CRIMINAL PROCEDURE CODE 2010

Confessions and Statements by Accused Persons Revisited

As the provisions on admissions and confessions in the Evidence Act are ported over to the new Criminal Procedure Code substantially unchanged, the article examines the developments in case law and in other fields (such as behavioural sciences). It is argued that the old voluntariness formula remains difficult to apply even taking into account the valiant judicial attempts to rationalise this area of the law. It examines the incorporation of the doctrine of oppression, and discusses the problems of procedural irregularities as revealed in recent decisions. The article makes the case that there should have been more substantial amendments to the law.

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I. Introduction

1 When one reads reports of criminal trials in Singapore, one is usually struck by the frequent, even pervasive, use of statements by accused persons tendered in evidence by the Prosecution; very often, a string of statements taken from them in custody. The reliance (or over reliance) on accused's statements by the Prosecution is regarded by some, Stephen[1] included, as unhealthy for the criminal justice system. After all, is it not the case that the so-called Anglo-American criminal justice system is based on the adversarial system and on inspiring principles such as *nemo debet prodere se ipsum* (no one ought to be compelled to betray himself)[2]? Yet questioning by law enforcement agents forms an important part of the criminal process in modern states, and there is no doubt that without it there would be many

* The author would like to thank the anonymous reviewer who made suggestions for improvement and pointed out several errors. Remaining errors are the author's own.

1 Sir James Fitzjames Stephen thought it inimical to justice to admit in evidence confessions obtained by law enforcement agents as there would be the risk of forced confessions (using torture) as well as the risk of such agents not bothering to obtain other evidence.

2 Lord Diplock's formulation of the *nemo debet* principle in *R v Sang* [1980] AC 402 at 436.

criminals today that would go unpunished for lack of evidence. So, as the Minister pointed out on the second reading of the Criminal Procedure Code Bill 2010, it is a question of searching for the right balance between protecting the community from criminal acts, and protecting the rights of the individuals from coercive acts by state agents charged with the duty of investigating crime and putting away the guilty. On the one hand, there is the right of individuals to be presumed innocent and to be treated as such until found guilty in a court of law, and on the other, the tough duty of investigating crime by law enforcement agents should not be *unduly* hamstrung by the rules and procedures that govern interrogations and the use of statements by the accused as evidence. The Minister candidly admitted that this is an evolutionary process and that there will probably never be a balance that would command universal assent.

2 This article accepts the difficulty of attaining a balance that would satisfy all, but takes the view that there should have been more done in evolving the law, which of course is the shared responsibility of the Legislature, Executive and Judiciary, as well as the legal profession. It is here proposed to examine the provisions relating to confessions and statements by accused persons that are found in the new Criminal Procedure Code ("CPC 2010"), which were virtually left unaltered from the old one[3] (a case of old wine in a new bottle?) and to review the case law in the area that saw the most decisions, including controversial ones in the last 20 years. One inference could be that as far as the law enforcement agencies are concerned, the current provisions reflect the correct balance already. It is not so obvious, however, judging from the debate on the Bill (Second Reading) in Parliament. Among the issues raised in the Debate included those relating to provisions concerning the admissibility of statements made by suspects under questioning by law enforcement agencies,[4] which were excised from the Evidence Act[5] and re-enacted in the new CPC 2010 with some amendments.[6] Unfortunately, the preoccupation with one rule (relating to statements obtained from suspects by trickery or when they were drunk) deflected attention away from other potentially more troublesome issues such as

3 Criminal Procedure Code (Cap 68, 1985 Rev Ed). Repealed and replaced by the Criminal Procedure Code 2010 (Act 15 of 2010) (Bill 11/2010; passed 19 May 2010; presidential assent 10 June 2010 and in force since 2 January 2011). The first reading was in December 2008 and there was a period of extended public consultation before the Second Reading in mid-May 2010.

4 Defined as "any authority or person charged with the duty of investigating offences or charging offenders under any written law": Criminal Procedure Code 2010 (Act 15 of 2010) s 2(1).

5 Cap 97, 1997 Rev Ed.

6 No reasons were given for importing the Evidence Act (Cap 97, 1997 Rev Ed) provisions to the Criminal Procedure Code 2010 (Act 15 of 2010); one could only assume that as the Evidence Act was not amended at the same time, any reform to those provisions had to be done via the Criminal Procedure Code.

leaving the much-discredited formula of voluntariness untouched, other than including in it the idea of "oppression".

3 While the Minister pointed out that the inclusion of "oppression" was simply consolidating case law, it nonetheless remains "an indefinite and highly relative term",[7] and it may be useful to examine how, or whether, it could ever be regarded as "the touchstone for determining … voluntariness". The issues that need to be addressed here are first, what does the doctrine of "oppression" entail generally; second, what is its relationship to the doctrine of "voluntariness" in the statute and case law; and third, what are the likely developments in the law resulting from the new formulations and how they may differ from current case law.

4 Other than the abovementioned issues, there is good reason to review the other provisions of the CPC 2010, including Explanation 2 of s 258(3).[8] During the Debate, MPs proposed removing Explanation 2 (intoxication or inebriation not a reason for exclusion of confessions so obtained). The proposal was not accepted. But on principle, this matter should be re-considered. For instance, should statements obtained by deception be a ground for exclusion where it is flagrant misconduct by the officers, overstepping the bounds of public decency? In similar vein, should statements obtained from inebriated suspects be excluded for its poor probative value as measured against its prejudicial effect? Does the fact of inebriation or deception affect findings of voluntariness in its traditional sense, or oppression? Should these matters be decided by judicial discretion rather than by rule?

5 There are also other unresolved issues in this very important area of the law, particularly the use of confessions of accused persons to incriminate co-accused and its unhappy relationship with the hearsay provisions in the Code.[9] Judicial disquiet about the use of such evidence

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7 *Cross on Evidence* (London: Butterworths, 4th Ed, 1974) (the last edition before the legislative amendments in the UK included a definition of "oppression"). The same comment may be found in the Australian edition of *Cross on Evidence* (Australia: LexisNexis Butterworths, 8th Ed, 2010) at p 1230. For a similar view, see P Mirfield, *Confessions* (London: Sweet & Maxwell, 1985) at p 103.

8 Explanation 2 of s 258(3) of the Criminal Procedure Code 2010 (Act 15 of 2010) is a re-enactment of s 29 of the Evidence Act (Cap 97, 1997 Rev Ed), but with an additional sub-s (*e*) concerning a failure to record an accused's statement in accordance with statutory requirements.

9 This issue was raised in *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 and discussed by the author at [2009] Sing JLS 242. Several important areas in confessions law are left out as covering them would extend the length of the article – such areas as retracted confessions, mixed statements, confirmation by subsequent facts and confessions of co-accused have already been covered amply in the journals.

went unheeded; the offending section re-enacted without amendment.[10] More generally, this area of the law seems to receive less attention than changes to other areas of the criminal process, notably discovery. Despite modern findings by psychologists in the area of questioning of suspects doubting the voluntariness formula, or the advent of new technologies that could be utilised in this area to minimise false confessions, the law can be described as having stagnated, very much a relic from the 19th century, whose time, many would have thought, has come and gone. It is pertinent also to examine how judicial decisions have in fact tried to remove several problems inherent in the traditional formula, such that if the formula were to be redrafted, it would look rather different from its present form.

II. Preliminary points

6 Several general points at this stage may be noted: first, by re-enacting the provisions of the Evidence Act relating to admissions and confessions in the new CPC 2010 the scope for development of a more principled approach to this subject is facilitated. This is because the "gap filling" provision (s 6) in the CPC 2010 is a power-conferring rule stating that where there is no special provision in the Code or "other law", "such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted".[11] This contrasts sharply with the repealing provision in s 2(2) of the Evidence Act that provides for the repeal of any rule that is "inconsistent" with the Act, and by extension, the adoption of any subsequent rule that is "inconsistent" with the Act. A power to adopt or devise a "just procedure" is very different from a duty not to import or devise a rule that is mutually repugnant or contradictory to the provisions of the Code.

7 Second, as the CPC 2010 is a new Code and quite different in approach from the Evidence Act, the courts may want to re-examine decisions based on the Evidence Act provisions with its troubling s 2(2).[12] This is not to say of course that the provisions in the

10 Section 30 of the Evidence Act (Cap 97, 1997 Rev Ed), now s 258(5) of the Criminal Procedure Code 2010 (Act 15 of 2010). Admittedly, this is a slightly inaccurate statement; the header "Consideration of proved confession affecting person making it and others jointly under trial for same offence" has now been removed.

11 In *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [105]–[106], V K Rajah JA said: "[T]he reference to what 'the justice of the case may require' must include procedures that uphold established notions of a fair trial in an adversarial setting where not already part of the written law." (This is the first case to consider s 6 of the Criminal Procedure Code 2010 (Act 15 of 2010), albeit *obiter*.)

