WHETHER A SINGAPORE COURT HAS A DISCRETION TO EXCLUDE EVIDENCE ADMISSIBLE IN CRIMINAL PROCEEDINGS

Whether a Singapore court has the power to exclude evidence admissible in criminal proceedings, and if so, in what circumstances it may be exercised, appear to be some of the more elusive questions in the law of evidence. No less than four judicial approaches are discernable from 1964 until 2008. The purpose of this article is to examine the developments in this area of the law and to consider how the courts may go forward.

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I. Introduction

1 Although the common law has long recognised the propriety of a residual judicial discretion to exclude evidence which, if admitted, would cause the accused person to suffer injustice,[1] the scope of this principle has been tainted by uncertainty, repeatedly modified by the courts and ultimately reformulated by legislation in England.[2] In Singapore, until recently, the courts seemed to have been satisfied in applying successive common law developments concerning the scope of the discretion without attempting to rationalise the governing principle in the context of the Evidence Act ("the EA").[3] This judicial trend was recently arrested by the High Court (Chan Sek Keong CJ, Andrew Phang JA and Andrew Ang J sitting) in *Law Society of Singapore v Tan Guat Neo Phyllis* ("*Phyllis*"),[4] in which the law was comprehensively reviewed and restated. Although the High Court's observations on the principles governing the discretion to exclude evidence were incidental

1 See para 34 of this article.
2 See Police and Criminal Evidence Act 1984 (c 60) s 78.
3 Although it is not provided for in the Evidence Act (Cap 97, 1997 Rev Ed). This issue is discussed in J D Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365 at 365–386. See also Tan Y L, "Sing a Song of *Sang*, A Pocketful of Woes?" [1992] Sing JLS 365.
4 [2008] 2 SLR(R) 239.

to its decision on the facts,[5] and do not endorse the previous positions taken by the Court of Appeal and the High Court,[6] *Phyllis* must now be regarded as the leading authority in this area of the law.[7]

2 The primary aim of this article is to examine the issue of whether the court continues to have a discretion to exclude evidence admissible under the EA, and if so, to analyse the nature and scope of this authority in the post-*Phyllis* era. The approach in the first part of the article will be to consider chronologically the three phases of judicial development prior to *Phyllis*: the broad position as represented by *Cheng Swee Tiang v PP*[8] (which takes into account "the interest of the individual to be protected from illegal invasions of his liberties by the authorities');[9] the narrower approach endorsed by the High Court in *Ajmer Singh v PP*[10] and the Court of Appeal in *How Poh Sun v PP*[11] (which essentially limited the discretion to circumstances in which the accused would suffer injustice at the trial);[12] and the partial *volte face* by the High Court in *SM Summit Holdings v PP*[13] (which purported to extend the discretion to exclude evidence to specific circumstances of illegality).[14] Thereafter, the author will consider the significance of the High Court's observations in *Phyllis*[15] and examine the present state of the law in the light of the fundamental principles affecting the integrity of the law of evidence and justice at trial.[16]

II. The early position: Fairness and the accused's "rights"

3 *Cheng Swee Tiang v PP*[17] ("*Cheng Swee Tiang*") is the first case reported locally concerning the common law discretion to exclude evidence obtained by entrapment.[18] The appellant was charged with assisting in the carrying on of a public lottery. Two police officers had entered the appellant's shop for the express purpose of entrapping the appellant into accepting a stake, which he did. One of the issues on

5 [2008] 2 SLR(R) 239 at [52]. The facts of this case are set out in para 18 of this article.
6 See para 17 of this article.
7 This is explained in para 19 of this article.
8 [1964] MLJ 291.
9 See paras 3–6 of this article.
10 [1987] 2 MLJ 141.
11 [1991] 3 MLJ 216.
12 See paras 7–13 of this article.
13 [1997] 3 SLR(R) 138.
14 See paras 14–16 of this article.
15 See paras 17–21 of this article.
16 See paras 22–42 of this article.
17 [1964] MLJ 291.
18 For an explanation of entrapment evidence, see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [61]–[70]. Also see *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377.

appeal was whether a trial court had the discretion to exclude evidence improperly obtained. Wee CJ, who delivered the judgment of the majority,[19] referred to the judgment of Goddard CJ in the Privy Council case of *Kuruma Kaniu v The Queen*[20] ("*Kuruma*") (which concerned an illegal search of the accused's person). Lord Goddard had formulated the principle as follows:[21]

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

4 Wee CJ also considered *Callis v Gunn*,[22] in which Lord Parker CJ referred to *Kuruma* and indicated that the "strict rules of admissibility would operate unfairly against the accused" if the evidence "had been obtained in an oppressive manner by force or against the wishes of the accused" and if it had been "obtained oppressively, by false representations, by a trick, by threats, by bribes …".[23] Wee CJ concluded that it was "undisputed law" that there is a judicial discretion to exclude relevant evidence if its reception "would operate unfairly against the accused".[24] His Honour also declared that:[25]

> … two important interests come into conflict when considering the question of admissibility of such evidence so obtained. On the one hand there is the interest of the individual to be protected from illegal invasions of his liberties by the authorities; and on the other hand the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground …

5 This proposition identified the existence of opposing interests but omitted to provide a principle to govern the resolution of the conflict. This was underlined by Wee CJ's statement "… on principle

19 This case was heard by the High Court consisting of three judges. Chua J agreed with Wee CJ. Ambrose J delivered a dissenting judgment.

20 [1955] AC 197.

21 [1955] AC 197 at 204.

22 [1964] QB 495.

23 In *Jeffrey v Black* [1978] QB 490 at 498 (a case decided after *Cheng Swee Tiang v PP* [1964] MLJ 291), Lord Widgery CJ offered further elaboration on the *Kuruma* test: "[I]f the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial."

24 [1964] MLJ 291 at 292.

25 [1964] MLJ 291 at 293. Also see the *dictum* of Lord Justice-General Cooper in *Lawrie v Muir* (1950) SC 19 at 26.

and authority … no absolute rule can be formulated and the question is one depending on the circumstances of each particular case".[26] As the court in *Cheng Swee Tiang* allowed the appeal against conviction on other grounds, it left open the question of whether the evidence ought to have been excluded in the circumstances of the case. Ambrose J dissented because he did not accept that such a discretion could exist in the absence of an empowering provision in the EA. However, the learned judge observed that even if the court had such a discretion, it would not have been correct to exercise it in the circumstances of the case.[27]

6 Accordingly, from the time *Cheng Swee Tiang* was decided in 1964 until *R v Sang*[28] ("*Sang*") (a decision of the House of Lords) was applied by the High Court in *Ajmer Singh v PP*[29] and confirmed by the Court of Criminal Appeal in *How Poh Sun v PP*[30] ("*How Poh Sun*"), the manner in which evidence was obtained had a potential impact on admissibility. A possible construction of *Cheng Swee Tiang* was that the public interest in the court's access to all relevant evidence had to be considered together with, and balanced against, any improprieties on the part of the police or other authority in acquiring the evidence. Although the court identified the conflicting interests at stake (the protection of the individual's rights and the admissibility of relevant evidence in the interest of the administration of justice), it did not formulate how this proposition was to be applied in the exercise of the discretion (for example, whether the court should balance the interests in the circumstances of the case), and omitted to elaborate on the meaning of "unfairly" in the phrase "… strict rules of admissibility would operate unfairly against the accused".[31] The standing of *Cheng Swee Tiang* was further weakened by the failure of the majority to consider the position (if any) of the EA on the discretion to exclude evidence and the impact of s 2(2) of the EA on the application of common law principles.[32]

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26 [1964] MLJ 291 at 293. Also note the observations of the High Court in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [99].

27 Ambrose J thought that the discretion might have been exercised if the evidence had been obtained "oppressively, by false representations, by a trick, by threats, by bribes, or anything of that sort" ([1964] MLJ 291 at 294). This was the view of Lord Parker CJ in *Callis v Gunn* [1964] QB 495. Also see *Jeffrey v Black* [1978] QB 490.

