THE CONCEPT OF VOLUNTARINESS IN THE LAW OF CONFESSIONS

The common law principle, that no statement by an accused is admissible in evidence unless it is a voluntary statement, is enshrined in s 122(5) of Singapore's Criminal Procedure Code. Both the UK and Australia have abandoned this principle and replaced it with a "reliability test"; statements are excluded only if they are likely to be unreliable. This article questions the desirability of adopting a similar position in Singapore. It examines the jurisprudential basis of the voluntariness concept, the alleged defects of the concept and the applicability of the English and Australian reforms to Singapore. The article concludes that the reliability test should not be adopted because of potential negative ramifications.

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I. Introduction

1 The law of confessions, according to Andrew Ashworth,[1] presents a classic conflict in criminal procedure between crime control and the recognition of individual rights.[2] Ashworth observed that it is natural that law enforcement officers should sometimes wish to exert pressure on suspects in order to persuade them to make statements. At the same time, it is "equally natural that the law should declare certain forms of pressure to be unfair and unacceptable".[3]

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1 Andrew Ashworth, "Excluding Evidence as Protecting Rights" (1977) Crim LR 723 at 726.

2 The perennial conflict between these two goals is illustrated by the "crime control model" and "due process model" in Herbert L Packer, "Two Models of the Criminal Process" in *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at pp 154–173.

3 Ashworth, *supra* n 1, at 726.

2 This article seeks to explore the conflict between the twin objectives of criminal procedure in the context of the law on confessions in Singapore. The common law principle that an accused's confession will be inadmissible at his trial if it was made involuntarily ("the voluntariness test") is encapsulated in s 24 of the Evidence Act[4] as well as the proviso to s 122(5) of the Criminal Procedure Code[5] ("CPC"). Strident criticism has been directed at the courts' application of the common law exclusionary rule and the way the test has been formulated. There have also been doubts expressed as to whether the test fulfils the rationales underpinning the exclusionary rule. In both the UK and Australia, these doubts have culminated in statutory departures from the voluntariness test and the introduction of the "reliability test". This new test focuses on the likelihood that an untrue admission of guilt has been made. The question that now confronts Singapore is whether there should be reform of the CPC and Evidence Act along similar lines.

3 This article focuses principally on the question of whether the voluntariness test in Singapore ought to be replaced by the reliability test. Other possible defects in s 122(5) of the CPC and s 24 of the Evidence Act will not be addressed. It will be argued that the voluntariness test should not be completely abandoned. Importing the UK and Australian reforms into Singapore without due consideration of the context of these reforms may lead to potential difficulties. There may also be intractable problems in applying the reliability test.

4 This article will be in four components. There will first be an examination of the origin of the exclusionary rule of confessions, followed by an exploration of the possible rationales for this rule. There will then be a critical appraisal of the voluntariness test. Finally, the approaches adopted in the UK and Australia, coupled with the implications for Singapore, will be discussed.

II. Tracing the roots of the voluntariness test

5 Before 1960, the use of police statements in Singapore was severely curtailed. Sections 25 and 26 of the Straits Settlements Evidence Ordinance[6] provided that any statement made by an accused person to a police officer not above a prescribed rank and whilst in police custody

4 Cap 97, 1997 Rev Ed.
5 Cap 185, 1985 Rev Ed.
6 SS Ord No 3 of 1893.

was inadmissible. Singapore's Evidence Act was derived from the Indian Evidence Act 1872,[7] which was drafted by Sir James Fitzjames Stephen. Stephen explained in his "Introduction to the Indian Evidence Act" that such a strict stance was adopted to "prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody".[8] The position adopted by Stephen was noticeably different from the common law in England, as Stephen was probably of the view that the Indian police were far more corruptible than their English counterparts and more inclined to use torture to extract confessions.[9] These assumptions concerning the police were imported into Singapore's statutory regime. Sections 25 and 26 of the Straits Settlements Evidence Ordinance were reiterated in the Straits Settlements Criminal Procedure Code[10] which also prohibited the use of police statements in evidence.[11]

6 Subject to the above restrictions on the use of police statements, the common law voluntariness test was statutorily enacted in s 24 of the Evidence Ordinance,[12] which states that:

> A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

7 In his *Digest of the Law of Evidence*,[13] Stephen indicated that he based the above phraseology on various English cases such as *Regina v Baldry*[14] and *The Queen v Thompson*.[15] Cave J, in the latter case,