12 *Bank of England v Vagliano* [1891] AC 107 at 144–145; also, as the law of evidence is generally regarded as part of procedural law, it is suggested that the provision can

(*cont'd on the next page*)

CPC 2010 on statements and confessions were intended to create new law or that they render the existent case law irrelevant; it merely means that the courts will be able to chart new directions in interpreting the Code consonant with the general principles found in the new Code as well as in Parliamentary speeches especially those of the Law Minister.

8 Third, one must not lose sight of the main purpose for which this area of the law exists, namely, to ensure that the guilty, and only the guilty, are convicted; correspondingly, the law must assiduously seek to avoid convicting the innocent. Essentially, this means the risk of false confessions must be minimised as far as possible, assuming in an imperfect world, that we cannot avoid false confessions altogether. Given the probative worth of confessions as evidence of guilt, reliance on false confessions are very likely to lead to wrongful convictions. As the Law Minister in the debate on the CPC 2010 Bill observed, every individual has a "right not to be wrongly convicted".[13] A wrongly admitted confession carries with it particularly severe forensic risks: one, the conviction of the accused could be based on it alone; two, even a co-accused could be convicted on the confession; three, its admission in evidence may leave the accused with no choice but to testify, and in particular to rebut the "false" confession;[14] four, the burden on the Prosecution to proffer other incriminating evidence is usually significantly reduced; and finally, the existence of an "admissible confession" might trigger a plea of guilty, even when the accused might otherwise have a contestable case. The problem is further exacerbated by the phenomenon of false confessions that are made voluntarily.[15]

9 Fourth, the statement of principles articulated by the Law Minister in his speech on the second reading of the CPC 2010 Bill is

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also be used in matters of evidence, especially if the provisions are in the Criminal Procedure Code itself, such as the rules on confessional statements. The Legislature must have intended this by the repeal of the provisions in the Evidence Act (Cap 97, 1997 Rev Ed) and re-enacting them in the Criminal Procedure Code 2010 (Act 15 of 2010).

13 The "route" from "false confession" to "wrongful conviction" is fraught with the danger of error from prosecutors, defence counsel, witnesses, judges and jurors, but seldom discussed in the literature: for an illuminating account of potential errors from a psychological viewpoint, see R Leo & S Drizin, "The Three Errors: Pathways to False Confession and Wrongful Conviction" in *Police Interrogations and False Confessions* (G Daniel Lassiter & Christian A Meissner eds) (Washington DC: American Psychological Association, 2010) ch 1, at n 13.

14 The accused can retract the confession, but a court can still rely on it if it is satisfied that it is true. This means that the accused shoulders at least an evidential burden to show that the prior statement cannot be relied on.

15 See paras 14–15 of this article.

worthy of note – he said that the key principles that shape the criminal justice system are the following:[16]

> (1) Every person is presumed innocent. One is guilty only upon conviction by a Court. While we have specific exceptions in the law to this approach, *the presumption of innocence is fundamental*. (2) The procedure that is set out must be *fair* and (3) the procedure must provide a *system for arriving at the truth*. That means that it should not be a system that leans towards conviction regardless of innocence or guilt. But it should also not be a system which gives the offender every possible technicality to escape conviction. Each society seeks to strike a balance between: the rights of society, to secure conviction of a person who commits an offence; and the rights of an individual, not to be wrongly convicted. [emphasis added]

10 The presumption of innocence as referred to by the Minister is generally regarded as a talismanic evidential rule that the Prosecution has to prove the accused's guilt beyond reasonable doubt in a trial (an evidential rule of proof). It is not usually mentioned at the stage when suspects are being questioned and when evidence, including statements, is gathered against them.[17] As the then Attorney-General (the current Chief Justice) pointed out in his lecture on the criminal process, the statement that "a person is presumed to be innocent until proven guilty" is misleading:[18]

> The assumption is contrary to reality. An accused person is charged for an offence only if there is sufficient provable and admissible evidence against him on which there is a reasonable prospect of securing a conviction. The reality is that many, if not most, accused persons are factually guilty … .

16 This is a useful statement of principle that could be used by courts to interpret the provisions of the Criminal Procedure Code 2010 (Act 15 of 2010). V K Rajah JA echoed the sentiments embodied in the Minister's statement when he said that the presumption is "the cornerstone of the criminal justice system and the bedrock of the law of evidence" (*XP v PP* [2008] 4 SLR(R) 686 at [90]).

17 There are varying conceptions of the presumption of innocence; a pre-trial presumption of innocence was apparently abandoned at common law but retained and developed in European systems like that of the French: see F Quintard-Morenas, "The Presumption of Innocence in the French and Anglo-American Legal Tradition" (2010) 58 Am J Comp L 107 (the author is grateful to Professor Ho Hock Lai for the reference).

18 Chan Sek Keong, "The Criminal Process – the Singapore Model" (1996) 17 Sing LR 433 at 471. In this respect, the practice of US law officers making suspects do the "perp walk" where they are marched in hand-cuffs from police stations in full glare of the public notwithstanding that they have not been charged (a fate suffered recently by the ex-chief of the International Monetary Fund, Dominique Strauss-Kahn, accused of sex crimes) is also regarded by some as a "presumption of guilt". The practice is illegal in France, as being contrary to "the presumption of innocence": *ABC News* (16 May 2011). The original charges were later dropped or amended due to lack of credible evidence (*The New York Times* (3 July 2011)).

11 Of course, the then Attorney-General may be just making the point that the law enforcement agencies would only charge those after obtaining sufficient evidence, and that while they are investigating the cases, they do not presume them to be guilty but once they reach trial stage, they might well be factually guilty.[19] A more radical view may be found in American writings. Leo, a well-known researcher in the area of false confessions remarked that:[20]

> A confession sets in motion a seemingly irrefutable presumption of guilt among justice officials, the media, the public, and jurors. This chain of events, in effect, leads each part of the system to be stacked against the confessor; he will be treated more harshly at every stage of the investigative and trial process … Moreover, the presence of a confession creates its own set of confirmatory and cross-contaminating biases, leading both officials and jurors to interpret all other case information in the worst possible light for the defendant … The presumption of guilt and the tendency to treat more harshly those who confess extend to prosecutors. Like police, prosecutors rarely consider the possibility that an innocent suspect has falsely confessed.

12 As against this idea of presumption of guilt, it is well to contrast that to the pre-trial presumption of innocence in the French legal tradition, expressed simply as the right of a suspect to be treated as innocent before sentence and that this presumption operates pre-trial. Historically, common law seemed to have embraced this pre-trial presumption as well, but it was subsequently dropped and only the evidential rule remained.[21] It is necessary to re-examine the nature and scope of the presumption of innocence in the light of such observations – do we adhere strictly to the Anglo-American version of the presumption of innocence (applicable only at the trial stage) or should there be an extension of the doctrine to the pre-trial stage, and displace, as it were, the presumption of guilt?

13 Indeed, this re-examination is reinforced by the fact that studies conducted by psychologists and social scientists into the phenomenon of false confessions have revealed a disturbing picture where the techniques of interrogation now practised by law enforcement agencies

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19 The author is indebted to the anonymous reviewer for this point. In Singapore, there is simply no published research on the interrogation processes or on the mind-sets of investigators while questioning suspects, *etc*. It is therefore not asserted that the comments of writers from other jurisdictions apply here.

20 R Leo, "The Problem of False Confession in America" (2007) 41(10) *The Champion* 30.

21 F Quintard-Morenas, "The Presumption of Innocence in the French and Anglo-American Legal Traditions" (2010) 58 Am J Comp L 107 at 124–125. (At p 125, Quintard-Morenas referred to this pre-trial presumption as a "shield against punishment" and applying it means that there should be "no unnecessary act of severity against the accused".)

may increase the risk of *voluntary* but *false* confessions.[22] In other words, an exclusionary rule based on inducements, threats or promises is really one-dimensional and woefully inadequate as the main or sole control for the admission of confessions. Interrogators trained in behavioural sciences are more sophisticated and subtle these days – psychological coercion may not be couched in terms of crude inducements, threats or promises. In other words, even if the formula is correctly applied it may still lead to the admissibility of false confessions with deleterious results.

14 Although a detailed examination of the findings of psychologists in the area of police interrogation and false confessions is beyond the scope of this article, it is pertinent to note a general conclusion from these studies (admittedly not in Singapore, as we have no such studies to speak of) – "police-induced false confessions is one of the most prominent and enduring causes of wrongful conviction", and that this was prompted by the interrogators' "tunnel vision" and "confirmation bias".[23] To make matters worse, suspects might be suffering from what psychologists refer to as "a memory distrust syndrome" (or MDS) that might cause suspects who were clear, before the interrogation, that they were innocent of the crimes alleged, to doubt their own recollections and adopt those of their interrogators.[24] This may be the case whether the interrogator acts in good faith or not. A combination of these factors may render even a confession that is voluntarily obtained unsafe from the start.

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22 The classic reference for this and other related problems is: G H Gudjonsson, *The Psychology of Interrogations and Confessions – A Handbook* (Chichester, England: Wiley & Sons, 2003). Another useful volume is *Police Interrogations and False Confessions* (G Daniel Lassiter & Christian A Meissner eds) (Washington DC: American Psychology Association, 2010). Also see, Brandon L Garrett, "The Substance of False Confessions" (2010) 62 Stan L Rev 1051 (the author is grateful to Professor Michael Hor for this reference).

