a witness's previous inconsistent or contradictory statement is proved,<sup>78</sup> it "shall be ... admissible as evidence of any fact stated".<sup>79</sup> This terminology corresponds to that used by s 122(5) of the former CPC<sup>80</sup> (the provision interpreted in *Dahalan* as permitting the court's discretion to exclude) and the current s 258(1) of the CPC 2010.<sup>81</sup> As such statements are admissible even if involuntary or recorded in breach of the procedures

74 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [51]–[53]. See para 5 above.

75 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [53].

76 See paras 10–11 above. It has also been argued that because s 138 of the Evidence Act (Cap 97, 1997 Rev Ed) concerns procedure in court and not admissibility, the court is not obliged to admit relevant evidence. See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 10.37–10.39.

77 Evidence Act (Cap 97, 1997 Rev Ed).

78 Pursuant to s 147(1) or 147(2) of the Evidence Act (Cap 97, 1997 Rev Ed).

79 The admissibility of such statements in criminal proceedings is confirmed by s 259(1)(a) of the Criminal Procedure Code 2010 (Act 15 of 2010).

80 See paras 10–11 above.

81 See paras 10–11 above.

for recording them, it is essential that the courts have the power to exclude unreliable evidence in these circumstances as well.<sup>82</sup> The same concern applies to any other admissible hearsay statements that incriminate the accused. The position regarding the admissibility of statements of persons other than the accused will be considered in the context of s 32(3) of the EA.<sup>83</sup>

## V. Scope of application of the probative value/prejudicial effect balancing test

14 Although the probative value/prejudicial effect balancing test (“the *Sang* formulation”)<sup>84</sup> has been acknowledged by the Singapore courts on various occasions over a period of 25 years,<sup>85</sup> its propriety and scope have yet to be definitively addressed here. Most of the local authorities have cited *Sang* for the proposition that the courts do not have a discretion to exclude evidence solely on the basis that it has been improperly or illegally obtained (whether by entrapment or otherwise). In fact, *Kadar* is the only case where the Court of Appeal decided that the High Court ought to have exercised its discretion to exclude evidence on the basis of the *Sang* formulation (the probative value/prejudicial effect balancing test),<sup>86</sup> and is the first case to have applied *Sang* to the process of recording of statements. It will be recalled that in *Kadar*, Ismil’s voluntary statements were excluded because their prejudicial effect (caused by serious lapses in procedure) outweighed their probative value.<sup>87</sup>

15 While prejudice may arise from any unjustified disadvantage that a party experiences in the process of adjudication,<sup>88</sup> the phrase “prejudicial effect” has traditionally expressed the particular *impact* of evidence in criminal proceedings. The probative value/prejudicial effect balancing test evolved in response to the danger that the jury might overestimate the probative value of the evidence (as in the case of an unrelated previous conviction or other evidence of bad character), or

82 In *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [54], the Court of Appeal referred to certain cases that addressed the discretion to exclude.

83 Evidence Act (Cap 97, 1997 Rev Ed) (as amended). See Part VIII (at para 29 below) of the article.

84 See para 4 above.

85 *R v Sang* [1980] AC 402 was first cited in *Ajmer Singh v Public Prosecutor* [1985–1986] SLR(R) 1030, and confirmed by the Court of Appeal in *How Poh Sun v Public Prosecutor* [1991] 2 SLR(R) 270.

86 Although the High Court in *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 excluded the statements, it did not cite *R v Sang* [1980] AC 402 but decided the matter on the basis of the statutory terminology of s 122(5) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). See para 10 above.

87 See paras 6–8 above.

88 In both civil and criminal cases.

that it might react with a moral bias against the accused (because of the nature of the offence or the evidence). In this specific context, prejudicial effect involves an emotional or irrational response on the part of the trier of fact, unjustified by logical reasoning. Colin Tapper has referred to prejudice as “the tendency of evidence of discreditable extrinsic conduct or disposition to persuade the jury to convict the accused for reasons other than the logical force which constitutes the justification for admitting such evidence”.<sup>89</sup> To the extent that prejudice is related to the *effect* of the evidence on the trier of fact, it is only a single, non-encompassing factor that justifies the exclusion of evidence. Situations often arise in which the court is not concerned with the effect of evidence and resulting prejudice in its orthodox sense, but with other countervailing factors that demand the exclusion of the evidence. Prior to their consideration, it is necessary to examine the development of the *Sang* formulation more closely with a view to ascertaining its utility.

16 The probative value/prejudicial effect balancing test did not emerge from a developed legal principle but from a longstanding practice of the courts to prevent injustice resulting from admissible evidence to which the jury might accord a degree of weight out of all proportion to its actual probative value. In *R v Christie*<sup>90</sup> (“*Christie*”), the authority on the origin of this practice (the balancing test was first expressed in this case),<sup>91</sup> the House of Lords considered whether the trial judge ought to have exercised his discretion to exclude evidence of the accusation by a child in the presence of the accused that he had committed certain indecent acts,<sup>92</sup> and the accused’s subsequent reaction (he responded: “I am innocent”).<sup>93</sup> Lords Moulton and Reading considered that such evidence might have been excluded by the trial court as the probative value of the accused’s denial of the charge was minimal compared to the prejudicial effect of a public accusation of guilt on the minds of the jury.<sup>94</sup> Lord Moulton considered the judicial practice as follows:<sup>95</sup>

The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of

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89 Colin Tapper, “Proof and Prejudice” in *Well and Truly Tried* (E Campbell & L Waller eds) (Law Book Co, 1982) at p 204.

90 [1914] AC 545.

91 [1914] AC 545 at 559.

92 The accused was charged with indecently assaulting the child.

93 See also s 261(2) of the Criminal Procedure Code 2010 (Act 15 of 2010) and s 123(3) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) (which, respectively, apply and applied the common law rules in such circumstances). See also para 18 below.

94 *R v Christie* [1914] AC 545 at 559–560 and 565–566.