7 No 1 of 1812.
8 Sir James Fitzjames Stephen, *The Principles of Judicial Evidence (being an Introduction to the Indian Evidence Act)* (Macmillan and Co, Limited, 1872) ch III.
9 Whitley Stokes, *The Anglo-Indian Codes* vol 2 (Clarendon Press, 1888) at pp 827 and 839.
10 SS Ord No 36 of 1933.
11 While s 122 of the Criminal Procedure Code (SS Ord No 21 of 1900) allowed the police to record any confession if satisfied that it was made voluntarily, s 120 provided that no statement other than a dying declaration made to a police officer should be reduced to writing and signed by the accused otherwise than to prove that the witness made a different statement. There were similar provisions in Ordinance 10 of 1910.
12 *Supra* n 6.
13 Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, Limited, 12th Ed, 1936) at pp 195–197.
14 (1852) 2 Den 430; 169 ER 568 ("*R v Baldry*").
15 [1893] 2 QB 12.

summarised the authorities by describing a free and voluntary statement as one which was not preceded by an inducement to make a statement held out by a person in authority. For many years, English law deemed the exclusionary rule against involuntary confessions to be a fundamental principle in criminal procedure. As Lord Sumner put it in *Ibrahim v The King*:[16]

> It has long been established as a positive rule 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 or held out by a person in authority.

When the UK Judges' Rules[17] were promulgated, principle (e) in the introduction reprised the voluntariness test in this form:

> [I]t is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression.

8 The latter portion of this rule stemmed from a change in the common law rule to also exclude statements obtained in "an oppressive manner": *Callis v Gunn*.[18] It was recognised that there were other forms of pressure placed on the accused, that were not in the nature of obvious threats, inducements or promises, which could sap the accused's will and also result in involuntariness.

9 In 1960, this common law exclusionary rule was imported from Singapore's Evidence Act into the CPC.[19] The protection previously

16 [1914] AC 599 at 609. Lord Hailsham of Marylebone in *Director Public Prosecutions v Ping Lin* [1976] AC 574 ("*DPP v Ping Lin*") at 598 was of the opinion that Lord Sumner probably meant "excited" instead of "exercised" when quoting from the judgment of Cave J in *The Queen v Thompson*, *supra* n 15. However, he stated that the sense was obvious and unaffected by this change.

17 The Judges' Rules were drafted between 1912 and 1918 to provide practical guidance for the police in the conduct of questioning suspects. See David Wolchover & Anthony Heaton-Armstrong, *Confession Evidence* (Sweet & Maxwell, 1996) at p 117.

18 [1964] 1 QB 495.

19 Criminal Procedure Code (Amendment) Ordinance 1960.

accorded to accused persons was abolished.[20] By virtue of the amended s 122(5) of the CPC, all statements made in the presence of a police officer above the rank of Inspector were admissible as evidence in the accused's trial. There were two provisos to this general rule: the voluntariness test; and the need for the police, in recording the statement, to comply with the rules set out in Sched E of the CPC, which was modelled upon the UK Judges' Rules. Subsequently, the Criminal Procedure Code (Amendment) Act 1976 (No 10 of 1976) abolished the second proviso together with Sched E,[21] thus leaving the current s 122(5) of the CPC:

> Where any person is charged with an offence *any statement*, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not, *by that person to or in the hearing of any police officer of or above the rank of sergeant shall be admissible* at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
>
> Provided that the court shall refuse to admit such statement or allow it to be used as aforesaid 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 such person, proceeding from a person in authority and sufficient, in the opinion of the court, to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.*
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> [emphasis added]

20 The prohibition against using police statements as evidence had already been slowly eroded. Under s 121 of the Straits Settlement Criminal Procedure Code (SS Ord No 36 of 1933), no statement made to a police officer was to be evidence except for the purpose of impeaching the credit of the witness. Tan Yock Lin, *Criminal Procedure* vol 1 (Butterworths Asia, Looseleaf Ed, 1996) (Issue 12, 2005) at V[5] – V[150] refers to the Malaysian position, described in *PP v Zakaria bin Isa* [1978] 2 MLJ 35 at 36. Section 6 of the Criminal Procedure Code (Amendment) Enactment 1932 amended s 113 of the CPC 1926 (Federated Malay States) to make it possible to use police statements for the impeachment of credit. Section 113 of the CPC was abrogated from in specific offences, such as reg 33 of the Emergency Regulations 1948, s 75(1) of the Internal Security Act 1960 and s 14 of the Prevention of Corruption Ordinance (Ord No 5 of 1950).