23 R Leo & S Drizin, "The Three Errors: Pathways to False Confession and Wrongful Conviction" in *Police Interrogations and False Confessions* (G Daniel Lassiter & Christian A Meissner) (Washington DC: American Psychological Association, 2010) ch 1, at p 23 defines "tunnel vision" as "the tendency to focus on a suspect, select and filter the evidence that will build a case for conviction while ignoring or suppressing evidence that points away from guilt" and "confirmation bias" as "the psychological tendency to seek out and interpret evidence in ways that support existing beliefs, perceptions, and expectations and to avoid or reject evidence that does not". Citing from studies, the authors reported that "tunnel vision and confirmation bias are pervasive in the criminal justice system and present in virtually all wrongful convictions".

24 G H Gudjonsson, *The Psychology of Interrogations and Confessions – A Handbook* (Chichester, England: Wiley & Sons, 2003) at pp 196–197. For a judicial appreciation of the problems of false confessions, see *R v Oickle* [2000] 2 SCR 3 at [34]–[46]; 147 CCC (3d) 321: this is the leading case on confessions in Canada, where the voluntariness test still applies.

15 Admittedly, there is no justification or evidence for concluding that there is an acute problem, or even of any problem, of false confessions in Singapore. What is argued here is that even a strict adherence to the presumption of innocence at the trial stage counts for little if attention is not paid to the presumption at the pre-trial stage. The Minister's comments that the procedure must be fair, and facilitate truth rather than lean towards conviction have special significance when considered at this "gathering of evidence" stage of the criminal process.[25] How the presumption of innocence has a part to play in the investigative process therefore should be considered, so that its later role as an evidential doctrine of proof becomes even more meaningful. It will be seen that adopting the same voluntariness formula with the addition of oppression provides little, if any, guarantee of reliability in statements and confessions. Be that as it may, it is necessary to examine these traditional concepts to see how they can be made to work in the current system as no real amendments to the old law have been made.

III. The remarkable durability of the voluntariness test[26]

16 It is probably a surprise to many that the traditional formula for voluntariness found in the Evidence Act and the former CPC should survive unscathed and some may even say, fortified with the inclusion of "oppression". As every student of evidence learns on her first encounter with this subject, there are serious flaws in the test, which provides that a statement or confession is inadmissible:[27]

> … 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

25 Recently, it was noted that more than 250 convicted felons (who gave confessions) were exonerated by DNA evidence in the US: Brandon L Garrett, "The Substance of False Confessions" (2010) 62 Stan L Rev 1051. According to Garrett's own study of 40 cases, all but two were induced to confess, not by offending the so-called voluntariness formula, but by interrogators piling them with detailed information that "contaminated" their statements. The confessions were "voluntary" but tainted and unreliable. See also, Steven Drizin & Richard Leo, "The Problem of False Confessions in the Post DNA World" (2004) <http://www.aals.org/am2005/saturdaypapers/130drizin.pdf> (accessed 5 March 2012).

26 For a recent examination of the current law on admissions and confessions, see Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 3rd Ed, 2010) ch 5, sections B and C. Also see Dorcas Quek, "The Concept of Voluntariness in the Law of Confessions" (2005) 17 SAcLJ 819, defending the current test as contrasted with a test based on reliability. *Cf* Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii, which rejected the current test in favour of reliability, as well as rules and discretion on impropriety in obtaining statements.

27 Criminal Procedure Code 2010 (Act 15 of 2010) s 258(3).

> the statement he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

17 The so-called formula is derived from English law in a period which Wigmore referred to as one of "sentimental irrationality",[28] and acquired the appellation "voluntary" by virtue of Lord Sumner's famous *dictum* in the Privy Council's decision in *Ibrahim v The King*[29] ("*Ibrahim*") that:

> It has long been established as a positive principle of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a *voluntary* statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised[30] or held out by a person in authority. [emphasis added]

18 Generally, two types of "attack" have been mounted on the traditional test: the first is the formulaic attack, that is, emphasising the imprecision of terms like "threat, inducement or promise having reference to the charge" or "person in authority",[31] and the difficulties inherent in applying it, such as the so-called "objective" and "subjective" parts of the test. The second type of attack is on the policy basis of the test – is the test based on reliability, or other aims such as protecting the rights of accused persons, judicial integrity or disciplining the law enforcement agencies. If it is based on more than one principle and there is a conflict between them (usually between reliability and others), *eg*, a statement otherwise reliable obtained by egregious means, how should the conflict be resolved?

A. *Inducement, threat or promise having reference to the charge*

19 It is no doubt true that some of the flaws in the traditional formula have been, by and large, addressed by case law. The courts have in the last two decades addressed some elements bravely, if not

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28 Wigmore, *Evidence* (Chadbourn Rev 1970) Vol III at p 298, para 820a. For an excellent judicial account of reasons for the "sentimental irrationality", see Lord Hailsham in *DPP v Ping Lin* [1976] AC 574 at 600A–C.

29 [1914] AC 599 at 609. In P Mirfield, *Confessions* (London: Sweet & Maxwell, 1985) at pp 50–53, Mirfield pointed out that in the judgment, Lord Sumner did not mention "threats" or "promises" – which means that "it is possible for a policeman to inspire fear or hope in a suspect without threatening him or promising him anything" (at p 60). In the event, the use of the word "voluntary" in the light of psychological studies of suspects under interrogation, is inapposite as suspects by and large would already feel compulsion to "help the police with their inquiries" especially when they are taken into custody and questioned in what would undoubtedly be perceived by them as a hostile environment.

30 Lord Hailsham in *DPP v Ping Lin* [1976] AC 574 at 597H–598A believed this word to be wrong and that it should have been "excited".

31 As exposed by Lord Reid in *Harz and Power* [1967] 1 AC 760.

altogether successfully; the most obvious example probably is the Court of Appeal's decision in *Poh Kay Keong v PP*[32] where the phrase "having reference to the charge" was interpreted purposively to vanishing point. In this case, the officer threatened to charge the brother and sister-in-law if the accused did not make a statement; he made the statement which was challenged in court as being involuntary.[33] L P Thean JA first pointed out that the basis for the formula was to ensure the reliability of statements. Giving the example of police officers threatening to beat up the accused unless he gives a good statement, and another where they threaten to beat up his brother and sister-in-law, the judge said:[34]

> As between the two there is no difference in principle. The only difference is that the first affects the appellant physically, whereas the second is directed against his brother and sister-in-law physically but affects the appellant emotionally. The object or purpose of both is the same: it is to induce the appellant to make a statement relevant to the charge and in this case a confession; in that sense, they each have everything to do with the charge. In that sense, they were made with reference to the charge. In our opinion, to say that either of the threats is not one having reference to the charge but relates to a 'collateral' matter is unreal; and to say that the first threat, which affects the appellant directly, is one having reference to the charge, but the second, which does not so affect him, is not, is illogical.

He summed up the position by stating that "an inducement, threat or promise has reference to the charge against the accused person, *if it was made to obtain a confession relevant or relating to the charge in question*"[35] [emphasis added]. While this resolved the untenable (unreal and illogical) position of requiring an inducement, threat or promise to "have reference to the charge" in order to be effective, the approach is tantamount to ignoring the clear words of the provision.

20 A string of decisions following *Poh Kay Keong v PP* affirmed the use of purposive interpretation to such an extent that the Court of Appeal in 2000 could declare categorically in *Syed Yasser Arafat bin Shaik Mohamed v PP*[36] that: "It is not a requirement that the inducement must relate or have reference to the charge in order to exclude a confession made as a result of that inducement … A threat made against family members could be sufficient to vitiate a confession." It would seem therefore that deletion of the words "having reference to the charge"

32 [1995] 3 SLR(R) 887.

33 The trial judge held that the threat had no reference to the charge and, therefore, the statement was strictly admissible "but the accused would be entitled to ask the court to give it little or no weight" (*Poh Kay Keong v PP* [1995] 3 SLR(R) 887 at [25]).

34 *Poh Kay Keong v PP* [1995] 3 SLR(R) 887 at [41].

35 *Poh Kay Keong v PP* [1995] 3 SLR(R) 887 at [44].

36 [2000] 2 SLR(R) 977 at [35].

would accord more with judge made law and principle than retaining the phrase. It would be disingenious, in this regard, to argue that the retention of these words is to show clearly the intention of the Legislature to make it a requirement again.

B. The objective-subjective elements

21 Unfortunately, the forthrightness with which the courts dealt with the problem of "having reference to the charge" was not shown in dealing with other aspects of the formula – the most difficult one to apply being the so-called "subjective, objective" elements in the formula.[37] In *Chai Chien Wei Kelvin v PP*,[38] Yong CJ delivering the judgment of the Court of Appeal said:

> The test of voluntariness is applied in a manner which is partly objective and partly subjective. The objective limb is satisfied if there is a threat, inducement or promise, and the subjective limb when the threat, inducement or promise operates on the mind of the particular accused through hope of escape or fear of punishment connected with the charge … It is a question of fact to be determined in the circumstances of each case whether a statement or conduct by someone else, usually a police officer, constitutes an inducement, threat or promise which operated on the mind of an accused person and caused him to give his statement.