95 *R v Christie* [1914] AC 545 at 559. See the extract from Lord Moulton’s judgment immediately below. See also *R v Sang* [1980] AC 402 at 434.

proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection ... Under the influence of this practice, which is based on an anxiety to secure for everyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure.

17 Lord Reading took the same position by pointing out that the principles of the law of evidence “are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action”.<sup>96</sup> There are “exceptions to the law regulating the admissibility of the law of evidence ... which have acquired their force by the constant and invariable practice of judges”.<sup>97</sup> His Lordship classified these as “rules of prudence and discretion” that are intended “to ensure a fair trial for the accused, and to prevent the operation of indirect but not the less serious prejudice to his interests”.<sup>98</sup> More specifically, Lord Reading referred to the contemporary judicial practice of communicating to the Prosecution that the evidence it is seeking to present is of low probative value compared to its prejudicial effect and ought not to be adduced.<sup>99</sup> Although this practice had not been observed by the trial judge in *Christie*, the House of Lords did not find it appropriate to disturb the finding on admissibility.<sup>100</sup>

18 Interestingly, *Christie* was considered by the Privy Council in *Parkes v R*,<sup>101</sup> which was referred to by Yong Pung How CJ in *Tan Khee Koon v Public Prosecutor*<sup>102</sup> as embodying the law applicable in Singapore, by virtue of s 123(3) of the CPC (now s 261(2) of the CPC 2010).<sup>103</sup> It is clear from *Christie* that the probative value/prejudicial effect balancing test was developed to control the admissibility of specific types of evidence and was never intended to be a general template underlying the discretion to exclude evidence in every case. For example, the courts would exercise their discretion to exclude technically admissible evidence of the accused’s bad character (including convictions) on previous occasions if its probative value was outweighed by its disproportionately adverse impact on the jury (the prejudicial effect of

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96 *R v Christie* [1914] AC 545 at 564.

97 *R v Christie* [1914] AC 545 at 564.

98 *R v Christie* [1914] AC 545 at 564.

99 In the absence of a good reason. *R v Christie* [1914] AC 545 at 564–565.

100 The House of Lords affirmed the Court of Appeal’s decision to quash the conviction on a different ground.

101 [1976] 1 WLR 1251.

102 [1995] 3 SLR(R) 404.

103 These provisions are also addressed in para 12 above.

the evidence).<sup>104</sup> Similarly, English judges often utilised their discretion to control the admission of evidence of bad character against the accused when he had relinquished his statutory protection against such questions.<sup>105</sup> Indeed, in *Sang*, Lord Diplock considered these categories and the circumstances of *Christie* as the primary instances of the application of the probative value/prejudicial effect balancing test.<sup>106</sup>

19 In England, the discretion to exclude irregularly obtained voluntary confessions and admissions would ordinarily have been exercised under the second limb (not the first limb) of the House of Lords' formulation in *Sang*:<sup>107</sup>

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

Furthermore, even prior to *Sang* and the introduction of the Police and Criminal Evidence Act 1984<sup>108</sup> ("the PCEA"), the English courts had exercised an independent discretion to exclude such evidence where its reliability was compromised by the failure of the authorities to comply with statutory procedure or the Judges' Rules.<sup>109</sup> Although the Court of Appeal in *Kadar* applied the first limb of the *Sang* formulation in determining that the probative value of Ismil's statements was outweighed by their prejudicial effect, its real concern was that the extent of the procedural improprieties had rendered them unreliable. As it was unsafe to rely on the statements, no value could be attributed to

104 Cases such as *Selvey v Director of Public Prosecutions* [1970] AC 304; *Harris v Director of Public Prosecutions* [1952] AC 694; and *Noor Mohamed v R* [1949] AC 182. For an overview of these cases in the context of the discretion to exclude evidence, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 10.32–10.34.

105 In Singapore, evidence of this nature is governed by ss 56 and 122(4)–122(8) of the Evidence Act (Cap 97, 1997 Rev Ed).

106 See *R v Sang* [1980] AC 402 at 433–434.

107 *R v Sang* [1980] AC 402 at 437. See also n 19 (para 4 above). As the applicability of the second limb of the *Sang* formulation was not considered in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 and *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 (nor in any previous authority), it is not addressed in this article. For a consideration of the second limb of the *Sang* formulation, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at [10.40]–[10.41]; Jeffrey Pinsler, "Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings" (2010) 22 SAcLJ 335.

108 c 60 (UK).

109 The Judges' Rules were formulated by the Judiciary in 1912 and replaced by the Police and Criminal Evidence Act 1984, in 1984. See *R v Prager* [1972] 1 WLR 260 for an example of the circumstances in which the court would exercise its discretion.

them and the only possible consequence was their exclusion. This is the gold standard for admissibility in such circumstances.

20 A further point is that although the first limb of the *Sang* formulation expresses the probative value/prejudicial effect balancing test as a general principle, it is necessary to limit it to situations in which the court is able to assess both the probative value and prejudicial effect of the evidence. The test requires known values (probative value and prejudicial effect) that are capable of being measured against each other. For example, with regard to similar fact evidence, it is clear that the jury might attribute disproportionate weight to the accused's previous convictions even though they are wholly unrelated to the issues before the court. Here, the probative value of the evidence of bad character can be assessed against its prejudicial effect. Conversely, where a person commits a crime in response to instigation or entrapment (the circumstances of *Sang*), the probative value/prejudicial effect test has little or no value because (as pointed out in *Phyllis*)<sup>110</sup> the evidence of the commission of the crime is of the highest probative value and its integrity is unaffected by the manner in which it was obtained. There is simply no prejudicial effect in the sense of injustice in the actual adjudication of the case.