21 This amendment was made in acceptance of the UK Criminal Law Revision Committee's Eleventh Report's recommendations (n 26 *infra*). The cautions in Sched E were replaced by a warning to the accused as to the possible effect of his failure to mention any fact he intended to rely on in his defence (the present s 122(6)). See also *Sim Ah Cheoh v PP* [1991] SLR 150 for the legislative history.

10 It is evident, from this brief examination of the origin of s 122(5) of the CPC, that the balance between the conflicting goals of protection of the accused and crime control has been tipped heavily in favour of the latter. This shift in emphasis is not necessarily a negative development, since the position adopted by Stephen was somewhat extreme and could have constituted an unwarranted clog in the administration of criminal justice. In this regard, both Wigmore and Andrews have advocated a clear separation of functions between the criminal court, whose purpose is to determine the *truth* of charges against the accused, and other agencies such as police disciplinary tribunals, which deal with *improprieties* by law enforcement officers.[22] The truth-finding process should not be unduly hampered by other extrinsic concerns. Yet, a pre-occupation with reliability of evidence in criminal procedure inevitably causes unease amongst many. The Singapore Bar Committee, in response to the proposal to amend the CPC in 1960, expressed its concern that the amendments would have a tendency to encourage undesirable methods in police investigation and would "seriously impair the possibility of the growth of the tradition of respect by the people for their police force".[23] It is therefore untenable to defer to either the crime control goal or the need to protect the accused, to the exclusion of the other. A crucial yet delicate balance has to be struck.

11 The current s 122(5) of the CPC, while permitting the use of police statements, still seeks to protect the accused through the voluntariness test.[24] The question to consider, 45 years after the 1960 amendment to the CPC, is whether it is still desirable to continue adhering to this position, or should the balance be tipped further in favour of reliability and the need for crime control? An examination of the rationales behind the exclusion of involuntary confessions is necessary, to discern the most appropriate course of action.

III. The rationales underlying the voluntariness test

12 English law has conventionally cited the reliability, protective and disciplinary principles as justification for the exclusionary rule of

22 Wigmore, *Treatise on Evidence* (Little Brown and Company, 3rd Ed, 1940) at paras 2183–2184; J A Andrews, "Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases" (1963) Crim LR 15 at 77.

23 *Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill* (LA 1/1960) at p 15.

24 References to s 122(5) of the CPC will henceforth also be references to s 24 of the Evidence Act.

involuntary confessions.[25] The UK Criminal Law Revision Committee, in its Eleventh Report on Evidence, opined that the primary rationale underlying the common law on confessions was the reliability principle.[26] In contrast, the Privy Council in *Lam Chi-ming v The Queen*[27] decided that all three principles justify the voluntariness test. It is vital to ascertain whether the reliability rationale is, and should, be the main reason for the exclusionary rule in Singapore, before there can be a proper assessment of whether the current s 122(5) of the CPC fulfils the rationales it embodies.

A. The reliability principle

13 As the name itself suggests, this principle is predicated on the concern that the truth-finding process in criminal cases should not be hampered by the admissibility of untrustworthy evidence. This rationale was first articulated in *The King v Warickshall*,[28] in which Eyre B stated that confessions:

> … forced from the mind by the flattery of hope, or by the torture of fear, comes in *so questionable a shape* when it is to be considered as the evidence of guilt, that *no credit ought to be given to it*. [emphasis added]

Only confessions which were given freely and voluntarily were deemed to be of the highest credit. The UK Criminal Law Revision Committee coined the term "reliability principle" to reflect this distrust of involuntary confessions.

14 The presumption underlying this rationale is that a rational being will not voluntarily make a statement which is against his interest,

25 Ashworth, *supra* n 1, at 723 and 727, defined these principles succinctly. According to the reliability principle, determining the truth of the criminal charges is the sole purpose of the criminal trial, and evidence should be admitted or excluded solely on grounds of reliability. According to the disciplinary principle, improperly obtained evidence should generally be excluded, even when its reliability is not in doubt, since the court should use its position to discourage improper practices in the investigation of crime. Ashworth further suggested that the House of Lords' decision in *DPP v Ping Lin*, *supra* n 16, was a step towards a protective principle. In this principle, the courts recognise the rights of suspects not to be subjected to certain forms of inducement and oppression, and protecting suspects from the disadvantage which might result if evidence obtained through a violation of those rights were admitted at his trial.