22 Thus stated, the issue, "was there an inducement, threat or promise[39] proffered by the person in authority" would be decided "objectively" and the issue, "did it operate on the mind of the accused so as to cause him to make a statement" would be decided "subjectively", presumably with reference to the accused's mental state. But how have these issues been decided in actual cases? Have these two elements been kept apart and analysed accordingly into its objective and subjective parts? Identifying whether there was in fact an inducement, threat or promise without regard to the effect words spoken by the person in authority have on the accused (*ie*, objectively) seems to be an odd exercise though, it would seem, required by the words in the statute.

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37 See Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 3rd Ed, 2010) at para 5.24. Dorcas Quek, *The Concept of Voluntariness in the Law of Confessions* (2005) 17 SAcLJ 819 in fact attributed the durability of the formula to the fact that it contained both subjective and objective elements, so that the law is not, like the previous English formula, "excessively lenient" towards the accused (at para 71(a)) where the objective part is missing.

38 [1998] 3 SLR(R) 619 at [53].

39 The "inducement, threat or promise" is actually not an accurate reflection of the common law. Lord Hailsham in *DPP v Ping Lin* [1976] AC 574 at 597–598 spoke of the original *Ibrahim* formula (*Ibrahim v The King* [1914] AC 599) as referring only to the duty of the Prosecution to prove beyond reasonable doubt that the confession was not obtained by the accused either by fear of prejudice or hope of advantage excited or held out by a person in authority. See n 29 above.

One could sympathise with Lord Hailsham in *DPP v Ping Lin*[40] ("*Ping Lin*") when he remarked that "inducement" formed no part of the original *Ibrahim* formula, and that he doubted whether the hypostatisation would be particularly helpful generally. He went on to observe, it is submitted correctly, that:[41]

> The question to be answered in every case is whether the prosecution has proved the statement in question to be voluntary in the sense of not being obtained as a matter of fact by fear of prejudice or hope of advantage excited or held out by a person in authority. *It is the chain of causation which has to be excluded by the prosecution and not the hypostatisation of any particular part of it.* [emphasis added]

23 This means that the issue of causation, whether what was said or done by a person in authority *caused* the accused to make a statement or *caused* his will to be overborne, is more crucial than the issue, "did the words uttered by the person in authority amount to a threat, inducement or promise?". *Ping Lin* has been followed regularly in Singapore courts but on the issue whether a self-perceived inducement could operate to render a confession involuntary.[42] This needs explaining, as the test in such a situation should have been subjective rather than objective if one were truly concerned about the perceptions of the accused as to the nature of those words. The mere uttering of words by the person in authority that, objectively speaking, would amount to an inducement, threat or promise would not be enough; surely the accused must perceive them to be such, and that essentially is a subjective question.[43] It follows that only if the accused perceived such an utterance to be an inducement, threat or promise could we move to the next issue, which is, did it cause him to provide the statement? If he

40 [1976] AC 574.

41 *DPP v Ping Lin* [1976] AC 574 at 602.

42 See Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 3rd Ed, 2010) at para 5.28. The case stands for the position that where a person in authority utters words that, ordinarily speaking, could not be construed as an inducement, threat or promise, then the accused is precluded from claiming that he perceived it to be one and to have acted on it. There are unsatisfactory aspects about this case, especially when the accused (Hong Kong Chinese) had only a rudimentary knowledge of spoken English. But there seems to be sufficient evidence that he volunteered information in the hope of getting an advantage rather than acting on an offer by a person in authority unless given his limited English he wrongly perceived one to be proffered. For a local case, see *Lu Lai Heng v PP* [1994] 1 SLR(R) 1037 where the person in authority did not say anything but the accused acted on the understanding that he would confess to avoid getting his mother into trouble (as the drugs were in the mother's room). Regrettably only the Court of Appeal decision was reported, and the facts are scanty as to what actually happened at the time.

43 There is some authority in England that at common law, judges refrained from entering the issue of causation once they ascertained that there was an inducement, threat or promise: see P Mirfield, *Confessions* (London: Sweet & Maxwell, 1985) at pp 50–52 and 118 and cases discussed therein.

did not think that it was an inducement, threat or promise, then *a fortiori* it would not have caused him to give a statement.

24 Dorcas Quek pointed out in her useful article on voluntariness another interpretation of the objective-subjective elements. She stated that the objective limb "entails the consideration of whether the circumstances are such that it would give the accused *reasonable grounds* to suppose that he would gain an advantage or avoid an evil".[44] If a judge were to take the view that an inducement, say of being allowed to see the wife or girlfriend, would not be sufficient to give the accused "reasonable" grounds to suppose that he would gain an advantage or avoid an evil, given the fact that he was charged with a capital offence, the subjective test would never come into play.

25 For instance, in *Sharom bin Ahmad v PP*,[45] one of the accused (facing a capital charge of drug trafficking) alleged that he gave the statement after the inspector (together with an interpreter) threatened to arrest his wife, but at the same time promised to let him see her if he gave a statement. An inducement to lower the charge to a non-capital one was also allegedly made, and a further threat of indefinite detention if the accused did not give a statement that would tally with the co-accused's account.[46] The "objective" analysis of the court was as follows:[47]

> The remark on arresting Boksenang's [the accused] wife, if made at all, could amount to a threat sufficient to vitiate the confession … *As for the inducement to see the wife, this by itself was unlikely to be a sufficient inducement that would render the statement involuntary, especially if the accused was facing a capital charge*. In *Yeo See How v PP* [1996] 2 SLR(R) 277, the court found that given the nature of the capital charge that the accused was facing, it was *incredible* that he would have made the statement merely to obtain cigarettes and visits by his family members … *We could not believe and it made no sense* that Boksenang's free will would be so easily weakened by his desire to see his wife that he would rather give a statement that would eventually bring him more harm than any advantage. [emphasis added]

26 In other words, trivial inducements would not, according to the court, give accused persons "reasonable grounds" for making statements,

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44 Dorcas Quek, *The Concept of Voluntariness in the Law of Confessions* (2005) 17 SAcLJ 819 at para 35.

45 [2000] 2 SLR(R) 541.

46 The investigating officer denied he made all these threats and inducements, and was corroborated by the interpreter. The fact that the request to see the wife was granted was also "not conclusive since they were not made pursuant to any inducement or promise given earlier" (*Sharom bin Ahmad v PP* [2000] 2 SLR(R) 541 at [47]).

47 *Sharom bin Ahmad v PP* [2000] 2 SLR(R) 541 at [47].

especially if they were facing serious or capital charges. Given such an analysis, a judge would hardly ever need to proceed to the so-called subjective stage as objectively speaking it would be "incredible" for an accused person facing a serious charge attracting severe penalties to confess for trivial inducements such as food or drink or to meet up with the spouse or family members. Does that mean that investigation officers can promise meals, meetings with girlfriends or other family members to accused persons facing serious charges as trial judges would invariably "find" that it would not be reasonable to succumb to such inducements, threats or promises and confess? Where and how can one draw the line on principle? In *Chng Seow Hong v PP*,[48] the accused was suffering from asthma and alleged that his statement was involuntarily obtained as he gave it after an officer threatened to take away his inhaler. He could not identify the officer, but said he was in constant fear that if the inhaler were taken away he would die. How would an objective test work in such circumstances?[49]

27 One of the major difficulties in applying the objective test is that in the myriad of circumstances where inducements, threats or promises are made, a judge is giving his opinion on how a reasonable man, with his full faculties, would react to it, probably in the calmest of circumstances. But as Lord Reid in the oft cited case of *Customs & Excise Commissioners v Harz*[50] reminded us:

> Many of the so-called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men and women; they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side.

28 Who is to know what could have influenced an accused person, sometimes faced with "robust questioning" in a hostile, unfriendly environment, into making a statement just to obtain some relief, especially those suffering from ailments or drug withdrawal symptoms, or those who in the face of hostile questioning desperately want to see just a familiar face like that of his spouse or friend? No wonder Dorcas Quek, who put up a sustained and bold defence of the voluntariness test, remarked that: "There is no doubt that our courts have been stringent in applying the voluntariness test and *that it is exceedingly rare that a confession is excluded on the ground of involuntariness*."[51] [emphasis

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48 [1996] SGCA 21.

49 See also, *PP v Lim Boon Hiong* [2010] 4 SLR(R) 696 where the accused alleged an interpreter (who died before trial) offered the inducement, the judge stated that the "the only question in this case was the objective one of whether there had been an inducement, threat or promise by [the interpreter]' (at [32]).

50 [1967] 1 AC 760 at 820.