21 Following this argument, it is submitted that the first limb of the *Sang* formulation may not be the appropriate test for determining whether to exclude an accused's voluntary statement when its reliability has been compromised by non-compliance with the procedural rules of s 22 or 23 of the CPC 2010 and/or the Police General Orders. The reason is that the court cannot be certain of its probative value, which may or may not have been wholly undermined by non-compliance with the procedural safeguards.<sup>111</sup> The balancing process is not appropriate here because the issue before the court is whether the statement can be relied upon at all (not whether its specific value is outweighed by its prejudicial impact).<sup>112</sup> If so, it remains admissible, subject to a proper assessment of its weight. If not, it is unsafe and ought to be excluded. As the reliability of evidence is critical to a fair trial, the principle(s) underlying the discretion to exclude in such circumstances ought to be clearly set out by statute. It will be argued that there is a need for a new statutory discretion based on reliability in the CPC 2010 to supplement its admissibility scheme.<sup>113</sup>

110 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

111 In s 22 or 23 of the Criminal Procedure Code 2010 (Act 15 of 2010) and the Police General Orders.

112 Although confessions have been excluded by the English courts on the basis of prejudicial effect resulting from the accused person's mental disability. For example, see *R v Stewart* (1972) 56 Cr App R 272.

113 See paras 25–28 below.

## VI. Significance of introduction of paragraph (e) of Explanation 2 to s 258(3) of the Criminal Procedure Code 2010

22 It will be recalled that s 258(3) of the CPC 2010<sup>114</sup> requires statements admitted pursuant to s 258(1) to be voluntary. Explanation 2 to s 258(3) states: “If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made ... (e) where the recording officer or the interpreter of an accused’s statement recorded under section 22 or 23 [of the CPC 2010] did not fully comply with the section” (“paragraph (e)”). Paragraph (e) appears to formulate the principle affirmed by the Court of Appeal in *Tsang Yuk Chung v Public Prosecutor*<sup>115</sup> (“*Tsang*”) that non-compliance with the procedure for recording a statement prescribed by the ss 121 and 122(6) of the former CPC (which were replaced by ss 22 and 23 of the CPC 2010, respectively) merely affects the weight of the statement, not its admissibility.<sup>116</sup> As paragraph (e) came into force subsequent to *Kadar*,<sup>117</sup> it was not necessary for the Court of Appeal to consider its impact on the court’s discretion to exclude evidence.<sup>118</sup> Nevertheless, having pointed out that paragraph (e) merely incorporated the principle established in cases such as *Tsang*, that procedural non-compliance does not *per se* affect admissibility,<sup>119</sup> the Court of Appeal went on to decide that the court does have a discretion to exclude evidence that is rendered *unreliable* by such irregularities.<sup>120</sup>

23 Various observations may be made about paragraph (e). First, the words “did not fully comply” in respect of the procedural requirements of ss 22 and 23 of the CPC 2010 suggest that full or even substantial non-compliance may not be within the contemplation of the paragraph. If so, paragraph (e) would not affect the court’s discretion to exclude statements where their reliability has been tainted by serious irregularities in procedure. Furthermore, it may be significant that the

114 See para 9 above.

115 [1990] 2 SLR(R) 39. See also *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [44].

116 See also *Vasavan Sathiadew v Public Prosecutor* [1992] SGCA 26 to the same effect. However, a procedural breach could affect the inferences which might be drawn pursuant to s 123(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) (now s 261(1) of the Criminal Procedure Code 2010 (Act 15 of 2010)). See *Tsang Yuk Chung v Public Prosecutor* [1990] 2 SLR(R) 39 at [17]–[20]; *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [44].

117 The Criminal Procedure Code 2010 (Act 15 of 2010) came into force in January 2011 (after proceedings were commenced in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205).

118 Although the Court of Appeal did point out that paragraph (e) encapsulated the principle established in *Tsang Yuk Chung v Public Prosecutor* [1990] 2 SLR(R) 39 (see *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [44]).

119 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [44]–[45].

120 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [46] (folld).



corresponding clause in the draft of the Criminal Procedure Code Bill 2009<sup>121</sup> included “prejudice” as a condition so that, presumably, a statement would be inadmissible if the degree of non-compliance was such that the accused would suffer injustice at trial. It may not be farfetched to assume that paragraph (e) is intended to maintain this principle.<sup>122</sup> This approach would ensure consistency between paragraph (e) and the Court of Appeal’s affirmation in *Kadar* of the discretion to exclude unreliable evidence.

24 Second, it may be argued that as paragraph (e) is part of Explanation 2, which is specifically concerned with the voluntariness test in s 258(3) of the CPC 2010, it is merely declaring that the *voluntariness* of a statement is not affected.<sup>123</sup> This is also evident from paragraphs (a) to (d) of Explanation 2, which consist of inducements or circumstances that could affect the voluntariness of a statement. As such an interpretation of paragraph (e) would not affect the court’s discretion to exclude a *voluntary* statement that is unreliable, it would also be consistent with the Court of Appeal’s approach in *Kadar*. Third, the view taken by the Court of Appeal in *Tsang*,<sup>124</sup> that irregularity in the recording procedure (irrespective of degree and effect) should only be considered in the context of weight, suffers from the failure to distinguish between the evaluation of evidence as a matter of fact and the legal principle that requires a court to decide whether it should reject evidence from the outset as being too unsafe to even consider and, consequently, inimical to the interests of justice. If paragraph (e) is considered in this light, it does not interfere with the court’s discretion to exclude evidence and, accordingly, does not alter the position taken by the Court of Appeal in *Kadar*.

## VII. Need for a new statutory discretion in the Criminal Procedure Code 2010

25 It is necessary for various reasons to formulate a new discretionary provision to supplement the voluntariness test in s 258(3) of the CPC 2010. First, it has been shown that the probative value/prejudicial effect balancing test does not address the concerns faced by a court in determining whether a voluntary statement that is

121 Draft Criminal Procedure Code Bill 2009 cl 220 <<http://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclickf8ea.pdf>> (accessed 1 March 2009).