28 [1980] AC 402.

29 [1987] 2 MLJ 141.

30 [1991] 3 MLJ 216. Although *R v Sang* [1980] AC 402 was applied by the High Court in *Ajmer Singh v PP* [1987] 2 MLJ 141, there had yet to be a definitive statement about its status by the Court of Appeal.

31 Also see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [98]–[99].

32 Section 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Act, are repealed." This provision expressly repeals

(*cont'd on the next page*)

III. A stricter test: Unfairness at trial

7 The difficulty posed by *Kuruma* and *Cheng Swee Tiang* is the ambit of the terminology: "operate unfairly against the accused". It is arguable that any form of impropriety involves unfairness to the accused if there is a denial of rights. A plausible counterview is that the admissibility of evidence at trial is not concerned with a breach of the accused's rights, which is a matter of administrative or tort law and disciplinary action against the police.[33] Moreover, it may be contended that the improper manner of obtaining relevant evidence should not bear upon admissibility because its probative value remains unaffected.[34] This approach, which limits the words "operate unfairly against the accused" to unfairness at the trial, was endorsed by the House of Lords in *Sang*[35] and, as already mentioned, confirmed in Singapore by the Court of Criminal Appeal in *How Poh Sun*.[36]

8 The issue for consideration in *Sang*, as in *Cheng Swee Tiang* and *How Poh Sun*, was whether the courts had the discretion to exclude evidence obtained by an undercover agent. The House of Lords held that the use of an undercover agent did not give rise to a discretion to exclude evidence of a crime merely because the crime was so instigated.[37] Lord Diplock interpreted Lord Goddard's words "operate unfairly against the accused" (in *Kuruma*) as follows:[38]

> That statement was not, in my view, ever intended to acknowledge the existence of any wider discretion than to exclude (1) admissible evidence which would probably have a prejudicial influence on the minds of the jury that would be out of proportion to its true

pre-existing common law rules. As the Evidence Act is a self-contained code, "the spirit" of s 2(2) also prohibits the application of subsequent common law rules which are inconsistent with the Evidence Act. This principle (concerning the integrity of the Evidence Act as a code) is clearly established by the cases as pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Also see [2008] 2 SLR(R) 239 at [126] concerning the Chief Justice's reference to the "spirit" of s 2(2).

33 As observed by the High Court in *SM Summit Holdings Ltd v PP* [1997] 3 SLR(R) 138 at [48].

34 This is also borne out by s 29 of the Evidence Act (Cap 97, 1997 Rev Ed) which provides, *inter alia*, that deception *per se* is not a vitiating factor. Section 29 is set out in para 40 of this article.

35 [1980] AC 402. It is important to note that *R v Sang* was superseded by s 78 of the Police and Criminal Evidence Act 1984 and the Human Rights laws applicable in England.

36 The Court of Criminal Appeal held, on the basis of the decision in *R v Sang* [1980] AC 402, that "the defence of *agent provocateur* is not recognised in Singapore" ([1991] 3 MLJ 216 at 218). Also see *PP v Rozman bin Jusoh* [1995] 2 SLR(R) 879; *Ajmer Singh v PP* [1985–1986] SLR(R) 1030; *Goh Lai Wak v PP* [1994] 1 SLR(R) 563; *Chan Chi Pun v PP* [1994] 1 SLR(R) 654.

37 [1980] AC 402 at 433.

38 [1980] AC 402 at 436.

> evidential value and (2) evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect.

9 In his answer to the question referred to the House of Lords ("the certified answer"), Lord Diplock added that there is no discretion to exclude evidence beyond these situations; namely there is no discretion to exclude evidence merely because it has been improperly obtained.[39] According to his Lordship, a court has no right to exclude admissible evidence "[h]owever much [it] may dislike the way in which [it was] obtained …".[40] The terminology "operate unfairly against the accused", as interpreted in *Sang*, concerns unfairness at the trial itself. Regarding category (1) above, Lord Diplock stated in his certified answer that a trial judge in a criminal trial always has a discretion to refuse to admit evidence if its probative value is outweighed by its prejudicial effect.[41] His Lordship reviewed the authorities and concluded that the principle, although initially confined to certain areas of evidence, had now developed into a general rule of practice.[42]

10 Category (2) above is formulated in the certified answer as "admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence".[43] This category does not, of course, affect the rules of law which automatically exclude confessions and admissions which are involuntary.[44] The basis for the discretion to exclude evidence in the second category lies in the maxim "*nemo debet prodere se ipsum*" or "no one can be required to be his own betrayer" (the privilege against self-incrimination).[45] The second limb preserves the accused's common law privilege against self-incrimination. Accordingly, if, for instance, the accused is improperly induced or coerced by the police to provide an incriminating document or to give a sample of his blood or urine or breath for examination, the court would have the discretion to exclude such evidence under this limb. In *R v Barker*,[46] it was held that incriminating documents (showing that the accused had committed fraud) obtained from the accused by

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39 [1980] AC 402 at 437. Although some of the other members of the House of Lords (Viscount Dilhorne, Lord Salmon and Lord Scarman) expressed specific considerations of their own (see, in particular, pp 441, 443 and 454–455 respectively), they agreed with the certified answer of Lord Diplock.

40 [1980] AC 402.

41 [1980] AC 402 at 437.

42 [1980] AC 402 at 434.

43 [1980] AC 402 at 437.

44 See s 24 of the Evidence Act (Cap 97, 1997 Rev Ed) and the proviso to s 122(5) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed).

45 [1980] AC 402 at 436.

46 [1941] 2 KB 381.

the promise of favours were inadmissible. Although the evidence was excluded as a matter of law,[47] Lord Diplock preferred to treat the case as illustrating the discretion to exclude in the circumstances of the second category.[48] In *R v Payne*[49] (also cited by Lord Diplock as an illustration of the second category), the accused was charged with driving while unfit through drink. He was induced into submitting himself to a medical examination to determine whether he was suffering from an illness or disability. The accused agreed on the understanding that the doctor would not examine him for the purpose of determining whether he was fit to drive. At the trial, the doctor did give evidence that the accused was unfit to drive as evinced by his symptoms and behaviour during the medical examination. The Court of Criminal Appeal quashed the conviction on the basis that the lower court should have exercised its discretion to exclude the evidence. The incriminating document in *R v Barker* and the accused's symptoms and behaviour in *R v Payne* amounted to evidence tantamount to self-incriminating admissions obtained after the commission of the offence. In *Sang*, Lord Fraser emphasised that the discretion only extends to "evidence and documents obtained from an accused person or from premises occupied by him".[50]

11 The essence of the decision in *Sang* is that the words in Lord Goddard's dictum, "operating unfairly against the accused", are confined in their scope to unfairness at the trial. Lord Diplock concluded that the circumstances in the two categories would give rise to unfairness at the trial and therefore formed a basis for the discretion to exclude.[51] If the prejudicial effect of evidence outweighs its probative value, reliance on it may lead to injustice. Hence the justification for the first category, which formulated the existing practice of the courts. If the accused is improperly or illegally induced into providing evidence tantamount to a self-incriminatory admission, the principle that he is not required to incriminate himself[52] is breached. Unfairness in the sense that the accused's civil rights have been infringed by the improper manner in which the evidence is obtained was eliminated from the scope of the court's discretion to exclude.[53] The rationale for these principles was explained by Lord Diplock as follows:[54]

47 Because the court in that case likened the evidence to an involuntary confession.
48 [1980] AC 402 at 435.
49 [1963] 1 WLR 637.
50 [1980] AC 402 at 450. His Lordship added: "It is not easy to see how evidence obtained from other sources, even if the means for obtaining it were improper, could lead to an accused being denied a fair trial."
51 [1980] AC 402 at 436–437.
52 See para 10 of this article.
53 [1980] AC 402 at 437.
54 [1980] AC 402 at 436.