26 UK, *Eleventh Report of the Criminal Law Revision Committee Evidence* (*General*) (Cmnd 4991, 1972) at para 56.

27 [1991] 2 AC 212.

28 [1783] 1 Leach 263; 168 ER 234 ("*Warickshall*") at 235.

unless it is true.[29] However, under certain conditions the confession may become unreliable as testimony, and there is a risk that the accused may incriminate himself falsely. Such instances of false confessions normally arise when the accused is induced by hope or fear to make a statement. It was clarified in *Regina v Baldry*[30] that it is not that the law presumes that all such statements are untrue, but that, owing to the danger of receiving such evidence, the judges have thought it better to reject such evidence. In criminal cases, it is all the more crucial that greater caution is exercised to exclude suspicious testimony and avoid miscarriages of justice.[31] Such fears of false confessions are certainly not misplaced or far-fetched, as evidenced in the UK by the quashing of the convictions of the "Guildford Four" and the "Birmingham Six".[32] In Singapore, these fears were also realised when the High Court in *PP v Somporn Chinphakdee*[33] acquitted the accused upon finding that his confession was obtained involuntarily, and when a false confession led the Prosecution to withdraw a charge against Samat Dupree in 1993.[34]

15 The reliability principle appears to be the predominant reason buttressing the exclusionary rule for confessions. Lord Griffiths in *Lam Chi-Ming* observed that the "fruit of the poisoned tree" rule was developed as a result of a preoccupation with the need for reliability.[35] According to this rule, which has now been enacted in s 76(4) of the UK Police and Criminal Evidence Act 1984 (c 60), although a confession may be rejected based on the voluntariness test, facts which are discovered in consequence of a confession may be admissible.[36] There seems to be an implicit assumption in this rule that a confession should not be totally disregarded if it is proven by other facts to be trustworthy evidence. The Criminal Law Revision Committee noted, in this respect, that only the reliability principle could fully justify the existence of this doctrine.[37] Singapore has gone further to enact the doctrine of confirmation by subsequent facts in s 27 of the Evidence Act. While the confession itself

29 *The King v Lambe* (1791) 2 Leach 554; 168 ER 379. Confessions were described in *Mortimer v Mortimer* [1920] 2 Hag Con 310 at 315 as ranking "highest in the scale of evidence".
30 *Supra* n 14.
31 Wigmore, *supra* n 22, at vol III section 822.
32 Adrian Zuckerman, "Miscarriage of Justice and Judicial Responsibility" (1991) Crim LR 492.
33 [1994] SGHC 209.
34 Ben Davidson, "Court Frees Innocent Man after 2½ Years' Jail" *The Straits Times* (18 March 1993) at News Focus at p 2.
35 *Supra* n 27, at 217.
36 *Warickshall, supra* n 28, affirmed in *R v Berriman* (1854) 6 Cox 388.
37 *Supra* n 26, at para 56.

was inadmissible under the common law "fruit of the poisoned tree" rule, s 27 provides for the admissibility of parts of the confession, as long as facts were discovered as a consequence of the confession.[38] It seems then that it is the reliability principle that historically underlies the law concerning confessions.

16 Notwithstanding the centrality of the reliability principle, it does not appear to be the sole rationale behind the voluntariness test, as asserted by the English Criminal Law Revision Committee. The voluntariness test does not only reflect the high premium placed on reliability. If this were the case, the courts would not refrain from ascertaining the truth of the confession in order to decide on its admissibility. Nevertheless, the Privy Council in *Wong Kam-ming v The Queen*[39] did not do so, holding that it was improper for the Prosecution to cross-examine on the *voir dire* with the object of establishing the truth of the confession. Disapproving of the practice of enquiring about the truth of the confession, Lord Edmund-Davies cited the Canadian response in *Reg v Hnedish,* where Hall CJ said:[40]

> I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of an accused. That would be repugnant to our accepted standards and principles of justice; it would invite and encourage brutality in the handling of persons suspected of having committed offences.