122 See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 5.94–5.98.

123 For such an interpretation to be viable, it would be necessary to read the word “admissible” in Explanation 2 to s 258(3) of the Criminal Procedure Code 2010 (Act 15 of 2010) in the context of the voluntariness test formulated by the same subsection.

124 See para 22 above.

significantly tainted by procedural irregularity should be excluded. Second, a statutory provision would ensure certainty of principle in the critical area of reliability of confessions and other incriminating statements. The courts would not have to revisit the long series of inconsistent judgments delivered in the course of half a century and grapple with the issues of precedent raised by cases such as *Phyllis*.<sup>125</sup> Third, a statutory provision would send the clear message that the court's discretionary power to exclude unreliable statements is no less important than the newly introduced discretionary provisions in ss 32(3) and 47(4) of the EA (concerning hearsay and expert opinion evidence, respectively). Fourth, and most importantly, a statutory provision would address the concerns that arise from the voluntariness test expressed in s 258(3) of the CPC 2010.<sup>126</sup> This provision, which has somehow endured since it was introduced by the original Evidence Ordinance 1893,<sup>127</sup> has drawn considerable criticism for its unreasonably restrictive conditions and the failure to fully address issues of reliability.<sup>128</sup> Even the Court of Appeal has had to apply a broad purposive approach to avoid serious injustice.<sup>129</sup> Consequently, if the voluntariness test is to be retained in its current form, it is vital that the courts have a discretionary power to exclude voluntary statements that are unreliable.

26 If a new statutory discretion is introduced to the CPC 2010 (perhaps a new s 258(4) that buttresses the voluntariness test in s 258(3) of the CPC 2010), it must be crafted in a manner that would, at the very least, take into account the concerns of the Court of Appeal in *Kadar*. For this purpose, it is worthwhile to consider how the position in England has changed since *Sang*, as a result of s 78(1) of the PCEA,<sup>130</sup> which states:

125 In *Law Society of Singapore v Tan Guat Neo Phyllis* ("Phyllis") [2008] 2 SLR(R) 239, the High Court disagreed with former positions taken by the Court of Criminal Appeal and the Court of Appeal. For example, it considered *How Poh Sun v Public Prosecutor* [1991] 3 MLJ 216 to be inconsistent with the Evidence Act (*Phyllis* at [126]). It referred to *Chan Chi Pun v Public Prosecutor* [1994] 1 SLR(R) 654, which approved *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291 (*Phyllis* at [103]). For a fuller account of the approach in *Phyllis* to former authorities, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 10.17–10.19.

126 See paras 9–10 above.

127 SS Ord No 3 of 1893. In Chin Tet Yung, "Confessions and Statements by Accused Persons Revisited" (2012) 24 SAcLJ 60, there appears the heading, "The remarkable durability of the voluntariness test".

128 See Chin Tet Yung, "Confessions and Statements by Accused Persons Revisited" (2012) 24 SAcLJ 60; Michael Hor, "The Confessions Regime in Singapore" (1991) 3 Mal LJ lvii; Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 5.36–5.38. Cf Dorcas Quek, "The Concept of Voluntariness in the Law of Confessions" (2005) 17 SAcLJ 819.

129 See *Poh Kay Keong v Public Prosecutor* [1995] 3 SLR(R) 887.

130 c 60 (UK).

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.<sup>[131]</sup>

27      It is evident that the discretion provided by s 78(1) of the PCEA is significantly broader than any proposition made by a Singapore court since Wee Chong Jin CJ's pronouncement in *Cheng Swee Tiang v Public Prosecutor*<sup>132</sup> ("*Cheng Swee Tiang*"), that there is a judicial discretion to exclude relevant evidence if its reception "would operate unfairly against the accused".<sup>133</sup> It is also clear that s 78(1) of the PCEA does not (in contrast to *Sang*) limit its objective to fairness at trial. The section refers to all the circumstances in any proceedings, including the "circumstances in which the evidence was obtained". It follows that improprieties prior to trial may justify the discretion to exclude the evidence even if its reliability is not compromised (as in the case of evidence obtained by entrapment or unlawful search and seizure). The discretion to exclude is triggered if 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". It is not sufficient that the admission of the evidence would be "unfair": the degree of adversity must be such that a court would consider it proper to exclude the evidence. Put another way, the evidence would need to be sufficiently unfair that a court could not admit it in good conscience. A line of English authorities treat the section as having extended the scope of the discretion well beyond the *Sang* formulation.

28      As the *Sang* formulation has been recently affirmed by the Court of Appeal in *Kadar*, s 78(1) of the PCEA clearly does not represent the position in Singapore. However, it is proposed that a more narrow statutory provision (which is consistent with *Kadar*) be introduced to supplement the voluntariness test expressed in s 258(3) of the CPC 2010. It has been mentioned that the voluntariness test fails to address the danger of introducing unreliable evidence.<sup>134</sup> If so many other common law jurisdictions have enacted a judicial discretion to exclude evidence despite having abandoned the voluntariness test in

131 Section 78(2) of the Police and Criminal Evidence Act 1984 (c 60) (UK) preserves rules of law that require the exclusion of evidence.

132 [1964] MLJ 291.

133 [1964] MLJ 291 at 292. Note the arguments in support of the broader approach taken in *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291 in Ho Hock Lai, "National Values on Law and Order' and the Discretion to Exclude Wrongfully Obtained Evidence" [2012] JCCL 232. The learned author made a compelling case for a general discretion to exclude wrongfully obtained evidence in the interests of criminal justice.