51 Dorcas Quek, *The Concept of Voluntariness in the Law of Confessions* (2005) 17 SAcLJ 819 at 837, para 38. She found four cases from 1991–2004 where the

(*cont'd on the next page*)

added] It is difficult to see why a judge should not, at the time he is considering the "objective" test, also consider whether the accused has "subjectively" any reason to succumb to the inducement, threat or promise. In the final analysis, as Lord Reid so wisely said, it may be right to "err on the safe side". Moreover, one could also cite the forensic reason of reliability for being cautious whenever an inducement, threat or promise is identified. Finally, it is right as a matter of principle, that we must pay attention to the presumption of innocence: if a suspect believes that he is innocent, but induced to confess, would he be thinking of punishment or sentence? When the trial court applied the objective test as it did in *Sharom bin Ahmad v PP*, did it do so on the assumption that the accused must have been guilty, therefore he would not have been induced to speak, given that he is facing a capital charge?

C. "Person in authority"

29 The difficulties with the voluntariness test lie partly in the lack of definition of important elements of the test such as "a person in authority"; that is left to case law.[52] Singapore courts have endorsed the definition of "person of authority" in *Deokinanan v R*[53] where the Privy Council did not so much define as adopt Lord Parker CJ's discussion of a definition put forward by counsel that "a person in authority is anyone who can reasonably be considered to be concerned or connected with the prosecution, whether as initiator, conductor or witness".[54] Lord Parker in fact went on to say that "the court find it unnecessary to accept or reject the definition, save to say that they think the extension to a witness is going very much too far". The tenor of the Privy Council judgment also suggests that it tended to the view that the term should mean "anyone whom the suspect might reasonably suppose to have

statements were rejected. Having said that, she did assert that "this does not imply that the test is defective". There is no empirical evidence to challenge her conclusion.

52 It is odd that this phrase is retained when the section is aimed at statements taken by law enforcement officers. The phrase is not statutorily defined, and as the ensuing discussion shows, it is capable of causing confusion and technical decisions, which do no credit to the law.

53 [1969] 1 AC 20 (on appeal from Hong Kong).

54 *R v Wilson* [1967] 2 QB 406 at 415. Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 3rd Ed, 2010) referred to the other definition cited in the Privy Council's judgment, the Manitoba case of *R v Todd* (1901) 13 Man LR 364 at 376 where Bain J said, "A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him." (This is really a tautological effort adding little, if any, to the phrase.)

influence over the prosecution".[55] In Singapore, there is a dearth of authority on this aspect.

30 Recently, in *PP v Lim Boon Hiong*,[56] the trial judge had to deal with an inducement held out by an interpreter (and introduced as such to the accused). The case proceeded on the basis that an interpreter would not be regarded as a person in authority, presumably on the assumption that an interpreter would not have "control" over the Prosecution. Had a wider definition been accepted, such as the one in *R v Hodgson*,[57] also a Canadian case, which defined "persons in authority" as "those formally engaged in the arrest, detention, examination or prosecution of the accused", the analysis could arguably have been different.[58]

31 Be that as it may, the judge then proceeded to consider a secondary rule that extended the term to persons, though not in authority, proffering inducements or promises or uttering threats in the presence of a person in authority: if the latter does not disassociate himself from such a threat or inducement, it would be regarded as having been made by a person in authority, and the statement rendered inadmissible.[59] Steven Chong J postulated four different scenarios and concluded as follows:[60]

> An interpreter, in my view, could in principle be regarded as a person in *constructive* authority if his inducement or promise to the accused was made in the presence of a person in *actual* authority *provided* the accused subjectively believed, on reasonable grounds, that the person in actual authority heard the inducement or promise made by the interpreter and took no step to dissociate himself from it … Where the accused has no reasonable grounds to believe, or does not even

55 This may be inferred from the discussion on whether the accused regarded the person offering the inducement as a person in authority or as a friend. The Privy Council decided on the latter to the exclusion of the former.

56 [2010] 4 SLR 696.

57 (1998) 18 CR (5th) 135 (SCC). This definition is wider and reflects better the modern practices of interrogation in police stations, where, for instance, investigation officers may interview together with interpreters.

58 It could be argued for instance that the interpreter who is interviewing the suspect together with investigation officers would have *apparent authority*, unless the suspect is told clearly that he does not (which might be the case here). The judge disagreed explicitly with the view expressed in *Halsbury's Laws of Singapore* vol 10 (LexisNexis, 2006 Reissue) at para 120.121 that stated that "an interpreter acting in the course of police investigation as an interpreter … is a person in authority". How would an accused person be able to tell whether an investigation officer is only acting as interpreter or actively investigating? As they are in plain clothes, they would probably look to be all investigating officers as far as the accused is concerned.

59 *PP v Syed Abdul Aziz* [1992] 5 CLAS 10 and *R v Cleary* (1963) 48 Cr App R 116 were both distinguished.

60 *PP v Lim Boon Hiong* [2010] 4 SLR 696 at [47].

> believe, that the person in actual authority heard the inducement or promise …, then the interpreter cannot be clothed with constructive authority, for the accused is not relying on any actual authority at all, but is relying instead on his own subjective viewpoint and beliefs. [emphasis in original]

32 This seems to be a rather elaborate way of interpreting the extended rule. It may be queried whether we need such an extension at all. On principle, if the suspect (subjectively) believes or has no reason not to believe that the person (because he/she is part of a team of investigators questioning the accused) proffering the inducement has authority over his case, then the general rule should operate to bar the statement, as the mischief for which the rule is enunciated to deal with is in effect, namely, that there is real risk of a false confession created by the accused acting on an inducement that he believes is held out by a person in authority. This nuanced approach together with a more appropriate definition of "persons in authority" would be sufficient to cover the problem of interpreters working in tandem with investigation officers.[61] Whether an interpreter should be regarded as a person in authority or not *should not* depend on the chance of whether the "person in *actual* authority" happens to be around at the time the inducement, threat or promise is made. It is easy to manipulate such situations.[62]

33 There is one other situation that should be considered: what if the accused, for whatever reason, did not believe that the person offering an inducement, threat or promise is a "person in authority"[63] even though he may actually be one within the description? On principle, a confession given to such a person would satisfy the reliability principle (on the assumption that the confession is freely given, hence trustworthy), but could it be argued that it would be inadmissible as it was given in response to an inducement, threat or promise held out by a person in authority (objectively ascertained)? Subjectively, the accused did not believe that that person was one "in authority" but "objectively" (that is, as a matter of law) he is one in that he is employed as a law enforcement agent. The better view seems to be that, as the accused did not believe the person to be "in authority", the inducement, threat or promise did not work on him and, hence, did not cause the making of

61 This, it is submitted, reflects the reality of interrogation by law enforcement officers. To hold otherwise could lead to mischief as it is possible for overzealous officers to ask interpreters, for example, to offer inducements, threats or promises when they are alone with the accused, say, during a break. Interpreters do not work alone.

62 In the four situations envisaged by the judge, it also depends on whether the person in *actual* authority hears or does not hear the inducement, threat or promise. Does this matter so long as the accused believed he did or should have heard?

63 *Eg*, masquerading as a prisoner or cleric.

the confession.[64] The confession should be admissible. This presupposes that the rationale of this requirement is based on the power of persons in authority to influence proceedings and hence an accused person may be susceptible to the inducement, threat or promise.

IV. Oppression *redux*

34 It is strange how the law on oppression looks rather like the proverbial Cheshire cat: the new formulation of "oppression" in s 258(3) Explanation 1 of the CPC 2010 finally makes explicit what was implied, allegedly in the voluntariness formula. It was not mentioned in the formulations of voluntariness in the Evidence Act (s 24, now repealed) or in the proviso to s 121(5) in the former CPC. It was found in principle (e) of the Judges Rules 1964 (UK), which were substantially re-enacted in the repealed Schedule E (but where "oppression" was again excluded) of the former CPC.[65] The concept was then recognised in local case law as being part of a doctrine of "voluntariness",[66] which the new Code now seeks to incorporate.[67] This is achieved by Explanation 1, which might be odd for a doctrine that developed independently of the "inducement, threat or promise" test and which is supposed to be a "touchstone" of admissibility. Section 258(3) Explanation 1 provides:

> If a statement is obtained from an accused person by a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will of the maker of the statement, and the court is of the opinion that such acts gave the accused grounds which would appear to the accused reasonable for supposing that by making the statement, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, such acts will amount to a threat, inducement or promise, as the case may be, which will render the statement inadmissible.

It may be pertinent to contrast this statutory approach with the common law, as the oppression doctrine in Singapore is actually imported from it. The only link between oppression and the general

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64 Compare the situation where the inducement, threat or promise had through effluxion of time, dissipated before the statement is obtained.

65 Cap 103, 1970 Rev Ed.

66 See *Gulam bin NMS Jamaddin v PP* [1999] 1 SLR(R) 498. This is probably an error as it is not defensible historically or doctrinally. The error seems to have been instrumental in the omission of oppression as a separate ground for exclusion in 1975. During the Select Committee's sittings in 1975 on the Criminal Procedure Code amendments, representations were made to include "oppression", but the then Law Minister, Mr E W Barker, suggested that the word "threat" in the current formulation is sufficient to include "oppression" and hence not necessary to incorporate it specifically: Minutes of Evidence, 28 November 1975, para 16.