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

12 In Singapore, the High Court had its first opportunity to consider *Sang* in *Ajmer Singh v PP* ("*Ajmer Singh*").[55] The case involved an appeal before the High Court against the decision of the magistrate. The accused was convicted of riding a scooter whilst incapable of having proper control of the vehicle as a result of intoxication. At the trial, the doctor gave evidence that the accused showed symptoms of intoxication and that the blood specimen taken from him indicated a certain blood alcohol level above the prescribed limit. The accused argued on appeal that the evidence of the blood sample should not have been admitted as it was taken in breach of the procedures laid down by the Road Traffic Act[56] which, *inter alia*, required his consent.

13 Chan Sek Keong J (as his Honour then was) decided that it was not necessary to determine whether or not the accused gave his consent. As the issue had not been raised before the magistrate, it could not be raised on appeal.[57] The court then proceeded to consider the issue on the assumption that no consent had been given. His Honour referred to *R v Payne* and distinguished it on the basis that there the evidence of the doctor as to the accused's symptoms and behaviour was tantamount to an involuntary confession to the doctor (that the accused was unfit to drive), and came within the second category of the *Sang* formulation so that the court had a discretion to exclude such evidence. The learned judge regarded the facts of *Ajmer Singh* in a different light. The blood sample only amounted to an admission that the accused had an excessive amount of alcohol in his blood, not to the fact that he was unable to control his scooter whilst intoxicated. Therefore, according to the court, the case did not come within the second category of the *Sang* formulation. The evidence of the blood sample was admitted because its probative value (the excessive level of alcohol) exceeded any prejudicial effect.[58]

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55 [1987] 2 MLJ 141.

56 Cap 276, 1985 Rev Ed.

57 [1987] 2 MLJ 141 at 144.

58 Also see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [101] and [126] for comments on *Ajmer Singh v PP* [1987] 2 MLJ 141.

IV. A partial *volte face*

14 In the following years, *Sang* was applied by the Court of Appeal in a series of cases.[59] However, in *SM Summit Holdings v PP* ("*Summit*"),[60] the High Court decided to qualify the scope of application of the case by holding that where illegal conduct (in the manner of procuring evidence) precedes the crime, the evidence would be excluded as a matter of judicial integrity. After declaring that "[t]he court only has a discretion to exclude relevant evidence where the prejudicial effect outweighs the probative value, and where the evidence is tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence was committed",[61] Yong Pung How CJ went on to express his view that the *Sang* principle may not be justified in specific situations:[62]

> … *Sang* is not of universal application in all cases of illegally obtained evidence. In my opinion *Sang* has been cited too frequently by the prosecution in an attempt to admit any evidence which is illegally or improperly obtained without any real consideration as to its underlying principles. There are several distinguishing features between *Sang* and the present case. First, as alluded to earlier, this was not a typical case of illegality in obtaining the evidence of a crime already committed but a case where the illegality procured the very offence. Secondly, *Sang* was a decision involving the alleged illegality on the part of the police or law enforcement officers; but this was a case of an illegality on the part of a private investigator. Thirdly, *Sang* concerned the admissibility of evidence, not whether one was entitled to retain the evidence after an illegal search warrant.

15 In *Summit*, a private investigator (at the behest of the plaintiff) had procured a party (who was suspected of copyright and trade mark infringements) to infringe copyright and trade marks so that a complaint could be made, and consequential search warrants obtained, against the party. The private investigator had deposed in his statutory declaration showing how he had procured the party to replicate eight stampers (counterfeit masters) which contained allegedly copyright infringing programmes. The High Court declared that the illegal conduct of the investigator could not be condoned; and, therefore, his statutory declaration ought to have been excluded from the court's consideration in determining whether search warrants could issue:[63]

> There is a distinction between the case where police conduct has merely induced the accused person to commit the offence which he

59 See para 17 of this article.
60 [1997] 3 SLR(R) 138.
61 [1997] 3 SLR(R) 138 at [45].
62 [1997] 3 SLR(R) 138 at [42].
63 [1997] 3 SLR(R) 138 at [52]. Also see [57].

> has committed[64] (as in *Sang*) and the case where the illegal police conduct itself constitutes an essential ingredient of the charged offence.[65] The present situation falls in the latter category, albeit the illegal conduct is that of a private investigator rather than a law enforcement officer. … Different tests apply for both [categories]. In the former category, it is a case where the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations, and the exclusion of evidence would in fact undermine judicial integrity in allowing such alleged offenders get away. In the latter category, the illegality and the threat to the rule of law which it involves assume a particularly malignant aspect. … The integrity of the administration of criminal justice would require that such evidence be excluded. [footnotes added]

16 Although the High Court in *Summit*[66] sought to distinguish *Sang* on the basis of the particular facts of the case, it nevertheless contradicted repeated pronouncements by the Court of Appeal that there is no discretion to exclude evidence merely on the basis that it has been improperly obtained (irrespective of the nature of the conduct).[67] The case was criticised for its problematic factual findings, reasoning and legal conclusions in *Phyllis*.[68] Ultimately, the High Court in *Phyllis* determined that as the EA[69] does not grant any discretion to exclude evidence simply on the basis that it has been improperly obtained (whether the impropriety is general in nature or takes the form of entrapment or illegal conduct),[70] the decision in *Summit* is inconsistent with the statute.[71]

V. Standing and significance of *Law Society of Singapore v Tan Guat Neo Phyllis*

17 Apart from a noble attempt by the High Court in *Wong Keng Leong Rayney v Law Society of Singapore*,[72] the authorities prior to *Phyllis*

64 "In such a case the illegality is only in relation to the means of proof of the offence already committed." ([1997] 3 SLR(R) 138 at [41])

65 "This was a clear case where the illegality preceded the crime and was designed to bring about the commission of the crime." ([1997] 3 SLR(R) 138 at [41])

66 [1997] 3 SLR(R) 138.

67 See para 17 of this article.

68 [2008] 2 SLR(R) 239 at [108]–[113].

69 Cap 97, 1997 Rev Ed.

70 [2008] 2 SLR(R) 239 at [126]. For a thorough consideration of the distinction between evidence which has merely been improperly obtained and evidence secured through entrapment or unlawful activity, refer to the Court of Appeal's observations in *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [61]–[70].

71 [2008] 2 SLR(R) 239 at [126].

72 [2006] 4 SLR(R) 934.

failed to provide any analysis of the relationship between the contradictory approaches in *Cheng Swee Tiang* (evidence could be excluded as a result of impropriety in the process of obtaining evidence) and *Sang* (evidence could only be excluded as a result of unfairness at trial). For example, the Court of Appeal in *How Poh Sun*,[73] *Goh Lai Wak v PP*[74] and *PP v Rozman bin Jusoh*[75] merely applied *Sang* without any consideration of *Cheng Swee Tiang*. However, in *Chan Chi Pun v PP*[76] (which was decided within a very short time of these cases), the Court of Appeal endorsed *Cheng Swee Tiang* (and the common law authorities which stood for the discretion to exclude relevant evidence on the basis that it had been improperly obtained),[77] but made no mention of *Sang* and *How Poh Sun*.[78] Furthermore, in none of these cases did the Court of Appeal consider the principle underlying s 2(2) of the EA[79] that common law rules may only be applied to the extent that they are consistent with the provisions of the statute.[80]

18 In *Wong Keng Leong Rayney v Law Society of Singapore*[81] ("*Rayney*"), Chan Sek Keong CJ declared that the term "unfairness" in the context of the *Sang* principle is not concerned with the process of obtaining evidence but with the effect of the evidence at trial.[82] However, as the parties did not address the court on the admissibility provisions in the EA and the related policy considerations, the Chief Justice determined that it would be more convenient for a court of three judges to consider the question in *Phyllis*.[83] In *Phyllis*, certain lawyers had hired