134 See para 25 above.

favour of the broader principle of reliability, the case for incorporating a judicial discretion in the CPC 2010 (to supplement the voluntariness test) is much stronger. At the very least, such a statutory discretion would enable the court to ensure that the accused has a fair trial. The statutory formulation should be clear and easy to apply. As the issue is one of reliability, the court should simply ask itself whether the admissible statement can be relied upon at all. If so, the discretion to exclude would not be exercised. However, if the circumstances are such that it would be dangerous to attribute any weight to the statement, it must be excluded. The following criterion is offered merely as an illustration of how this principle would operate:

*The court may exclude a statement which is admissible pursuant to s 258(1) read with s 258(3) if the circumstances in which that statement was made or recorded have compromised its reliability to such an extent that it cannot be safely relied upon.*

This wording or approximate terms would not be inconsistent with paragraph (e), which, as has been explained, concerns the voluntariness of the statement (not whether it is unreliable for any other reason).<sup>135</sup> Furthermore, the proposed criteria is more straightforward and germane in this scenario than the probative value/prejudicial effect balancing test, which, as has been argued, is concerned with the disproportionate effect of particular types of evidence.<sup>136</sup> If such a statutory provision is introduced,<sup>137</sup> it would govern circumstances such as those that arose in *Kadar*. The provision would also address the injustice that may result from the strict application of the voluntariness test to an accused person who is interrogated while his mental state is impaired by alcohol or drug consumption or withdrawal (or by any other medical condition). Although a statement made in such circumstances could be regarded as voluntary if the accused person had consciously provided the information without coercion,<sup>138</sup> it may be unreliable if, as a result of his physical symptoms, he lacked mental clarity or was otherwise not fully cognisant of the content of the statement. In short, the court should have a discretion to exclude the statement if the accused's mental condition could have compromised its reliability so that it would be just to disregard the statement entirely.<sup>139</sup>

<sup>135</sup> See paras 22–24 above.

<sup>136</sup> See paras 14–21 above.

<sup>137</sup> As suggested in para 26 above, the provision may be formulated in a new s 258(4) of the Criminal Procedure Code 2010 (Act 15 of 2010).

<sup>138</sup> In *Garnam Singh v Public Prosecutor* [1994] 1 SLR(R) 1044 at [31], the Court of Appeal declared that the effects of drug withdrawal would only render a statement involuntary if the accused is “in a state of near delirium, that is to say, that his mind did not go with the statements he was making”.

<sup>139</sup> In *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [160]–[165] and [185], the Court of Appeal considered that the withdrawal symptoms of the accused were a factor that could have compromised the reliability of his statements.

Other situations in which a discretion to exclude might be exercised will be considered in the context of the recent amendments to the EA.<sup>140</sup>

### VIII. New discretionary provisions recently introduced to the Evidence Act

29 The 2012 amendments to the Evidence Act<sup>141</sup> introduced two identical discretionary provisions pertaining to the admissibility of hearsay and expert opinion evidence. Section 32(3) of the EA<sup>142</sup> states:

A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

Section 47(4) of the EA<sup>143</sup> similarly provides:

An opinion which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

30 As the word “relevant” is used in the EA to express the admissibility of a fact, it must be assumed that this is the meaning intended by ss 32(3) and 47(4). It is clear that they confer upon the court a discretion to exclude the hearsay statement or expert opinion if its admissibility would not be in the interests of justice. The terminology of these provisions does raise conceptual and practical concerns. First, as s 5 of the EA (which is the sole pillar of the admissibility scheme) declares the admissibility of the facts set out in ss 32(1) and 47(1),<sup>144</sup> their status is established once and for all. By empowering the courts to reverse their status (by deciding that the statement or opinion “shall not be relevant”), these new provisions introduce a legal fiction to the effect that those facts were never relevant (admissible) or somehow lost their relevancy (status of admissibility) pursuant to the court’s discretion. The second point is related to the first. One must assume that the provisions of the EA (indeed, the content of every statute) were drafted with a view to the interests of justice. Therefore, as a matter of principle, how is it that the court should be entitled to decide that the admissibility of facts within the scope of ss 32(1) and 47(1) would not be in the interests of justice? The real issue here is not whether the status of admissible evidence might somehow be converted to inadmissible evidence at the pleasure of the court, but whether admissible evidence

140 See the following part of this article.

141 See para 2 above.

142 Evidence Act (Cap 97, 1997 Rev Ed) (as amended).

143 Evidence Act (Cap 97, 1997 Rev Ed) (as amended).

144 As it does in the other sections of Part I of the Evidence Act (Cap 97, 1997 Rev Ed) (as amended).

(its status as admissible evidence does not change) should nevertheless be excluded because of other countervailing factors that outweigh or override its value (its benefit to the process of adjudication) to the case. While the effect of the exclusion of admissible evidence would be the same as if it had been regarded as inadmissible, the distinction between the two approaches is vital to the balancing operation just referred to. Moreover, in exercising its discretion to exclude admissible evidence as opposed to reversing the effect of s 5 of the EA, the court would not interfere with the scheme of admissibility of the EA.

31 The other difficulty with ss 32(3) and 47(4) is that the terminology is unnecessarily vague. What do these provisions mean by the expression “interests of justice”? It was shown earlier in *Kadar* that the discretion to exclude Ismil’s two statements was based on the first limb of *Sang*: the prejudicial effect of the statements (their unreliability resulting from serious failures to comply with recording procedures) outweighed their probative value. While unreliability may well be a pertinent factor to be considered pursuant to ss 32(3) and 47(4), it is obviously not the only concern of these provisions, given the broad context of the terminology “interests of justice” and the fact that they concern civil as well as criminal cases. It has been said that this statutory discretion “ensures that the expanded exceptions are not abused”<sup>145</sup> and that they operate “in addition to the Court’s inherent jurisdiction to exclude prejudicial evidence”.<sup>146</sup> It would seem from the first-quoted statement that ss 32(3) and 47(4) are intended to control the volume of evidence that may increase as a result of the expansion of the scope of ss 32(1) (hearsay evidence) and 47(1) (expert opinion evidence).