67 The reference to the Cheshire Cat here is with regard to its ability to appear and disappear, rather than to its other defining feature, its rather broad grin.

basic voluntariness test is really in the word "voluntary", which is not found in the Codes. A statement obtained where the will of the maker was "overborne" by oppression can, in a very real sense, be described as "involuntary"; and statements obtained by threats, inducement or promises are also in an extended sense, "involuntary". A classic statement of how these two doctrines may be seen as operating together but distinct from each other is that of Dixon J in *McDermott v R*:[68]

> If he [the accused] speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. *But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made.* [emphasis added]

A. Statement to person in authority acting in oppressive manner

35 Even before discussing the nature of oppression, the wording of Explanation 1 of s 258(3) of the CPC 2010 gives rise to several problems: first, the statement must be obtained from the accused by *the person in authority who acted in an oppressive manner towards him*. This seems to be an unduly strict requirement: if the acts of oppression are carried out by another (such as another officer or lock-up guard), and the statement is later taken not by him but by yet another investigation officer, literally, the statement is outside the scope of the Explanation, whether or not the accused is "oppressed". That is not the common law position that is supposed to be codified by the provision; it does not require the link between the "oppressor" and the person in authority who eventually takes the statement. One can only hope that the courts would employ purposive interpretation again to avoid such an undesirable result.

B. Link to basic voluntariness test

36 Second, there is the link to the so-called test of "voluntariness" in the second part of Explanation 1 of s 258(3) of the CPC 2010, where the court has to form an opinion that the so-called acts would give the

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68 (1948) 76 CLR 501 at 511. Indeed, it may be submitted that Dixon J's formulation is superior to the statutory explanation in terms of representing the common law. A more modern and elaborate statement in Australia explaining the requirements of the two distinct rules is that of Brennan J in *Collins v R* (1980) 31 ALR 257 at 307–309 where the personal characteristics of the maker as well as the body language (aside from what was said) of the persons in authority were mentioned as having a bearing on the voluntariness of a confession.

accused reason to give a statement to avoid the evil or gain an advantage. Only if such acts fit the description, that they would amount to "a threat, inducement or promise, as the case may be", will they render the statement inadmissible. Why is this necessary? It was formerly thought to be necessary under the Evidence Act simply because there was no separate provision for oppression, hence the link to ensure its reception.[69] But when the CPC 2010 is enacted anew, there is no real need to link the ground of oppression to that of voluntariness. It should be a separate ground for invalidating confessions in situations where there is just illegitimate pressure without inducements, threats or promise; the legal fiction in the Explanation is as unnecessary as it is puzzling. The addition of the phrase, "or oppression" to the main body of s 258(3) at the end would have been enough, with the Explanation defining what "oppression" entails.

37 Be that as it may, it would appear that Explanation 1 of s 258(3) of the CPC 2010 requires several elements to be established, at least by some evidence probably led by the accused, before "oppression" can be raised as a ground for inadmissibility:

(a) the "person in authority" must have acted in a manner that

(b) tends to sap and *in fact sapped*

(c) the free will of the accused (maker of the statement)

(d) and he then gives a statement to *that person in authority*.

38 Furthermore, the court must be persuaded that the accused had (to him reasonable) grounds to believe he would gain an advantage or avoid an evil (of a temporal nature and related to the proceedings) by giving the statement. Only then will the "acts of the person in authority" be regarded as an inducement, threat or promise rendering the statement inadmissible. Surely where oppression is alleged the evil that the accused sought to avoid could only be the continuing oppression, whether in the circumstances (such as withholding of amenities, rest or food or other demeaning treatment) or "robust questioning" (prolonged, aggressive questioning). One hardly needs to look further than that as a reason or reasons for his will to crumble and for him to want to avoid perceived further ill treatment by "volunteering a statement".

69 It is a trite proposition at common law that oppression is seen as a separate ground and that the Prosecution does not bear the initial burden to disprove oppression unless the accused alleges it and provides some evidence of it. The Prosecution of course has the burden of proof on the issue of voluntariness.

39 The phraseology of Explanation 1 of s 258(3) of the CPC 2010 suggests that one could describe the link to voluntariness in the following way – that the accused at the time he is suffering from the "acts of oppression" still has a mind capable of reason, even as his will to resist making a statement is wilting, such that when he accedes to making a statement, he chooses to avoid the evil. However, this does not cohere well with the requirement that his "free will" must be gone at the time of the statement, which suggests that there is no operating mind capable of choice. He must have lost his will to resist. It remains to be seen how this new explanation, unknown to common law in fact, is supposed to work. One plausible interpretation may be that of the Australian High Court's majority judgment in *Cornelius v R*[70] where the situation was described as follows:

> [Confessions are involuntary if obtained by] prolonged and sustained pressure by police officers upon a prisoner in their hands, until, through mental and physical exhaustion to which want of sleep and food sometimes contributes, he consents, in order to obtain relief, to make a confession of the crime. If it is alleged that the confession is the outcome of pressure, the question whether by persistent interrogation, or by other means, a prisoner has been constrained to confess so that his statement cannot be regarded as voluntary must sometimes be decided as a matter of degree.

It is submitted, however, that though one could explain the link to voluntariness in this way, the opportunity is lost to establish oppression as an independent means of weeding out unreliable confessions and statements. Instead, the provision has raised problems, which hitherto did not exist at common law as discussed above. Finally, it may be mentioned that there is a definite link between oppression and the natural meaning of a "voluntary" act, where one performs an act – such as provide a statement – of one's free will,[71] that is in the complete absence of oppressive circumstances. But this is not what the Explanation refers to. So what are the elements of "oppression"?

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70 (1936) 55 CLR 235 at 246–247(majority comprising Dixon, Evatt and McTiernan JJ). See also Dixon J's *dictum* from *McDermott v R* (1948) 76 CLR 501 cited at para 34 of this article.

71 As defined in the *Oxford Dictionary* (Oxford: Oxford University Press, 2010).

C. The "elements of oppression"[72]

40 One of the most cited *dictum* on what constitutes oppression is that of Sachs J in *R v Priestley*[73] and quoted *in extenso* by Yong CJ in *Chai Chien Wei Kelvin v PP*[74] ("*Kelvin Chai*"):

> [T]his word [oppression] … imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary … Whether or not there is oppression in an individual case depends upon many elements … They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.

Yong CJ continued: "a statement would not be extracted by oppression unless the accused was in such a state that his will was 'sapped' and he could not resist making a statement which he would otherwise not have made".[75] From the *dictum*, one may classify the elements as follows: (a) oppression may be of two types, of circumstances (as in the withholding of food and rest, as well as the use of basic amenities like restrooms) and of the duration, intensity and time of questioning; (b) the characteristics of a suspect, experienced or inexperienced, tough or timid, are important; and (c) for oppression to occur the will to resist must be overborne (or cease to exist). It does not, however, seem to be the case in Singapore that there is a prerequisite for establishing oppression that the person in authority engages in some unlawful or illegal conduct, though if it is present, it could be easier to draw the inference, but in itself, it is not decisive. What is decisive is the so-called "sapping of the will" through deprivation of sleep or rest, food, drink and use of basic amenities or through intense and prolonged questioning.

41 While it is easy enough to point to external aspects of "oppression" such as the periods when the suspect is deprived of food and drink or other basic amenities, or subject to what the judges

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72 The latest summary of the doctrine may be found in the admirable effort of Woo Bih Li J in *PP v Ismil bin Kadar* [2009] SGHC 84 at [16]–[26], where he reviewed the local cases on the subject. His review, together with his analysis of voluntariness in the paragraphs preceding, were not challenged in the Court of Appeal: see *Muhammad bin Kadar v PP* [2011] 3 SLR 1205.

73 (1967) 51 Cr App R 1.

74 [1998] 3 SLR(R) 619 at [56].

75 *Chai Chien Wei Kelvin v PP* [1998] 3 SLR(R) 619 at [57].

euphemistically refer to as "robust questioning", it is not easy to determine whether, and when, the suspect's will to resist making a statement has wilted. That is probably why "oppression" never is, nor can be, a primary touchstone for determining the admissibility of statements by accused persons. Here, more than in any other area of the law, the differences in characteristics of suspects can make the difference in deciding whether he or she is "oppressed" or not. What is sauce for the goose may not be sauce for the gander. Comparisons of cases on oppression are apt to be counter-productive due to the differences in characteristics among suspects.

42 Be that as it may, it is clear that for a confession to be rejected on the ground of oppression, the courts have normally set a high bar – in other words, there seems to be an assumption that suspects generally can tolerate rather rough circumstances, such as eight to ten hours without food or water, or be under "robust" questioning for long periods of time.[76] Generally, the suspects were described as tired, hungry, thirsty and confused but their will to resist making a statement seemed to be intact.[77] In *Kelvin Chai*, Yong CJ mentioned the fact that the accused had no food or drink since his arrest to the time he made his statement (about seven hours) and said:[78]

> Although P34 and the first part of P36 were recorded in the early hours of the morning of 14 January 1998 (bearing in mind also that the first accused had been arrested at 4.54pm the previous day and had, presumably, not been given any rest since that time), it is clear that the circumstances under which the statements were recorded fell far short of the standard required for a finding of oppression to be made.