73 [1991] 3 MLJ 216.
74 [1994] 1 SLR(R) 563.
75 [1995] 2 SLR(R) 879 at [34].
76 [1994] 1 SLR(R) 654.
77 [1994] 1 SLR(R) 654 at [12]. These authorities are set out in paras 3–4 of this article.
78 As noted by the Court of Appeal in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [103].
79 Section 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Act, are repealed." This provision expressly repeals pre-existing common law rules. As the Evidence Act is a self-contained code, "the spirit" of s 2(2) also prohibits the application of subsequent common law rules which are inconsistent with the Evidence Act. This principle (concerning the integrity of the Evidence Act as a code) is clearly established by the cases as pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Also see [2008] 2 SLR(R) 239 at [126] concerning the Chief Justice's reference to the "spirit" of s 2(2).
80 For an article which specifically addresses the relationship between the Evidence Act (Cap 97, 1997 Rev Ed) and the common law, see J D Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365 at 365–386 (cited in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124]).
81 [2007] 4 SLR(R) 377.
82 [2007] 4 SLR(R) 377 at [27] and [40].
83 [2008] 2 SLR(R) 239.

a private investigation firm to obtain evidence that the respondent's law practice had been involved in touting for conveyancing work. The security firm engaged an individual (*J*) to run the operation and she proceeded to represent herself as a real estate agent who might want to engage the respondent to act for her client in the purchase of a property and they eventually met. *J* made audio and video recordings of a telephone discussion and meeting respectively with the respondent (without the latter's knowledge). After that meeting, *J* made a complaint against the respondent to the Law Society in connection with the respondent's offer to pay a referral fee for procuring conveyancing work. The Court of Appeal affirmed the disciplinary committee's finding on the evidence that the respondent had indeed offered a referral fee to *J* for the purpose of securing work. As the court concluded that *J*'s conduct in obtaining evidence from the respondent (concerning the latter's unprofessional actions) did not amount to entrapment and was not illegal,[84] it did not need to consider the law governing the discretion to exclude evidence. Nevertheless, it proceeded to examine the law "for the guidance of the courts in future cases".[85]

19 Although *Phyllis* was not decided by the Court of Appeal, it must now be considered to be the leading case on the principles governing the scope of the discretion to exclude relevant evidence which has been improperly or unlawfully obtained. Apart from the composition of the court (including the Chief Justice and a Justice of Appeal) and the reference by the Court of Appeal in *Rayney* to *Phyllis* as the case in which the matter would be determined, and the subsequent observation by the Court of Appeal concerning the status of *Phyllis* on the issue of discretion,[86] the Chief Justice's judgment is clearly intended to resolve various difficulties created by previous cases (including decisions of the Court of Appeal) and to clarify the law once and for all. Having considered the previous authorities and the position of the EA,[87] his Honour concluded:[88]

> [W]e are of the view that given the overarching principle in the EA that all relevant evidence is admissible unless specifically expressed to be inadmissible, neither *Cheng Swee Tiang* nor *How Poh Sun* would be consistent with the EA in so far as they sanction the exclusion of

84 For a thorough consideration of the distinction between evidence which has merely been improperly obtained and evidence secured through entrapment or unlawful activity, refer to the Court of Appeal's observations in *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377.

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

86 See *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 at [106]. Also see the High Court's observations in *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] 2 SLR(R) 587 at [24]; *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR(R) 411 at [19].

87 Cap 97, 1997 Rev Ed.

88 [2008] 2 SLR(R) 239 at [126].

> relevant evidence on the ground of unfairness to the accused. It may be recalled that the fairness exception in *Sang* (as set out at [76] above) was based on the common law. In our view, Ambrose J was correct in pointing out (in *Cheng Swee Tiang*) that there was no such exception in our local evidence code in relation to entrapment evidence. In any event, the fairness exception has no practical effect in the case of entrapment evidence since, by definition, the probative value of such evidence must be greater than its prejudicial value in proving the guilt of the accused (see *Sang*, at [76] to [80]). *For this reason, the Sang formulation is, in practical terms, consistent with the EA and in accordance with the letter and spirit of s 2(2), and is therefore applicable in the Singapore context.*[89] [emphasis and footnote added]

20 Towards the end of the judgment, his Honour summarised the position by stating that "*the court has no discretion to exclude illegally obtained evidence (including entrapment evidence) by reason of the provisions of the EA*" [emphasis added].[90] A conjunctive consideration of the italicised sentence in the judgment extract set out in the preceding paragraph (statement (a)) and the italicised proposition at the beginning of this paragraph (statement (b)) leads to the conclusion that the *Sang* formulation applies in Singapore to the extent that it is consistent with the EA.[91] If statement (b) is interpreted as simply eliminating the manner of obtaining evidence as a basis of the court's discretion (this would be consistent with the general tenor of the judgment),[92] one may conclude on the premise of statement (a) that the court retains the discretion (pursuant to the first limb of *Sang*) to exclude technically admissible evidence where it would result in obvious

89 The Chief Justice went on to point out ([2008] 2 SLR(R) 239 at [127]–[128]) that the Evidence Act (Cap 97, 1997 Rev Ed) itself admits evidence which might be regarded as improperly obtained (see s 29). Section 2(2) of the Evidence Act states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Act, are repealed." This provision expressly repeals pre-existing common law rules. As the Evidence Act is a self-contained code, "the spirit" of s 2(2) also prohibits the application of subsequent common law rules which are inconsistent with the Evidence Act. This principle (concerning the integrity of the Evidence Act as a code) is clearly established by the cases as pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Also see [2008] 2 SLR(R) 239 at [126] concerning the Chief Justice's reference to the "spirit" of s 2(2).

90 [2008] 2 SLR(R) 239 at [150].

91 The decision in *Ajmer Singh v PP* [1987] 2 MLJ 141 was also justified on this basis: "For the same reason, the decision in *Ajmer Singh* (which was a straightforward case of illegally obtained evidence), is consistent with the EA as it was essentially an application of *Sang*." ([2008] 2 SLR(R) 239 at [126])

92 As pointed out by the learned Chief Justice in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, there is no issue with regard to entrapment evidence as the probative value of such evidence is greater than its prejudicial effect. The Chief Justice pointed out (at [127]–[128]) that the Evidence Act (Cap 97, 1997 Rev Ed) itself admits evidence which might be regarded as improperly obtained (his Honour referred to s 29).

injustice at the trial. Although there is no provision in the EA which expressly formulates such a principle, it will be argued in the following section of this article[93] that the legal basis of the court's discretion to exclude evidence lies in its inherent power to prevent injustice.

21 *Phyllis* also stands for the related proposition that a prosecution based on entrapment or illegally obtained evidence is not an abuse of the court's process as long as it has been brought "for the bona fide prosecution of criminals".[94] Accordingly, the court may not exclude evidence or stay the proceedings on this basis. The reason for this approach is that any abuse is not directed against the court process, the function of which is to determine the guilt or otherwise of the accused on the basis of the evidence presented.[95] The position would be otherwise where the integrity of the court process is compromised by its engagement for a purpose other than which it is intended to serve or which it is incapable of serving.[96]

VI. The court's inherent power as the basis of the discretion to exclude evidence which would cause injustice at trial

A. Integrity of the law of evidence

22 The question arises as to whether, after *Phyllis*, the process of balancing probative value against prejudicial effect can be applied

93 See below: "VI. The court's inherent power as the basis of the discretion to exclude evidence which would cause injustice at trial."

94 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [138]–[139] and [132]. The court endorsed Brennan J's judgment in *Ridgeway v R* (1995) 184 CLR 19.

95 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [138]. The court endorsed the majority view in *Ridgeway v R* (1995) 184 CLR 19 (in particular, see the extracts from Brennan J's judgment at [2008] 2 SLR(R) 239 at [85]–[86]). Accordingly, *Regina v Looseley* [2001] 1 WLR 2060 has no application in Singapore ([2008] 2 SLR(R) 239 at [139]).