32 Sections 32(3) and 47(4) are silent as to the mechanism that the court might apply and the factors it would take into account in exercising its discretion. It is submitted that the optimal approach would be to balance the significance of the evidence (its probative value or importance to one or more of the issues) against any factors that militate against its admission. Put another way, the admissible evidence may be excluded if it does not justify the disadvantages that would result from its admission. These would include additional costs (as when a hearsay statement or an expert opinion is not necessary because it essentially duplicates other evidence in the case), delay in the proceedings (where additional time is needed to adduce the evidence or the proceedings have to be postponed), the distraction of the court and/or the parties (where the evidence raises collateral issues that

145 *Singapore Parliamentary Debates, Official Report* (14 February 2012), vol 88 at col 45 (penultimate and final paragraphs) (K Shanmugam, Minister for Law).

146 *Singapore Parliamentary Debates, Official Report* (14 February 2012), vol 88 at cols 45 (penultimate and final paragraphs), 56 (second paragraph) (K Shanmugam, Minister for Law).

require undue attention), its tendency to confuse or its misleading effect (as when there are doubts about authenticity and good faith), lack of reliability (where the circumstances of the author of a statement or in which the statement was made raise concerns about its truthfulness) and prejudice (in the sense of evidence that would have the effect of being substantively unjust or procedurally oppressive). Clearly, the less significant or probative the statement, the less forceful the countervailing factors would need to be to justify exclusion. However, as the evidence is declared to be admissible by statutory law (the EA), the court should not normally exercise its discretion to exclude unless the countervailing factors clearly outweigh the benefit that would be gained by its admission.

33 It would be of considerable assistance to the court if ss 32(3) and 47(4) of the EA were to include a list of considerations that it might take into account in determining whether to exercise its discretion to exclude. This is the approach in various jurisdictions. For example, in the US, Rule 403 of the Federal Rules of Evidence<sup>147</sup> states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Similarly, s 135 of the Australian Evidence Act 1995<sup>148</sup> empowers the court to exclude evidence if:

... its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.<sup>[149]</sup>

There is some commonality between the above provisions and s 126(1) of the Criminal Justice Act 2003<sup>150</sup> (“the CJA”), which empowers the English court to exclude hearsay evidence if it is “satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence”.<sup>151</sup>

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<sup>147</sup> 2013; last amended Dec 2011.

<sup>148</sup> Act No 2 of 1995 (Cth).

<sup>149</sup> See also s 136 of the Australian Evidence Act 1995 (Act No 2 of 1995) (Cth), which entitles the court to limit the use of evidence.

<sup>150</sup> c 44 (UK).

<sup>151</sup> Section 126(1) does not affect other statutory provisions (such as s 78 of the Police and Criminal Evidence Act 1984 (c 60) (UK) or common law rules that empower  
*(cont'd on the next page)*

Section 114(1)(d) of the CJA admits hearsay evidence if it would be “in the interests of justice” to do so. The court is to take into account all relevant factors, including the following: the value of the evidence (if it is true) to a matter in issue or to the understanding of other evidence in the case; what other evidence has been or can be given on the matter or on the evidence in question; the importance of the matter or the evidence that concerns it in the context of the case as a whole; the circumstances in which the statement was made; the apparent reliability of the maker of the statement; the apparent reliability of “the evidence of the making of the statement”; whether oral evidence of the matter can be given (and if it cannot, the reason for this inability); and the amount of difficulty involved in challenging the statement and the extent to which that difficulty would be likely to prejudice the opposing party.<sup>152</sup> Sections 32(3) and 47(4) of the EA adopt the terminology “interests of justice”, albeit in the form of an exclusionary principle. However, the absence of any criteria in these provisions may hamper the courts in exercising their discretion to exclude evidence. As this is an invasive discretion (because it counters the statutory scheme of admissibility), guidance in the form of a list of considerations or factors would add clarity and certainty to the law, and assist lawyers in the presentation of their cases.

34 Furthermore, it is important that the criteria reflect the nature of the proceedings. It is not necessary for the CJA to distinguish between criminal and civil proceedings, as hearsay evidence is generally admissible in civil proceedings in England.<sup>153</sup> The position is otherwise in Singapore, as s 32(1) of the EA admits hearsay evidence in both criminal and civil cases. If one accepts that the court must protect the accused against the impact of indirect evidence where it could result in injustice, the discretion may have to be exercised more readily against the Prosecution’s evidence where hearsay statements are the mainstay of its case. Conversely, it may be in the interests of justice to permit the accused to rely on hearsay evidence even if its limited probative value is outweighed by countervailing factors, as it may raise a reasonable doubt concerning guilt.<sup>154</sup> Section 32(1) of the EA enables the Prosecution to adduce hearsay evidence<sup>155</sup> against the accused, without the controls that used to operate in the former CPC.<sup>156</sup> In particular, s 32(1)(j) admits any

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the court to exclude evidence). See s 126(2) of the Criminal Justice Act 2003 (c 44) (UK).

152 Criminal Justice Act 2003 (c 44) (UK) ss 114(2)(a)–114(2)(i). Section 114(3) of the Criminal Justice Act 2003 preserves other grounds for excluding statements.

153 Although safeguards apply.

154 For useful observations on this issue, see *R v Y* [2008] 1 WLR 1683.

155 Subject to the prescribed conditions.

156 Consider the conditions and safeguards in ss 378–385 of the former Criminal Procedure Code (Cap 68, 1985 Rev Ed) and subsequently the repealed ss 269–277 of the Criminal Procedure Code 2010 (Act 15 of 2010).



statement of any person in any circumstances if he is unavailable for one of the specified reasons.<sup>157</sup> The case of *Lee Chez Kee*<sup>158</sup> (which involved the offence of murder) is starkly illustrative of the need for distinctive approaches in civil and criminal cases. The Prosecution adduced the confession of an accomplice (which incriminated the accused) pursuant to s 378(1) of the former CPC. As the accomplice had been put to death (pursuant to his own conviction) prior to the trial of the accused, there was no question concerning the ground of admissibility. One of the issues before the Court of Appeal was whether the words “subject to the rules of law governing the admissibility of confessions” in s 378(1) rendered the accomplice’s confession inadmissible. V K Rajah JA concluded, *inter alia*, that as s 30 of the EA<sup>159</sup> (which admitted the confession of a co-accused at a joint trial for the purpose of incriminating the other co-accused) would have barred such a confession (as the accomplice and the accused were not being jointly tried), the confession ought not to have been relied upon in the circumstances of the case.<sup>160</sup>