17 The Privy Council was of the view that the reliability of the confession should be viewed separately from admissibility at the *voir dire* stage, the former being a matter to be determined by the jury after the *voir dire*. It is patently clear from this decision that there are other reasons, apart from the reliability rationale, for excluding an involuntary statement. The proviso in s 122(5) of the CPC and s 24 of the Evidence Act are intimately linked with other notions concerning justice and propriety. The Singapore High Court acknowledged this in *PP v Sng Siew Ngoh*.[41] While analysing the relationship between s 147(3) of the Evidence Act and s 122 of the CPC, Yong Pung How CJ stated that the latter was meant to regulate the activities of the police:

38 *PP v Chin Moi Moi* [1995] 1 SLR 297 at 303, [23].
39 [1980] AC 247 at 256–257.
40 (1958) 26 WWR 685 at 688.
41 [1996] 1 SLR 143 at 154, [48].

> The basis of the proviso to sub-s (5) is not rooted in the reliability or otherwise of the statement made to the police, but is intended clearly to prevent any impropriety on the part of the interrogators.

18 Further, not all unreliable confessions are excluded by virtue of the voluntariness test, which strongly suggests that there are other rationales underlying the exclusionary rule. Mirfield, in this connection, found it surprising that it has been said that the rule had "quite clearly" as its governing rationale, the reliability principle.[42] A confession obtained by powerful spiritual inducement would most likely be unreliable, but the voluntariness test would not be brought into action; only fear or hope "of a temporal nature" would be relevant for the purpose of the exclusionary rule. There are also various interrogation techniques employed by the police which do not amount to threats, promise or oppression, but which may nonetheless vitiate the truth of the confession made. One such technique – the "Inbau and Reid tactics" – suggests that the suspect's situation should be stage-managed by the police so as to facilitate the making of a confession.[43] While no overt coercion is employed, the accused may arguably still give a false confession. The voluntariness test cannot detect such instances. In fact, Mirfield goes further to add that the very nature of the interrogation process increases the likelihood of a suspect making a confession regardless of its truth or falsity. If reliability were the paramount concern, the exclusionary rule should have been phrased differently to exclude all instances when the truth of the confessions is questionable. Yet, the common law voluntariness test has never sought unequivocally to give effect to the reliability principle, focusing instead on the presence of threats, inducements or promises, and whether these actions had an effect on the accused's mind. Undoubtedly, there are other rationales for the common law voluntariness test, which should not be completely abandoned in favour of an all-encompassing reliability principle. The pertinent question is whether Singapore wishes to continue upholding these other rationales, which will now be considered in turn.

42 Peter Mirfield, *Confessions* (Sweet & Maxwell, 1985) at p 64.

43 Fred E Imbau & John E Reid, *Criminal Interrogation and Confessions* (Aspen, 4th Ed, 2001). Some examples of stage-management include ensuring that the interrogation room is designed to establish the authority of the interrogator and to focus the suspect's attention on the content of the questions asked. Some of the stronger tactics include drawing the suspect's attention to some but not all of the circumstantial evidence of guilt, the interrogator displaying confidence in the suspect's guilt and the interrogator sympathising with the suspect by telling him that anybody might have done the same thing in similar circumstances.

B. The protective principle

19 This principle was first articulated by Ashworth in 1977. In a nutshell, Ashworth suggested that a suspect has certain rights which the legal system respects. In order to ensure that the suspect is not placed at any disadvantage in the event that his rights are infringed, the court should have the power to exclude evidence obtained by improper means. An infringement of an individual's rights thus supplies a *prima facie* justification for the exclusion of evidence obtained as a result of that infringement.[44] In referring to the protective principle, modern English cases have emphasised the need to vindicate the right of an individual not to be subjected to official pressure to condemn himself, *ie*, the privilege against self-incrimination. Lord Diplock stated in *Regina v Sang*:[45]

> The underlying rationale of this branch of the criminal law, though it may originally have been based upon ensuring the reliability of confessions is, in my view, now to be found in the maxim nemo debet prodere se ipsum, no one can be required to be his own betrayer or in its popular English mistranslation "the right to silence".