96 [2008] 2 SLR(R) 239 at [130]. See Brennan J's judgment in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 47–48 (cited at [2008] 2 SLR(R) 239 at [86]). The criminal process would be used for an extraneous purpose where the prosecution initiates proceedings against the defendant "in order to harass him or teach him a lesson" ([2008] 2 SLR(R) 239 at [132]) in the absence of sufficient evidence to justify the charge. Again, criminal proceedings would be improperly engaged where the defendant has been promised immunity from prosecution in exchange for his assistance in police investigations, or where he is unjustifiably charged with a more serious offence in order to force him to plead guilty to a lesser crime ([2008] 2 SLR(R) 239 at [132]). For the court's perspective on how it might respond to the abuse of prosecutorial power in a constitutional context, see [2008] 2 SLR(R) 239 at [144]–[150]. Vital though they are, the issues raised in this paragraph concerning the court's role in the context of prosecutorial power are beyond the scope of this article.

generally to any situation in which admissible evidence may result in injustice at the trial. Such an approach would have to sit comfortably with the EA by not offending the principle of consistency enshrined in s 2(2).[97] As the primary concern of the law of evidence is to ensure a fair trial in the interest of justice, a judicial discretion to exclude evidence must surely be fundamental to the integrity of the adjudicative process (unless it can be said that all fixed rules of evidence guarantee reliability all the time). For example, where a person charged with an offence incriminates himself by stating his involvement but does not admit to all the elements of the crime (*ie*, he indicates some involvement in the crime which falls short of a confession), his statement is not subject to the voluntariness test in s 24 of the EA (which only applies to confessions). On a literal application of the EA, the incriminating statement would be admissible even if it had been extracted under torture. As the admissibility of the statement could result in excessive prejudice to the accused (because the statement is involuntary and therefore unreliable), the court should be entitled to exclude it so as to avoid injustice and preserve the fairness of the trial.

23 Again, the discretion might be exercised where the confession is voluntary according to s 24 of the EA[98] but clearly unreliable.[99] For example, *A* and *B* are charged with theft. While *A* and *B* are in prison waiting for their trial, *A* persuades *B* to confess that he committed the theft in return for a sum of money which *A* will give *B* on the latter's release. Although *B* is entirely innocent, he confesses to the crime. The confession is voluntary according to s 24 because *A*, who induced the confession, is not a person in authority. If there is a reasonable doubt that the confession is not reliable, it should be excluded as a matter of discretion. Another example concerns a prosecution witness's previous inconsistent statement which may be admitted as substantive evidence against the accused pursuant to s 147(3) of the EA. As courts have pointed out, the previous statement of a witness is not subject to the voluntariness test in s 24 of the EA or s 122(5) of the Criminal Procedure Code[100] (which only

97 Section 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Act, are repealed." This provision expressly repeals pre-existing common law rules. As the Evidence Act is a self-contained code, "the spirit" of s 2(2) also prohibits the application of subsequent common law rules which are inconsistent with the Evidence Act. This principle (concerning the integrity of the Evidence Act as a code) is clearly established by the cases as pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Also see [2008] 2 SLR(R) 239 at [126] concerning the Chief Justice's reference to the "spirit" of s 2(2).

98 Cap 97, 1997 Rev Ed.

99 The discretion was exercised in these circumstances in *R v Stewart* (1972) 56 Cr App R 272 (decided before *R v Sang* [1980] AC 402).

100 Cap 68, 1985 Rev Ed.

applies to the accused's statements).[101] Therefore, if there is a reasonable doubt as to whether the statement is voluntary (in which case it would constitute unreliable and prejudicial evidence against the accused), it should be excluded as a matter of discretion.[102]

B. Inherent power in criminal proceedings

24 In the author's view, a compelling argument may be made for classifying the discretion to exclude as an inherent power rather than a specific rule of evidence. This power is derived by the court by virtue of its responsibility and authority to ensure that its process is just and fair. If this proposition is correct, there would be no issue of inconsistency with the EA as the court's discretion to exclude, not being a rule of evidence, would not offend the substance and spirit of s 2(2),[103] and would accordingly be compatible with *Phyllis*.

25 It is well established that in civil proceedings a court has inherent power to prevent injustice or an abuse of process. Order 92 r 4 of the Rules of Court[104] states:

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

26 In an earlier article,[105] it was argued that this rule, while not an empowering provision, acknowledges the inherent power of the court as

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101 See *PP v Heah Lian Khin* [2000] 2 SLR(R) 745 at [82] (citing *PP v Sng Siew Ngoh* [1995] 3 SLR(R) 755 at [48]–[49]).

102 For observations on the exercise of the discretion to exclude in respect of statements not subject to the voluntariness test in s 24 of the Evidence Act (Cap 97, 1997 Rev Ed) and s 122(5) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), see *Yusof bin A Samad v PP* [2000] 3 SLR(R) 115 at [12]; *PP v Heah Lian Kin* [2000] 2 SLR(R) 745 at [82]–[84]; *Choo Pit Hong Peter v PP* [1995] 1 SLR(R) 834 at [59]; *PP v Sng Siew Ngoh* [1995] 3 SLR(R) 755 at [48]–[49].

103 Section 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Act, are repealed." This provision expressly repeals pre-existing common law rules. As the Evidence Act is a self-contained code, "the spirit" of s 2(2) also prohibits the application of subsequent common law rules which are inconsistent with the Evidence Act. This principle (concerning the integrity of the Evidence Act as a code) is clearly established by the cases as pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Also see [2008] 2 SLR(R) 239 at [126] concerning the Chief Justice's reference to the "spirit" of s 2(2).

104 Cap 322, R 5, 2006 Rev Ed.

105 J Pinsler, "The Inherent Powers of the Court" [1997] Sing JLS 1. Also see Goh Yihan, "The Jurisdiction to Re-open Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal" [2008] Sing JLS 395 at 407.

being derived from the court's status as the guardian of its own legal process.[106] The Court of Appeal has repeatedly declared that such a power may be exercised in exceptional circumstances on the basis of real necessity.[107] Goh Yihan[108] has persuasively argued that if the source of the court's inherent power is derived from its own status and authority as a court (rather than from legislation), it has a legitimate basis in both civil and criminal proceedings. It is illogical to acknowledge the doctrine of inherent power in civil proceedings but not in criminal proceedings as such an approach arbitrarily assumes judicial capacity and incapacity according to the nature of the case before the court.[109] Indeed, the learned author goes on to argue that "it could even be said that the exercise of its inherent jurisdiction in criminal proceedings is even more important since it is the liberty and life of the subject person at stake, as opposed to mainly financial claims in civil proceedings".[110]

27 The courts have acknowledged the existence of an inherent power in criminal cases. In *PP v Ho So Mui* ("*Ho So Mui*"),[111] although the Court of Appeal (in the absence of full argument on the status of this doctrine) decided not to express any view on whether it had the inherent power to stay the proceedings, did state: "[W]e are of the preliminary view that such a power to stay criminal proceedings in circumstances where it can be shown that the accused could not have a fair trial exists."[112] And in *Salwant Singh s/o Amer Singh v PP (No 2)*[113] ("*Salwant Singh*"), the Court of Appeal considered that it had the inherent power to require the production of the registrar's notes taken in certain pre-trial conferences even though the Criminal Procedure

106 In *Emilia Shipping Inc v State Enterprises for Pulp and Paper Industries* [1991] 2 MLJ 379 at 381, Chan Sek Keong J (as his Honour then was) considered that the court is so empowered by its status as "the master of its own process". Also see Jack Jacob, "The Inherent Jurisdiction of the Court" (1970) CLP 23 at 51; *Heng Joo See v Ho Pol Ling* [1993] 2 SLR(R) 763 at [21]–[25].

107 See *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27]; *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353 at [17]; *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [80]–[81]. Also see *Singapore Court Practice 2009* (LexisNexis, 2009) at para 1/1/8, where the relevant principles are formulated.

108 Goh Yihan, "The Jurisdiction to Re-open Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal" [2008] Sing JLS 395.

109 Goh Yihan refers to this approach as being "artificial" (Goh Yihan, "The Jurisdiction to Re-open Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal" [2008] Sing JLS 395 at 410).

110 Goh Yihan, "The Jurisdiction to Re-open Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal" [2008] Sing JLS 395 at 410.