35 The confession of an accomplice (or a statement of a witness, whether or not it is a confession) is now admissible under s 32(1)(j) of the EA if the accomplice is dead or unable to attend because of his physical or mental condition, or his whereabouts are unknown despite reasonable efforts to locate him, or he is outside Singapore and “it is not practicable to secure his attendance”, or where he is a competent but non-compellable witness who refuses to give evidence.<sup>161</sup> As s 32(1)(j) does not include the phrase “subject to the rules of law governing the admissibility of confessions”, it could be contended that the position taken by the majority of the Court of Appeal in *Lee Chez Kee* has been superseded. However, if one considers that V K Rajah JA’s primary reason for excluding the confession was to avoid injustice to the accused, a forceful argument may be made for the exercise of the court’s discretion to exclude the confession or any other unreliable hearsay statement on the ground that its admission would not be in the interests of justice pursuant to s 32(3) of the EA.<sup>162</sup>

36 Another concern raised by ss 32(3) and 47(4) of the EA is that these provisions are specific to hearsay and expert opinion evidence.

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157 These are set out later in this paragraph.

158 *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [106].

159 Evidence Act (Cap 97, 1997 Rev Ed); now re-enacted as s 258(5) of the Criminal Procedure Code 2010 (Act 15 of 2010).

160 Choo Han Teck J agreed with this conclusion in *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447.

161 See ss 32(1)(j)(i)–32(1)(j)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) (as amended), respectively.

162 See also *Singapore Parliamentary Debates, Official Report* (14 February 2012), vol 88 at col 60 (K Shanmugam, Minister for Law).

The Minister's observation that these provisions operate "in addition to the Court's inherent jurisdiction to exclude prejudicial evidence"<sup>163</sup> suggests that the courts may only exclude admissible evidence in other circumstances if its probative value is less than its prejudicial effect (the circumstances of *Kadar*). Yet, as shown earlier, there may be countervailing factors in addition to prejudice that might justify the exclusion of admissible evidence.<sup>164</sup> The fact that ss 32(3) and 47(4) were introduced as a corollary to the expansion of the admissibility provisions in ss 32(1) and 47(1) does not mean that a similar controlling mechanism is not needed in respect of other admissibility rules. For example, ss 6 to 11 of the EA are extremely broad provisions that could conceivably admit any fact of minimal probative value, regardless of the existence of forceful countervailing factors in both civil and criminal proceedings. An issue of particular concern is the position of an accused person who becomes vulnerable to questions on his conduct as a result of losing his protection against cross-examination on his character and previous misconduct under s 122(4) of the EA. There is currently no discretionary control mechanism concerning the nature, extent and effect of the evidence that may be presented against him. For example, where he asks questions of the prosecution witness for the purpose of undermining the latter's credibility, he becomes vulnerable to questions concerning his own credibility (pursuant to s 122(7) of the EA). In the absence of a discretionary element, the court may not be in a position to prevent the admission of prejudicial evidence (which may affect its decision on guilt) such as a previous conviction for a similar offence, which is not admissible under the provisions governing similar fact evidence.<sup>165</sup> Again, where the accused adduces evidence of his good character pursuant to s 56 of the EA, he may be asked any question about his previous misconduct including convictions. The exercise of an exclusionary discretion may be appropriate in such circumstances if, for example, the evidence of good character has been rebutted by certain evidence so that it is not necessary for the court to consider other misconduct that might have a prejudicial effect by reason of its bearing on the accused's guilt.

37 In addition to the categories above, the admissibility of previous inconsistent statements pursuant to s 147(3) of the EA is not affected by s 32(3) of the EA. It is highly unlikely that s 147(3) was ever intended to admit previous inconsistent statements of witnesses against the accused in the face of the restriction in s 122(2) of the former CPC.<sup>166</sup>

163 *Singapore Parliamentary Debates, Official Report* (14 February 2012), vol 88 at cols 45 (penultimate and final paragraphs), 56 (second paragraph) (K Shanmugam, Minister for Law).

164 See paras 31–33 above.

165 See the Evidence Act (Cap 97, 1997 Rev Ed) ss 11, 14, 15 and 122(5).

166 For academic writing in this area, see Michael Hor, "Prior Inconsistent Statements: Fairness, Statutory Interpretation and the Future of Adversarial Justice" (2002) (cont'd on the next page)

Nevertheless, s 147(3) has not only been applied in such circumstances;<sup>167</sup> it has also been successfully relied upon by the Prosecution in admitting previous statements of witnesses who have refused or were unwilling to testify.<sup>168</sup> Section 259(1)(a) of the CPC 2010 now leaves no doubt that previous inconsistent statements admitted by s 147(3) of the EA are admissible in criminal proceedings.<sup>169</sup> Section 147(3) raises the very real concern that an accused may be wrongly convicted, particularly as such statements (even of an accomplice who has been severely interrogated or subjected to other inducements) are not required to be voluntary.<sup>170</sup> Although a common law discretion to exclude such evidence has been recognised, the governing principle or grounds for its exercise have never been fully addressed. The most that has been said is that such evidence may be excluded if its admission would be “unfair” to the accused,<sup>171</sup> an expression that harks back to *Cheng Swee Tiang*<sup>172</sup> and which was disapproved of in *Phyllis*.<sup>173</sup> Clearly, it would not be desirable to retain separate sources of law that have the common aim of excluding evidence for the purpose of avoiding injustice. Whether a statement is admissible pursuant to one of the paragraphs of s 32(1) of the EA or s 147(3) (or for that matter, any other provision) of the EA ought to be determined by the EA. If ss 32(3) and 47(4) are converted into a single general provision that incorporates all the relevant criteria to enable a court to make the proper decision on admissibility, it will foster a clear line of jurisprudence, which can be applied with clarity and certainty, whatever the nature of the evidence. Such a provision may be included as subsection (2) of s 5 of the EA (which would become s 5(1) of the EA). In this scheme, s 5(1) would be subject to s 5(2), which would formulate a discretionary power to exclude any admissible evidence in accordance with the expressed criteria.<sup>174</sup>