But is there "a standard required for a finding of oppression" to be made? Does it not depend on the circumstances of each case, and the characteristics of each suspect?

43 By contrast, in *PP v Lim Kian Tat*,[79] a clear case of oppression was held to be proved when the suspect was interrogated for 18 hours (with an hour's break). Lai Kew Chai and Chan Sek Keong JJ held the statement involuntary as a result of oppression. There is every good

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76 See, for example, the cases of *Chai Chien Wei Kelvin v PP* [1998] 3 SLR(R) 619 (seven hours without food or drink), *Tan Boon Tat v PP* [1992] 1 SLR(R) 698 (nine hours without food or drink).

77 It is not clear what evidence supported these inferences that the will to resist still subsists in these cases.

78 *Chai Chien Wei Kelvin v PP* [1998] 3 SLR(R) 619 at [59].

79 [1990] 1 SLR(R) 273. One of the statements in the case was also reduced to writing three years after the accused gave the oral version. Other statements were also not admitted – they were recorded after six to seven hours of interrogation. The accused, charged with murder, was acquitted without his defence being called.

reason, however, to impress on the court, even when no oppression is found, that the statement or confession may be unreliable due to the severe questioning or circumstances – it must be remembered that oppression, if it succeeds, renders a statement inadmissible, but if it falls short of the mark, the statement may still be untrustworthy. But the difficulty with this head of involuntariness is that judges have little choice other than to draw inferences from the descriptions of the "oppressive" circumstances and the accused's physical and mental states. It is no surprise that such a ground is extremely difficult to establish, even though the burden should be on the Prosecution to disprove beyond reasonable doubt that the accused's will has been sapped once there is sufficient evidence adduced to show a *prima facie* case of oppression.

44 The language of oppression, namely, the "sapping of the will" has also been employed in a crop of cases dealing with drug or substance withdrawal symptoms, and indeed, has extended to alcohol abuse and withdrawal symptoms as well: where a suspect, who may be a drug or substance abuser or an alcoholic, is going through withdrawal symptoms, he would suffer a series of adverse effects which could include life threatening seizures and delirium. There can also be milder symptoms such as dizziness, nausea, cravings and fits. Is a statement obtained from a suspect who is suffering from such symptoms "voluntary" and admissible? The answer given by the cases seem to be that it would be involuntary only if the suspect was in a state of "near delirium".[80] There is little doubt that when the suspect is in that state, his statement could easily be regarded as truly "involuntary" and hence inadmissible, but what if the suspect was in a state of confusion, or hallucinating or just incoherent? The basis of exclusion could be that his state of mind was so abnormal that his statement should not be received, as the prejudicial value may exceed its probative worth.[81] The statement probably is extremely untrustworthy or unsafe given the state of the accused's mind. Of course this is a matter of degree, and where the debilitating condition is not so serious, there may be grounds to adjudge the statement reliable. But the use of the language of "oppression" in such cases should be resisted.

80 *Garnam Singh v PP* [1994] 1 SLR(R) 1044; *PP v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124; *Chua Poh Kiat Anthony v PP* [1998] 2 SLR(R) 342.

81 For another solution, see Woo Bih Li J's dictum in *PP v Ismil bin Kadar* [2009] SGHC 84 at [26]: "[A] drug abuser may not be nearly delirious but still be in a state of drowsiness or confusion such as to make it unsafe to admit his statement made in such circumstances."

V. Explanation 2, procedural irregularities and discretion

45 In the debate (Second Reading) of the CPC 2010 Bill, the Minister for Law was frankly somewhat surprised if not bemused at the remarks made about Explanation 2 of s 258(3),[82] as it was supposed to be, as he said, the present state of the law. To a large extent, he is right, and the section ported over, s 29 of the Evidence Act, had been the least referred to section in the group of provisions dealing with statements by accused persons.[83] Its inclusion in the CPC 2010 therefore was thought to be uncontroversial. However, there were calls for its removal,[84] principally on the grounds that in the case of deception or promise of secrecy, it would be a form of inducement or promise and that it would be letting in by the back door what is prohibited. Also the practice of deception may be egregious and lower the reputation of the law enforcement agencies; the justice system may also lose public approbation from condoning such practices. The criticisms appear valid; the five cases listed in Explanation 2 all go against not only the principle of reliability, but also the *nemo debet* principle, the protective principle, the disciplinary principle, and last but certainly not least, the judicial integrity principle.[85] The judicial responses to some of these situations are worthy of note.

46 In enticing the accused to incriminate himself through a deceptive act or promise of secrecy, the *nemo debet* principle, which declares that "no one ought to be compelled to betray himself", is disregarded. If a law enforcement agent were to tell a half-truth, such as "you must answer all my questions" and not relate the rest of the provision in s 22(2) of the CPC 2010 that the accused need not answer if that would expose him to a criminal charge, penalty or forfeiture, it is also against the *nemo debet* principle. The Court of Appeal in *PP v Mazlan bin Maidun*[86] was faced with this situation where an interpreter told the accused "he was bound to state truly the facts" but did not relate

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82 Explanation 2 of s 258(3) of the Criminal Procedure Code 2010 (Act 15 of 2010) provides for five instances where breach of which do not affect admissibility: these are statements made (a) under promise of secrecy, or in consequence of deception; (b) where the accused is intoxicated; (c) where the accused answers questions he need not answer; (d) where there was a duty to warn the accused that he need not answer and he was not warned; and (e) where the recording officer/interpreter did not comply with ss 22 and 23.

83 The Minister used the word "overlooked" to refer to the section.

84 At least three MPs who practise law call for the Explanation 2 of s 258(3) of the Criminal Procedure Code 2010 (Act 15 of 2010) to be removed.

85 On the five principles, see P Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Oxford: Clarendon Press, 1997) ch 2. See also Dorcas Quek, "The Concept of Voluntariness in the Law of Confessions" (2005) 17 SAcLJ 819 and Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii, where the principles are extensively discussed.

86 [1992] 3 SLR(R) 968.

the privilege against self-incrimination contained in the latter part of the provision (s 121 of the former CPC now s 22 of the CPC 2010). Yong CJ pointed out that "not only was the … accused's entitlement to keep silent about anything that might incriminate himself left unsaid, … he was in addition actually told that he was bound to tell all the truth".[87] Specifically referring to s 29 (now part of Explanation 2 of s 258(3)) he continued:

> Despite s 29 of the Evidence Act, we think that in the context of these facts it may be said that the failure to inform a person of his rights in circumstances where a positive duty has arisen to give such information may amount to an inducement within the meaning of the proviso to s 122(5), because it would be reasonable to assume that such an omission might have caused that person to say what he might not otherwise have said. At least, we think a reasonable doubt could arise as to whether he would have said the same things if he had been informed that he was entitled to refrain from doing so. In short, the seeming lack of choice might be an inducement to follow the only course of action, which apparently remains.

47 The approach taken by the court, and against the provision in s 29, can be seen as an example of the "protective principle" at work, which requires a remedy to be provided in a case where the accused suffers prejudice arising out the minimal standards set by law not being met. For instance, it was decided that s 121(2) of the former CPC (now s 22(2) of the CPC 2010) did not require the law enforcement agent to inform the suspect being questioned, that he has a privilege against self-incrimination.[88] The minimum standard required of the law enforcement agent is that he is under no duty to inform the suspect of this privilege. However, once there is misrepresentation of the law – where the policeman tells a half-truth ("you must tell me everything") a positive duty arises to correct the misrepresentation, otherwise the consequences on the accused might be dramatic. In such a case, it was suggested that the remedy would be to exclude the statement – that the half-truth could be regarded as an inducement to speak and hence render the statement involuntary.[89]

48 Explanation 2 of s 258(3) of the CPC 2010 contains a new limb that is not in s 29 of the Evidence Act: it is provided that "if a statement is otherwise admissible, it will not be rendered inadmissible merely because the recording officer or the interpreter of an accused's statement recorded under section 22 or 23 did not fully comply with that section".

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87 *PP v Mazlan bin Maidun* [1992] 3 SLR(R) 968 at [28].

88 *Quaere*: would a pre-trial presumption of innocence include the right to be informed of the privilege?

89 This argument is familiar to contract lawyers as it is used to impose obligations to disclose on a party to a contract if he were to misinform the other party, even though if he kept silent, the duty to disclose would not arise.

Section 121 (now s 22(3) of the CPC 2010) requires statements to be in writing, read over to the witness, and interpreted if necessary, as well as being signed by him. This provision is supported by the Police General Orders ("PGOs") providing more detailed instructions. It would appear then that a failure to comply with the section or PGOs would not be fatal to admissibility at first sight. However, in a recent decision, *Muhammad bin Kadar v PP*,[90] the Court of Appeal decided that a court has a discretion to exclude statements taken in breach of statutory provisions and/or PGOs where even though the statements satisfy the voluntariness test, they may be prejudicial to the accused as a result of the breaches, and their probative value may be weakened, justifying exclusion.