20 It was suggested by an academic in 1991 that the voluntariness test should not protect the privilege against self-incrimination because this privilege is flawed. There is the theoretical problem of why the suspect should have a right not to answer police questions. It also seems that this right, if it exists, must yield to the greater community interest in the expeditious investigation of crimes. Further, there is the practical problem of determining the level of pressure which should exist before the privilege is found to be breached. If the privilege were to be seriously upheld, it would mean the effective end of police interrogation. In Singapore, the privilege also "received a crushing blow" with the enactment of s 122(6) of the CPC which permits the drawing of adverse inferences from the suspect's silence. It has thus been argued that the courts have been sent on "a wild goose chase for the illusory line which separates the voluntary and the involuntary" at the expense of focusing on the dangers of unreliability and impropriety.[46]

21 Granted that there may be some truth to this opinion, it may nonetheless give rise to the understanding that the exclusionary rule should not reflect the protective principle, owing to the problems inherent in the privilege against self-incrimination. This opinion also

44 *Supra* n 1, at 725–726.
45 [1980] AC 402 ("*R v Sang*") at 436.
46 Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii at lviii–lix.

seems to suggest that the voluntariness test cannot simultaneously satisfy the reliability and protective rationales. However, it is submitted that the protective principle can, and should, continue to be fulfilled through the common law exclusionary rule.

22 Admittedly, the privilege against self-incrimination has been greatly diminished in Singapore. The Court of Appeal in *PP v Mazlan bin Maidun* held that the privilege was not a fundamental rule of natural justice and that breach of the right, if it existed, did not affect the admissibility of any statement given by an accused.[47] Nevertheless, the protective principle does not merely entail the protection of the privilege against self-incrimination. As Mirfield pointed out, the principle is capable of a much wider application than the *nemo debet* principle.[48] It is primarily concerned with the protection of a minimum standard for the treatment of suspects. Other humanitarian rights apart from the privilege against self-incrimination are upheld through this principle. Ashworth also explained that the exclusionary rule for confessions reflected the courts' recognition of the rights of suspects not to be subjected to certain forms of inducement and oppression.[49] It is clear, therefore, that the privilege against self-incrimination is merely part of the wider protective principle. Consequently, a diminution of the strength of the privilege against self-incrimination in Singapore need not necessarily lead to the impossibility of upholding the protective rationale in the voluntariness test.

23 It is perhaps in this spirit that the courts in more recent cases have expressed the protective principle in terms of the general concept of "fairness to the accused". The most frequently cited passage is Lord Hailsham's eloquent pronouncement in *Wong Kam-ming v The Queen*:[50]

> [A]ny civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, *because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions.* [emphasis added]

47 [1993] 1 SLR 512 at 515–518.
48 *Supra* n 42, at pp 69–70.
49 *Supra* n 1, at 727.
50 *Supra* n 39, at 261.

24 In a similar vein, Lord Salmon in *R v Sang* based the whole issue of the exclusion of involuntary confessions on the question of fairness to the accused.[51] It is therefore possible to view the protective principle as involving the upholding of a suspect's right not to be subject to improper coercion and ill-treatment in the extraction of confessions. The diminution of the privilege against self-incrimination does not completely undermine the relevance of the protective principle.

25 It is also submitted that the protective rationale and the reliability principle may be simultaneously satisfied by the voluntariness test. There is, admittedly, the possibility that a confession that is given involuntarily may in fact be true.[52] In this regard, there appears to be an irreconcilable conflict between the reliability and protective principles, since reliability seems to be sacrificed for the sake of protecting the accused. Be that as it may, it will be argued later in this article that in the absence of a litmus test of "voluntariness", it is both difficult, and impractical, for the judge to discern during the *voir dire* stage, whether a confession is in fact true or false.[53] In addition, it is submitted that in the practical application of the exclusionary rule, the supposed tension between the reliability and protective rationales is illusory. During the *voir dire* stage of a trial, it is not known for a fact whether the confession was reliable or not. The court may only infer that there was *potential unreliability* due to the use of threats or inducements that resulted in the making of the confession. It is thus untenable to assert that the court, in seeking to uphold the protective principle, may be sacrificing the reliability principle. Hypothetically speaking, the confession, which is excluded based on the voluntariness test, could have turned out to be trustworthy evidence. Nonetheless, realistically speaking, it will never be fully known whether the confession was indeed trustworthy. At this preliminary point of the trial, reliability of the evidence is yet to be conclusively determined. Hence, it is good to err on the side of caution – once a confession ought to be excluded based on the protective principle, it should be inadmissible despite the court's suspicion that it may be reliable.