14 SAcLJ 248; Jeffrey Pinsler, “Statements of Witnesses to the Police: A Story of Strange Bedfellows in the Criminal Procedure Code and the Evidence Act” [2001] Sing JLS 53; Jeffrey Pinsler, “Previous Inconsistent Statements: Scope of s 147(3) of the Evidence Act and its Applicability where the Witness does not Testify to the Facts Mentioned in his Previous Statements” (2001) 13 SAcLJ 1.

167 For example, see *Public Prosecutor v Sng Siew Ngoh* [1995] 3 SLR(R) 755.

168 See *Public Prosecutor v Heah Lian Khin* [2000] 2 SLR(R) 745.

169 It does so by creating an exception to the general rule, which excludes statements from persons other than the accused.

170 The Court of Appeal observed in *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 at [45] that the involuntariness of a witness’s statement only affects weight. Apart from the articles mentioned in n 166 above, see also Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) at paras 5.14–5.17 and 6.92–6.102.

171 In *Yusof bin A Samad v Public Prosecutor* [2000] 3 SLR(R) 115, the High Court pointed out that the court could exercise its discretion to exclude an involuntary statement of a witness on the basis that it would operate unfairly against the accused. See also *Public Prosecutor v Heah Lian Kin* [2000] 2 SLR(R) 745 at [84]–[86].

172 See para 27 above.

173 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

174 See paras 33–36 above.

## IX. Concluding observations

38 The current position concerning the discretion to exclude evidence is that there are two statutory provisions in the form of ss 32(3) and 47(4) of the EA (“the statutory provisions”) and an independent judicial power premised on the probative value/prejudicial effect balancing test formulated by the House of Lords in *Sang*. It has been shown that the statutory provisions do not set out any criteria for the courts to consider in exercising their discretion.<sup>175</sup> Furthermore, as they apply to evidence of hearsay and expert opinion, they do not extend to any other species of admissible evidence, which may need to be excluded because its probative value may be outweighed by one or more of a variety of countervailing factors.<sup>176</sup> More specifically, the statutory provisions do not attach any significance to the nature of the proceedings (whether they are civil or criminal) despite the need for a more sensitive or flexible approach in criminal cases.<sup>177</sup> This article proposes a general provision including a list of factors which the court might take into account in exercising its discretion according to the particular facts of each case. As mentioned earlier, this could take the form of a new subsection in s 5 of the EA.<sup>178</sup>

39 The probative value/prejudicial effect balancing test formulated in *Sang* has long been regarded by the Singapore courts as being fully definitive of the common law discretion to exclude evidence.<sup>179</sup> However, as has been argued in this article, it is not appropriate as an all-encompassing standard and its application should be limited to situations in which the probative value and prejudicial effect of the evidence can be measured in the balancing scale.<sup>180</sup> As for the status of a statement taken from an accused person in breach of statutory procedures (in particular, ss 22 and 23 of the CPC 2010) and the Police General Orders, the real issue is whether its reliability has been so compromised that it is no longer safe for the court to attribute any weight to it. In the interests of clarity and certainty, and considering the importance of the legitimacy of admissible evidence to the administration of justice, the discretion ought to be governed by a new statutory provision.<sup>181</sup> Ideally, it would supplement the voluntariness principle formulated by s 258(3) of the CPC 2010 (which, as has been shown, does not ensure the truthfulness of evidence) so that the two provisions unite in setting a clear standard of reliability. It was suggested

175 See paras 32–35 above.

176 See paras 36–37 above.

177 See para 34 above.

178 See para 37 above.

179 One of the earliest cases involving a consideration of this test is *Ajmer Singh v Public Prosecutor* [1987] 2 MLJ 141.

180 See paras 20–21 above.

181 See paras 25–28 above.

earlier that the new provision might be included as subsection (4) of s 258 of the CPC 2010.<sup>182</sup>

40 The outcome of the proposals above would be the existence of a general discretion to exclude evidence in the EA, and a specific discretion in the CPC 2010 (pertaining to statements from an accused person). Such a scheme would resolve various outstanding issues. The current situation in which two specific statutory provisions (ss 32(3) and 47(4) of the EA) combine with a common law discretion (the *Sang* formulation affirmed in *Kadar*) is unsatisfactory. Apart from the uncertainty of the scope of application of the common law discretion, its relationship with ss 32(3) and 47(4) (which presumably encompass the exclusion of prejudicial evidence) is uncertain as well. Furthermore, a hybrid scheme consisting of statutory and common law components is conceptually untidy and complex, and may generate unprofitable arguments. The introduction of a specific discretion to the CPC 2010 would also resolve the persisting uncertainty of the legal source of the discretion to exclude evidence.<sup>183</sup> Although there is recent affirmation of the view that the court has an inherent jurisdiction or power to exclude evidence,<sup>184</sup> the amorphousness of this doctrine makes it a less-than-ideal governing mechanism. Having served its purpose as an identifiable basis on which the court might exercise its discretion to exclude evidence,<sup>185</sup> it should now give way to precise statutory terms that will ensure the clarity and future development of this area of law.

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182 See para 26 above.

183 See paras 5 and 11 above.

184 See para 1 above.

185 The view that the court might exercise its discretion to exclude pursuant to its inherent jurisdiction or power is explained in Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2009) ch 10 and Jeffrey Pinsler “Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings” (2010) 22 SAcLJ 335.