111 [1993] 1 SLR(R) 57.

112 [1993] 1 SLR(R) 57 at [36].

113 [2005] 1 SLR(R) 632.

Code did not make any such provision.[114] As Goh Yihan has argued,[115] the Court of Appeal in *Ramachandran a/l Suppiah v PP*[116] ("*Ramachandran*") must have exercised an inherent power (whether it was aware of doing so or not) to hear an application for a rehearing of a previous appeal before the Court of Criminal Appeal (shortly before it was reconstituted as the Court of Appeal), because it certainly had no statutory jurisdiction to entertain such a motion. In *Koh Zhan Quan Tony v PP*[117] ("*Koh Zhan Quay Tony*"), the Court of Appeal considered that it had the jurisdiction to entertain certain applications under the s 29A of the Supreme Court of Judicature Act[118] concerning an issue of jurisdiction which ought to have been heard in the preceding appeal before the same court. The court observed that while an inherent power might exist, its exercise in the specific context of the case before it should have a statutory basis.[119] In other cases, the Court of Appeal did not consider the question of whether it had the inherent power to hear an application to introduce new evidence after proceedings before it were concluded.[120] Most recently, in *Attorney-General v Tee Kok Boon*,[121] the High Court did not need to answer the question of whether it had inherent power to restrain a vexatious litigant in criminal proceedings (as it ruled that s 74 of the Supreme Court of Judicature Act applied to both civil and criminal proceedings). However, the court did take the trouble to undertake a survey of the position in other countries and pointed out, *inter alia*, that the English Court of Appeal and High Court of Australia acknowledged an inherent power to make a restraining order or to stay proceedings.[122]

28 If one accepts the argument that inherent power is rooted in the authority of the court to prevent injustice, and not in the character of the suit before the court,[123] the fact that it has been acknowledged to be a fundamental component of civil justice should logically lead to the conclusion that it is also operational in the criminal process. *Ho So*

114 Section 400(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) did not apply. The Court of Appeal did not exercise its inherent power in the circumstances of the case because of the appellant's abuse of process.

115 Goh Yihan, "The Jurisdiction to Re-open Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal" [2008] Sing JLS 395 at 409–410.

116 [1992] 2 SLR(R) 571.

117 [2006] 2 SLR(R) 830.

118 Cap 322, 1999 Rev Ed.

119 [2006] 2 SLR(R) 830 at [15].

120 See *Abdullah bin A Rahman v PP* [1994] 2 SLR(R) 1017 and *Lim Choon Chye v PP* [1994] 2 SLR(R) 1024.

121 [2008] 2 SLR(R) 412.

122 [2008] 2 SLR(R) 412 at [125]–[130]. The cases are *Bhamjee v Forsdick* [2004] 1 WLR 88 and *Williams v Spautz* (1992) 174 CLR 509 respectively.

123 See para 26 of this article.

Mui,[124] *Salwant Singh*[125] and most probably *Ramachandran*[126] establish that an inherent power exists. *Koh Zhan Quan Tony*[127] requires the court to be more circumspect about the operation of the doctrine in the specific context of the regulated jurisdictional structure under the Supreme Court of Judicature Act.[128] The fact remains that no court has ever denied that it may exercise an inherent power in criminal proceedings.

29 Looking at the cases as a whole, it may be conservatively suggested that an inherent power exists in criminal proceedings and that it operates in exceptional circumstances when legitimised by need and justified by the legal context of the case (including the applicable statutory framework (if any), its appropriate construction in the circumstances, issues of justice and the integrity of the judicial process). As Goh Yihan has put it, "… the inherent jurisdiction of the Court of Appeal should be invoked, in deserving cases and subject to reasonable and rational judicial controls, to ensure that justice is done and seen to be done".[129]

C. Inherent power in the context of the exclusion of evidence

30 It is submitted that the criteria of essential need would be met in the context of a discretion to exclude evidence the prejudicial effect of which clearly outweighs any probative value, and which, if admitted, would undoubtedly result in injustice and thereby impugn the very law (the law of evidence) which is intended to promote a fair and just trial. As every provision of the EA[130] concerning the admissibility of evidence has this fundamental aim at its heart, the judicial exercise of inherent power on the basis of absolute necessity would augment the statute. There are compelling reasons why a Singapore court needs to have access to this residuary power. First, the law of evidence is adjectival in nature for it effectuates substantive rights and liabilities by providing a system of rules concerned with the presentation and proof of facts. While its ally (the law of procedure) provides the structures and mechanisms for legal proceedings, the law of evidence ensures that information concerning the issues is properly channelled through the procedural constructs at every stage of litigation. Both procedure and evidence are constituent elements of the judicial process by which the

124 [1993] 1 SLR(R) 57.
125 [2005] 1 SLR(R) 632.
126 [1992] 2 SLR(R) 571.
127 [2006] 2 SLR(R) 830.
128 Cap 322, 1999 Rev Ed
129 Goh Yihan, "The Jurisdiction to Re-open Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal" [2008] Sing JLS 395 at 410.
130 Cap 97, 1997 Rev Ed.

court decides any dispute in the course of the proceedings. As the inherent power of the court is concerned with the governance of its own process, the doctrine logically extends to the achievement of the ultimate purpose of the law of evidence (a fair and just trial).[131] This is a matter of fundamental importance simply because substantive rights and liabilities are entirely dependent on the information which the law of evidence permits a court to consider in order to reach its conclusion. The failure of the law of evidence may result in an improper conviction and the denial of substantive justice.

31 Secondly, the nature of the law of evidence demands the flexibility which (apart from specific areas which require methodical regulation) can never be offered by fixed rules in a statute notwithstanding the quality of draftsmanship. One only needs to survey the endless common law developments over the last century to be aware of the role of judicial involvement in the evolution of the subject. In contrast, it would seem that the constant pre-occupation of the Singapore courts with extending the EA[132] beyond its fixed 19th century borders (in order to benefit from common law developments) is the paramount concern of this area of law.[133] For the avoidance of doubt, the author is not arguing that the court should use its inherent power to exclude evidence in order to supplant or modify the EA. The point is that where the law of evidence is confined to a statute, the exceptional exercise of inherent power may have particular significance in preventing the injustice which may otherwise result from the technical application of a rigid statutory rule. In Singapore, this concern is emphasised by the fact that most of the admissibility provisions in the EA date back to the enactment of the statute in 1893 when the character and needs of the criminal process were quite different.

D. Development of the inherent power to exclude admissible evidence which would cause injustice

32 The common law discretion to exclude evidence because its prejudicial effect overrides its probative value has been acknowledged by the House of Lords to be an inherent power of the court intended to ensure a fair and just trial. In *Selvey v DPP*[134] (which was regarded by the House of Lords in *Sang* to be a case of "critical importance" on the issue

131 For a recent article concerning values in the law of evidence, see Chin Tet Yung, "Remaking the Evidence Code: Search for Values" (2009) 21 SAcLJ 52.

132 Cap 97, 1997 Rev Ed.

133 As indicated by the observations in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 on previous authorities (see, in particular, [125]–[126]). Also see J Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365.