51 *Supra* n 45, *per* Lord Salmon at 445: "A confession by an accused which has been obtained by threats or promises is inadmissible as evidence against him, because to admit it would be unfair." See also Lord Reid's speech in *Commissioners of Customs and Excise v Harz* [1967] 1 AC 760 at 820.

52 Hor, *supra* n 46, at lxiv: "But there will be many of us who are not prepared to accept that every time the suspect says something when he would have preferred not to, the reliability of what he says is suspect."

53 See paras 56 and 71 of the main text below.

26 In sum, it is submitted that reliability should not be the sole basis for the exclusionary rule. The rule is historically bound up with the concept of upholding the rights of the suspect. Abandoning this vital facet of the rule will lead to an excessively strict and objective application of the exclusionary rule in Singapore.

C. The disciplinary principle

27 The disciplinary principle is concerned with the prevention of improper police practices. The exclusion of confessions which have been improperly extracted may discourage the police from resorting to improprieties in extracting confessions.[54] As mentioned above, Stephen, in deciding to prohibit the use of police statements in the Indian Evidence Act, was prompted by the fear that the Indian police might continue using the practice of torture on suspects. Singapore's original CPC and Evidence Act, in adopting Stephen's approach, were similarly motivated by the disciplinary rationale. This rationale now finds expression, albeit in a diluted form, in the voluntariness test in s 122(5) of the CPC. Unlike its predecessor, the current provision no longer presumes that all statements extracted by the police are accompanied by abhorrent police misconduct. The court only expresses its disapproval of the use of threats, inducements or promises which are deemed severe enough to vitiate the suspect's free will.

28 While it has been earlier argued that the reliability and protective principles may coexist under the banner of the voluntariness test, the disciplinary rationale is not easily reconciled with these principles. This rationale principally focuses on the presence of *police impropriety* and the need to prevent further misdemeanour, whilst the other two principles concentrate on the effect of any threat, inducement or promise *on the accused* and the related need to protect the accused.[55] The following scenario illustrates the schism existing between the concepts: Certain interrogation tactics are employed to extract a confession from a suspect. The court may decide that these techniques do not amount to a threat, inducement or promise which has the effect of rendering the suspect's confession involuntary. As such, based on the reliability principle, there is no need to exclude the statement. Similarly, based on the protective principle, the accused's rights have not been infringed so as to warrant

54 See Eleventh Report of the UK Criminal Law Revision Committee, *supra* n 26, at para 55.

55 Mirfield, *supra* n 42, at p 70.

the court's protection. In contrast, from the perspective of the disciplinary principle, the statement may be excluded as the court may conclude that it cannot countenance the improper tactics used and that a deterrent signal ought to be sent out to other investigating officers. Strict adherence to the disciplinary principle may therefore readily lead to the exclusion of reliable confessions.

29 It is thus not difficult to understand why academics have disparaged the use of the disciplinary principle and have advocated a clear separation of the need to determine the truth and the unrelated need to enquire into improprieties during criminal investigations.[56] Reliability is easily compromised when the court seeks to redress impropriety. In addition, there is no agreement amongst advocates of the disciplinary rationale on the extent to which the principle applies and the types of irregularities which should be addressed. The application of this rationale will be immensely complicated. Furthermore, the supposed deterrent effect on criminal investigation officers is likely to be illusory. Due to the doctrine of confirmation by subsequent facts in s 27 of the Evidence Act, the exclusion of a confession does not necessarily prevent the police from pursuing other evidence arising from the accused's confession. The acceptance of this doctrine in Singapore dilutes any deterrent effect the exclusion of confessions may have.[57]

30 It is therefore submitted that the exclusionary rule for confessions should not be primarily underpinned by the disciplinary rationale. Instead, the disciplinary principle should have relevance only *in conjunction with* the protective principle; a statement should be excluded because the law seeks to *protect* the accused (rather than deter the police) from improprieties on the part of the investigating authorities. This position is not tantamount to denying the existence of the disciplinary rationale in the present voluntariness test. There is certainly the concern that the improper use of threats or promises by the investigating authorities should be avoided.[58] However, the presence of improprieties should not be the chief determining reason for the exclusionary rule on confessions. Rather, the litmus test for the mandatory exclusion of the

56 See para 10 of the main text above and *supra* n 21.

57 Mirfield also was of the view that the deterrent message will only be effective if there exists some internal police procedure designed to enable that message to be disseminated. The message itself may be unclear where the judge has a fact-related exclusionary discretion instead of a rule-related exclusionary duty. *Supra* n 42, at pp 72–73.