49 Again this is an example of the court applying the protective principle, which *prima facie*, seems to be contrary to Explanation 2(*e*) of s 258 of the new CPC 2010. Where the minimum standards (that is the procedures to be followed) are not met, and where this could cause significant adverse consequences to the suspect, the court came up with a remedy, a discretion to exclude such statements even though they are technically voluntary. The reasoning of the court as expressed by V K Rajah JA was as follows:[91]

> Police investigators are aware when they record statements that they are likely to be tendered as evidence before a court and that there is therefore uncompromising need for accuracy and reliability. The objective of the relevant provisions in the CPC and the Police General Orders is to ensure that both these twin objectives are met in every investigation. For this reason, as well as what we have articulated earlier, we think that a court should take a firm approach in considering its exercise of the exclusionary discretion in relation to statements recorded by the police in violation of the relevant requirements of the CPC and the Police General Orders (or other applicable legal requirements). This means that the court should not be slow to exclude statements on the basis that the breach of the relevant provisions in the CPC and the Police General Orders has caused the prejudicial effect of the statement to outweigh its probative value.

50 Continuing, the judge further declared that the burden of proof is on the Prosecution to show that the probative value of such a statement would exceed its prejudicial effect. The Prosecution needs to explain away the reasons for the irregularity and convince the court of its probative value. Where there are flagrant breaches, the burden will be harder to discharge – it will require more cogent evidence, as the *bona fides* of the recording officer may be in question. The judge was

90 [2011] 3 SLR 1205.

91 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [60].

concerned to point out three important elements in the exercise of such a discretion: first, only serious irregularities affecting the evidential value of the voluntary statement will justify exercise of the discretion; second, this discretion is not triggered by a failure to warn, as that will not affect the accuracy of what the suspect will say; and third, the disciplinary principle is not the one on which the discretion is based – it may be said that the discretion is of the reliability type rather than the fairness (due process) type. That is, the main reason for exercising the discretion is to ensure the reliability of statements admitted in evidence, and not some notion of a broader concept of fairness to the accused. In this regard, it is perhaps pertinent to mention that this formulation of the discretion is extremely narrow and follows the general one accepted as compatible with the Evidence Act in *Law Society of Singapore v Tan Guat Neo Phyllis*.[92] This was not the approach taken in *R v Sang*[93] which also recognised a *separate* discretion to exclude evidence that was obtained unfairly *from an accused* in custody, where the evidence resembled an "admission or confession" (the second exception). The basis of that discretion is the *nemo debet* principle, which in Singapore seems to be limited to the situations discussed above and not to be used broadly.

51 The role of "Explanations" is described as "not generally designed to expand or limit the scope of the section but to avoid confusion and to avert some potential arguments as to the scope of the law … Explanations therefore form part of the law that the courts will apply".[94] It is not known how the courts would react to Explanation 2(*e*) of s 258 of the new CPC 2010 and whether this would require a re-examination of the approach taken in *Muhammad bin Kader v PP* in the light of it. The judicial approaches discussed above suggest that Explanation 2 should perhaps not be retained in its current form and should be revised as soon as practicable – if applied literally it has the potential to work injustice. Explanation 2 should not be retained merely because "it had always been there". As may be seen in the cases discussed, the courts are prepared, if given the liberty, to come up with rules, principles and discretions that may ameliorate the strictness of the law and achieve justice in individual cases. As V K Rajah JA remarked (somewhat optimistically) in *Muhammad bin Kadar v PP*:[95]

> In our view, there is no reason why a discretion to exclude voluntary statements from accused persons should not exist where the prejudicial effect of the evidence exceeds its probative value. For one, where prejudicial effect exceeds the probative value, the very reliability

92 [2008] 2 SLR(R) 239.
93 [1980] AC 402.
94 S Yeo, N Morgan & Chan WC, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis, 2007) at p 15.
95 [2011] 3 SLR(R) 1205 at [55].

> of the statement sought to be admitted is questionable. It appears to us that this is an area of judicial discretion that Parliament has left to the courts.

The burden on the courts remains substantial so long as the old formulas remain, and contradictory principles and philosophy operate in this area.

VI. *Voir dire*, the role of the judge and weight of confessions

52 In assessing the adequacy or otherwise of the voluntariness test in the CPC 2010, it is pertinent to refer to an argument sometimes heard about the fact that as Singapore does not have a jury, and as it is the judge who determines both the admissibility of evidence as well as considers its probative value, there is no need to be strict about the first role, and that the *voir dire* is really inappropriate and unnecessary.[96] A stronger version of this argument includes the element that the judge might have seen the statement and therefore could be influenced by it even if it was ruled inadmissible. The arguments have superficial plausibility but suffer from three flaws: first, the issue at the *voir dire* has to do with voluntariness and not the truth of the contents of the statement, and therefore there would not be a close scrutiny as to its contents as the voluntariness test involves factors extraneous to it – such as the presence of threats, *etc*. Second, it would be wrong to leave the matter till the stage of the evaluation of evidence by the judge; a ruling on admissibility is vital and the accused is entitled to the strict application of the rules of evidence, as is the Prosecution. The right to appeal may be conditional on there being a ruling as to admissibility, and not an exercise of judicial discretion while weighing the probative value of such statements. To consider voluntariness at such a late stage would merely serve to confuse the judicial roles. Third, following from the second, it is important to have rulings of admissibility as part of the legitimising process of a criminal trial. The accused can give evidence regarding the obtaining of the statement, and he would still be able to retain his right to silence at the main trial if he so wishes.[97] This legitimation role as a symbol of adversary justice cannot be abandoned without good reason.

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96 This view is also found articulated in other jurisdictions with regards to magistrates trials: see *F (an infant) v Chief Constable of Kent* [1982] Crim LR 682 (DC) and rebutted in *Liverpool Juvenile Court, ex parte R* [1988] QB 1.

97 Section 279 of the Criminal Procedure Code 2010 (Act 15 of 2010) and illustrations (*c*) and (*d*) clearly mandate that there must be a *voir dire* when the voluntariness of a statement is in issue, as distinct from an assertion from the accused that he did not make the statement tendered as evidence. See also Woo Bih Li J's comprehensive statement of the common law position in Singapore in *PP v Ismil bin Kader* [2009] SGHC 84 at [9] ff, where the judge also painstakingly detailed the proceedings of the *voir dire* and his rulings.

53 Even if the statements were to be ruled admissible, the weight to be attached to them is another matter. Judges have to give detailed reasons of how they arrived at their findings of fact especially in criminal trials where the accused may face the death sentence.[98] In the case of statements by accused persons, it may be thought that the probative value would be especially high if the statement were truly voluntarily given. However, as case law has repeatedly shown, statements may contain self-serving exculpatory accounts, as well as shifting of blame to accomplices or co-accused. There can be no hard and fast rule about the weight to be attached in such cases – as Woo Bih Li J pointed out in *Lee Chez Kee v PP*[99] there may be cases where no weight or only minimal weight can be attached to statements where the accused blamed others and exonerated himself.

VII. Concluding remarks

54 The CPC 2010 heralds a new era in criminal litigation. The Minister's articulation of the basic principles operating in this area, in particular, the primary role of the presumption of innocence is laudable and signals the commitment to a fair trial and justice for those accused of crimes. However, the retention of the old formulas with minimal amendment will not help in fulfilling the aims declared. Indeed, the inclusion of oppression in the statute seems to create more problems than the doctrine at common law. Behavioural sciences also reveal the serious problem of false confessions, a problem that is yet to be addressed in Singapore. The normative changes, though minimal, are not supported at ground level by institutional changes, such as the need to provide more evidence to the judge on the questioning of suspects. Audio or video recording of interviews is still eschewed, even though studies by researchers in other countries have shown them to be useful in determining not only the voluntariness issue but also the reliability issue. However, the courts now seem more and more alert to the possibilities of error, especially if there were procedural irregularities in the recording of statements. With privilege (in the sense that courts would normally consider properly recorded statements to have high probative value) comes responsibility; law enforcement agencies require a higher level of professional conduct as the case of *Muhammad Kader v PP* demonstrates. Giving recognition to the presumption of innocence in the investigation stage and the custodial stage may allow for the derivation of a set of rights concerning fair treatment during interrogation, including access to a lawyer where it would not unduly hamper investigation and where it is reasonable to do so, informing

98 See now, *Thong Ah Fat v PP* [2011] SGCA 65 (an important case by the Court of Appeal on the duty to give reasons in findings of fact).

99 [2008] 3 SLR(R) 447 at [294].

persons being questioned of their rights (including the privilege against self-incrimination), reasonable amenities being available, as well as reasonable periods of questioning. The use of devices such as video recorders or even audio recorders would help judges in determining the proper weight of statements. It is hoped that the opportunity will be taken in the not too distant future to replace the present voluntariness provisions with another set that could allow for a more reliable search for the true facts in criminal prosecutions and where the undertaking that all those innocent of crime have a right not to be wrongly convicted can be substantially achieved.