134 [1970] AC 304. (A case concerning the court's discretion to limit the scope of cross-examination of an accused on his criminal record.)

of the court's discretion to exclude evidence),[135] Lords Hodson, Guest and Pearce (with whom Lord Wilberforce agreed) clearly believed that a court has a general discretion to exclude evidence (not limited to specific areas of evidence such as the bad character of the accused person) to avoid injustice at the trial.[136] Lord Guest stated that the discretion "springs from the inherent power of the judge to control the trial before him and to see that justice is done in fairness to the accused".[137] Lord Pearce explained that the discretion arises "from the inherent power of the courts to secure a fair trial for the accused …".[138]

33 In *Sang*, Lord Diplock considered that the judge's discretion to exclude evidence which would cause unfairness at trial stems from "a general rule of practice" rather than a rule of evidence.[139] Lord Scarman saw the court's inherent power as a necessary tool of the court to be used in the paramount interest of securing a fair trial. His Lordship said that the discretion is "based upon, and is co-extensive with the judge's duty to ensure that the accused has a fair trial according to law".[140] His Lordship added that: "The modern discretion is a general one to be exercised where fairness to the accused requires its exercise."[141] Furthermore, while the prosecution is entitled to rely on the admissible evidence it chooses to present, this right must be subject to the overriding duty of the court to ensure that the trial is fair: "[W]hen the prosecutor reaches court, he becomes subject to the directions as to the conduct of the trial by the judge, whose duty it then is to see that the accused has a fair trial according to law."[142]

34 In an earlier House of Lords case, *Harris v DPP*,[143] Viscount Simon said of the discretion that: "It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a [criminal case] when he thinks that the application of the practice is called for."[144] This very statement was endorsed by Spenser Wilkinson J in *R v Raju*[145] in the context of similar fact evidence which was technically admissible under ss 14 and 15 of the EA: "[C]ases may occur … in which it would be unjust to admit highly

135 *R v Sang* [1980] AC 402 at 453. The speeches in *Selvey v DPP* [1970] AC 304 are referred to throughout *R v Sang*.
136 *Selvey v DPP* [1970] AC 304 at 349, 352 and 360.
137 *Selvey v DPP* [1970] AC 304 at 352.
138 *Selvey v DPP* [1970] AC 304 at 360.
139 *R v Sang* [1980] AC 402 at 434.
140 *R v Sang* [1980] AC 402 at 454.
141 *R v Sang* [1980] AC 402 at 454.
142 *R v Sang* [1980] AC 402 at 455. Also see *Harris v DPP* [1952] AC 694 at 707.
143 [1952] AC 694 at 707.
144 His Lordship went on to state (at [1952] AC 694 at 707): "[T]he duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused."
145 [1953] MLJ 21 at 22. The court is not identified in the judgment.

prejudicial evidence simply because it is technically admissible."[146] Indeed, the distinction between the court's judicial practice (inherent power) of excluding evidence which would compromise a fair trial and the rules of evidence governing admissibility was recognised early on. As Lord Reading stated in *R v Christie*:[147]

> Such practice has found its place in the administration of the criminal law because judges are aware from their experience that in order to ensure a fair trial for the accused, and to prevent the operation of indirect but not the less serious prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence.

35 The decision of the Court of Appeal in *Tan Meng Jee v PP*[148] ("*Tan Meng Jee*") to superimpose the common law's probative value/prejudicial effect balancing test[149] on ss 14 and 15 of the EA[150] was in effect an arbitrary fusion of the court's inherent power (which, as has been seen, was pronounced in a series of cases including *R v Christie*, *Harris v DPP* and *Selvey v DPP* and acknowledged in *Sang*),[151] and the strict categorisation approach of those sections. Indeed, Yong Pung How CJ, who delivered the judgment of the Court of Appeal in *Tan Meng Jee*, had earlier (in *PP v Teo Ai Nee*)[152] considered "the inherent power of the court to exclude evidence where its probative value is totally disproportionate to its prejudicial effect" to be a settled doctrine independent of the EA. The establishment of the balancing test as an integral part of ss 14 and 15 in *Tan Meng Jee* has made it unnecessary for the Singapore court to proceed to the subsequent stage of considering whether to exercise its discretion to exclude similar fact evidence which is technically admissible under those sections.[153] Nevertheless, this new approach implicitly acknowledges the importance of weighing probative value against prejudicial effect inherent in the discretion to exclude any evidence (not just similar fact evidence) which might cause injustice and prevent a fair trial.[154]

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146 [1953] MLJ 21 at 22. Also see *Rauf bin Haji Mohd v PP* [1950] MLJ 190 at 191–192.

147 [1914] 1 AC 545 at 564.

148 [1996] 2 SLR(R) 178.

149 Which had been developed in the specific context of similar fact evidence in *DPP v Boardman* [1975] AC 421, and subsequently refined in *DPP v P* [1991] 2 AC 447.

150 Cap 97, 1990 Rev Ed.

151 [1914] 1 AC 545, [1952] AC 694, [1970] AC 304 and [1980] AC 402, respectively. These cases are addressed above. Also see *Noor Mohamed v R* [1949] AC 182, which was specifically considered in *Tan Meng Jee v PP* [1996] 2 SLR(R) 178.

152 [1995] 1 SLR(R) 450 at [79].

153 For the approach of some of the earlier cases, see *Teo Koon Seng v R* [1936] MLJ 9; *Teo Koon Seng v R* [1936] MLJ 9; *James v R* [1936] MLJ 7; *X v PP* [1951] 17 MLJ 10; and *Poon Soh Har v PP* [1977] 2 MLJ 126.

154 Also see *Lee Kwang Peng v PP* [1997] 2 SLR(R) 569, in which the High Court applied this reasoning to s 11(*b*) of the Evidence Act (Cap 97, 1990 Rev Ed).

36 Although the terminology "inherent power" is not always used by English judges (essentially because this is a common law power making it unnecessary for it to be specifically identified), it is quite clear from the above pronouncements (which were endorsed in *Sang*),[155] that, as a matter of practice, the court exercises its discretion to exclude evidence in its capacity as the guardian of its own legal process. That this is a power exercisable by a court to ensure a fair trial (rather than a specific rule of evidence) was underlined by Lord Diplock in *Sang* when his Lordship said: "I would hold that there has now developed a general *rule of practice* whereby … the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence … would be out of proportion to its true evidential value."[156] [emphasis added] Coming back to the EA, if one considers the prohibition in s 2(2) against the application of inconsistent "rules of evidence not contained in any written law",[157] it is clearly arguable (even on a literal interpretation of this provision), that its concern is with specific rules of evidence but not with the "*rule of practice*" pertaining to the court's power to exclude evidence the admissibility of which would result in injustice at the trial.

E. Nature of s 5 of the EA and its significance in the context of the court's inherent power

37 The law of evidence in Singapore is primarily governed by the EA, a statute which does not expressly refer to any rule empowering the court to exclude admissible evidence as a matter of discretion. However, if, as has been argued, the court has inherent power in criminal proceedings arising out of its authority and responsibility to provide a fair process of adjudication, such a role is not inconsistent with the Act. If the court derives its discretion from its status as a court rather than from a specific rule of evidence, s 2(2) does not apply to exclude it. The discretion to exclude and rules of evidence are derived from separate sources which combine to fulfil the legal system's ultimate aim of securing a fair and just trial for the accused. It cannot be the case that a

155 In particular, in *R v Sang* [1980] AC 402 at 434, 439 and 453.

156 *R v Sang* [1980] AC 402 at 434. Also see paras 32–35 of this article for similar statements by judges in other cases.

157 Section 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Act, are repealed." This provision expressly repeals pre-existing common law rules. As the Evidence Act is a self-contained code, "the spirit" of s 2(2) also prohibits the application of subsequent common law rules which are inconsistent with the Evidence Act. This principle (concerning the integrity of the Evidence Act as a code) is clearly established by the cases as pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Also see [2008] 2 SLR(R) 239 at [126] concerning the Chief Justice's reference to the "spirit" of s 2(2).

court would admit evidence which it considers to be unreliable or unjustly prejudicial as such an approach would undermine the whole purpose of the adjudicative process. A literal reading of s 5 of the EA would lend support to this argument:

> Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and no others.

38 This is the primary admissibility provision in the EA as it concerns the admissibility of evidence of facts in issue and facts declared to be relevant in ss 6 to 57 (ss 5 to 57 constitute Part 1 of the EA). Section 5 does not compel the court to admit such evidence, as it simply informs the parties that they may rely on evidence to the extent that it is admissible pursuant to these sections. Although s 138(1) of the EA[158] requires the court to admit evidence if it is satisfied (after questioning the party proposing to adduce it) that the fact sought to be proved is relevant, this rule is concerned with a specific situation in the course of proceedings in which a question arises as to whether an item of evidence is related to an issue in the case. For example, the court may enquire how a question which the lawyer has just asked of the witness, or how a document which the lawyer proposes to adduce, is pertinent. The section (which is procedural in nature) requires the court to permit the question or allow other evidence to be adduced "if it thinks that the fact, if proved, would be relevant …". It is submitted that s 138, which is positioned in Part III of the EA (which concerns the presentation and effect of evidence)[159] under "Examination of witnesses", does not impinge upon s 5, the primary admissibility provision in Part I of the EA.[160]

39 Accordingly, in the absence of any mandatory terms, s 5 does not rule out the possibility that evidence admissible pursuant to any of the provisions in Part 1 of the EA may be excluded. This is clear from the "Explanation" to the section, which declares that evidence may not be admissible if a party is "disentitled to prove [a fact] by any provision of any law for the time being in force relating to civil procedure". (No doubt, such a principle would also apply to criminal procedure.) If the

158 Section 138(1) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise."

159 The title of Part III of the Evidence Act (Cap 97, 1997 Rev Ed) is "Production and effect of evidence".

160 Cf *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124], where the High Court relied on the pronouncement in *Halsbury's Laws of Singapore* (vol 10 on Evidence) (Butterworths Asia, 2000) at para 120.009 to the effect that s 138 requires a court to admit evidence which is relevant.

philosophy of the EA is to promote the integrity of the legal process by ensuring that the accused receives a fair trial based on legitimate and adequate evidence, then the first limb of *Sang*[161] is consistent with the spirit and intent of the EA to the extent that it would exclude unreliable evidence which would otherwise cause injustice at trial.[162] Therefore, it is submitted that s 5 may be read to accommodate the court's inherent power. Although the following argument is not necessary to the thesis of this article, it might be suggested that the reference to "the law for the time being relating to civil procedure" in the "Explanation" to s 5 includes the court's inherent power to regulate its own process.[163] If, as has been argued, a court derives its inherent power from its status as a court rather than from the nature of the proceedings, s 5 and its "Explanation" might be interpreted to acknowledge the doctrine in the context of the admissibility of evidence.

VII. Status of the second limb in the *Sang* formulation

40 It will be recalled that in *Sang*,[164] Lord Diplock formulated two categories of evidence which a court is entitled to exclude as a matter of discretion.[165] The impact of the first limb in the post-*Phyllis* era (admissible evidence which has a prejudicial effect out of proportion to its probative value) has already been examined. The second limb concerns "evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect".[166] Several points may be made about the second limb in the Singapore context. First, the issue of prejudice and injustice, which is the fundamental feature of the first limb, does not arise in the second limb. Secondly, the second limb is essentially concerned with preserving the accused's common law privilege against self-incrimination,[167] a doctrine which, under the EA, does not generally excuse witnesses from answering incriminating questions at trial.[168] Thirdly, the second limb's basis for exclusion is inconsistent with the EA, which expressly admits evidence obtained from the accused after the commission of the offence. For example, s 29

161 *R v Sang* [1980] AC 402.

162 See Tan Yock Lin, "Sing a Song of *Sang*, A Pocketful of Woes?" [1992] 2 Sing JLS 365, in which the author posits that an exclusionary discretion is necessary, and argues that it may be discerned in ss 9, 14 and 15 of the Evidence Act (Cap 97, 1990 Rev Ed).

163 See O 92 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), which is set out in para 25 of this article.

164 *R v Sang* [1980] AC 402.

165 See paras 8–9 of this article.

166 See para 10 of this article.

167 See para 10 of this article.

168 See s 134 of the Evidence Act (Cap 97, 1997 Rev Ed) in relation to the examination of witnesses at trial.

states that an admissible confession does not become inadmissible "merely because: (a) it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk …".[169] In *Phyllis*, Chan Sek Keong CJ noted that "the only kind of incriminating evidence that has expressly been denied admissibility is admissions and confessions made involuntarily by an accused …".[170] Fourthly, it has been repeatedly held[171] (except for the qualification made in *Summit*),[172] and most recently emphasised in *Phyllis*,[173] that the court has no discretion to exclude evidence on the basis that it has been improperly (even unlawfully) obtained. Accordingly, the second limb is inconsistent with the EA to the extent that it enables the court to exclude improperly obtained evidence.

41 The second limb has never been applied by the Singapore court. In *Ajmer Singh v PP*[174] (which concerned the accused's failure to exercise proper control of a vehicle as a result of intoxication), the High Court concluded that the blood sample improperly taken from him only amounted to an admission that the accused had an excessive amount of alcohol in his blood. In the view of the court, the second limb did not apply because the blood sample did not constitute a self-incriminatory admission pertaining to his inability to control his scooter whilst in a state affected by alcohol. The evidence of the blood sample was admitted because its probative value (the excessive level of alcohol) exceeded any prejudicial effect.[175] It is submitted that the learned Chief Justice's statement in *Phyllis* that "the *Sang* formulation is, in practical terms, consistent with the EA"[176] should be read as only applying the first limb of *Sang*.

VIII. Conclusion

42 It may be useful to summarise the position taken in this article. The doctrine of inherent power exists in Singapore.[177] In civil cases, this is acknowledged by O 92 r 4 of the Rules of Court[178] and a series of

169 As pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [127].
170 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [127].
171 See para 17 of this article.
172 [1997] 3 SLR(R) 138. See para 14 of this article.
173 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [150].
174 [1987] 2 MLJ 141. Also see para 12 of this article.
175 *Ie*, there was no basis exercising the discretion to exclude under the first limb. See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [101] and [126], where *Ajmer Singh v PP* [1987] 2 MLJ 141 is explained.
176 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].
177 See para 25 of this article.
178 Cap 322, R 5, 2006 Rev Ed.

recent authorities.[179] As the court derives this power from its status and authority to control its own process, it is exercisable in both civil and criminal proceedings.[180] Indeed, the Singapore courts have acknowledged their entitlement to exercise their inherent power in criminal cases.[181] As the law of evidence is adjectival in nature, and has a fundamental role in the court's process by governing the scope and presentation of information which a court is to rely upon, the court is justified in exercising its inherent power to exclude evidence which, if admitted, would cause injustice and consequently compromise its process.[182] There is nothing in the EA which excludes the application of this doctrine. Section 2(2) and the principle which prohibits the application of non-statutory rules of evidence which are inconsistent with the EA[183] do not affect the court's inherent power, which is derived independently from the court's status.[184] Furthermore, s 5 of the EA, the governing provision on admissibility, does not compel the court to admit relevant evidence.[185] The section points to the different categories of admissible evidence which the parties may rely on and does not deprive the court of its power to exclude such evidence.[186] This must be correct in principle as the nature of the law of evidence is such that the strict application of its rules may cause injustice.[187] In this context, the court would only exercise its inherent power to uphold the aims of the EA by ensuring that its rules do not undermine the ultimate purpose of the statute, which is to secure a fair trial. It bears repeating that a court would only be entitled to exclude evidence in the exceptional situation where its admission would compromise the judicial process by causing injustice.[188] In accordance with the High Court's position in *Phyllis*, the

179 See para 25 of this article.
180 See para 26 of this article.
181 See paras 27–29 of this article.
182 See paras 30–31 of this article.
183 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Section 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Act, are repealed." This provision expressly repeals pre-existing common law rules. As the Evidence Act is a self-contained code, "the spirit" of s 2(2) also prohibits the application of subsequent common law rules which are inconsistent with the Evidence Act. This principle (concerning the integrity of the Evidence Act as a code) is clearly established by the cases as pointed out in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[117]. Also see [2008] 2 SLR(R) 239 at [126] concerning the Chief Justice's reference to the "spirit" of s 2(2).
184 See para 26 of this article.
185 See paras 37–39 of this article.
186 See paras 37–39 of this article.
187 See paras 22–23 of this article.
188 See paras 32–36 of this article.

court would not be entitled to introduce unwritten rules of evidence which are inconsistent with the EA.[189]

189 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126] and [150].