58 The disciplinary rationale was highlighted in *PP v Sng Siew Ngoh*, *supra* n 41.

confessions ought to be protection of the accused, coupled with the concern for reliability. This test may be fulfilled with or without the existence of improprieties. It is this writer's view that improprieties – such as entrapment and the use of deception – will be more appropriately addressed via a discretion to exclude statements than a mandatory exclusionary rule.[59]

31 To sum up, there is no doubt that the common law exclusionary rule is historically founded on the reliability rationale. Though a confession amounts to hearsay which cannot be safely relied on by the court, there was an exception made because of the understanding that a rational person would not normally make a statement against his own interest unless that statement is true.[60] It was recognised, however, that this understanding could be potentially erroneous when a confession was extracted by "flattery of hope, or by torture of fear". Hence, the practice of excluding such confessions emerged, premised on the concern for the reliability of the evidence. Nevertheless, the true purport of the exclusionary rule cannot be properly understood apart from the protective principle. Modern cases have defined the voluntariness test as being closely associated with an individual's privilege against self-incrimination, as well as the accused's right not to be subjected to ill-treatment or improper pressure. While the privilege against self-incrimination is less prominent in Singapore, it has been argued above that the protective principle, in terms of the general notion of fairness to the accused, is still relevant and should continue to be upheld. It is also feasible for the protective principle to coexist with the reliability rationale. The quintessence of the exclusionary rule will be lost if it is dissociated from the question of fairness to the accused. As for the disciplinary rationale, it also plays a part in supporting the common law exclusionary rule, though it has been suggested above that its role should be secondary and subordinate to the reliability and protective rationales. As such, reliability ought not to be the sole concern underlying s 122(5) of the

59 This was the view expressed by Hor, *supra* n 46, at lxvii:

> The voluntariness principle employs the technique of mandatory exclusion of evidence which, it has been argued, is an unsuitable response to impropriety.
>
> … An exclusionary discretion is required to enable the court to weigh the various public interests involved in the admission or exclusion of improper evidence.

Hor further states at lxix that it is desirable to enact a clear and express statutory provision for such a discretion to exclude evidence.

60 Wolchover, *supra* n 17, at p 4, noted that the modern doctrine excluding hearsay did not become fixed in common law until the years between 1675 and 1690. Confessions continued to be admissible alongside the rule against hearsay as an "exception".

CPC. The future development of the exclusionary rule should also not be along the lines of the reliability principle alone.

32 The next issue that will be considered in this article is whether the voluntariness test as reflected in the present s 122(5) of the CPC adequately encapsulates both the reliability and protective principles, and whether there are fundamental defects which warrant a reform of the current test.

IV. Whether the voluntariness test is practical and logical

A. Can a statement given to investigating authorities ever be voluntary?

33 The chief criticism of the voluntariness test is that it fails to fulfil the protective principle as it is inherently incongruous. It seems illogical to exclude confessions on the basis of voluntariness since in truth, very few confessions are truly given out of one's free will. Lord Lane LCJ, in recognition of this reality, remarked in *R v Rennie*:[61]

> Very few confessions are inspired solely by remorse. Often the motives of an accused person are mixed and include a hope that an early admission might lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible.

34 The UK Criminal Law Revision Committee did not appear to favour the common law test because "any threat or inducement, however mild or slight, uttered or held out by a person in authority makes a resulting confession inadmissible".[62] The Australian Law Reform Commission expressed similar sentiments. In its opinion, it was not at all clear what "free will" meant. If voluntariness were indeed equated with a "free choice", then no pressure would be permitted on the suspect being interviewed. Further, admissions made out of court when the law required an answer could not be regarded as genuinely voluntary. The Australian Law Reform Commission concluded that the law was unclear as to the relevant considerations that resulted in a lack of free will.[63] It has

61 [1982] 1 WLR 64 at 70.
62 *Supra* n 26, at para 57.
63 Australian Law Reform Commission, *Evidence (Interim)* (Report No 26, 1985) at paras 140, 371–374; *Evidence* (Report No 38, 1987) at para 156.

also been expressed in Singapore that "there really is no free will and it is a rare suspect indeed who would prefer to confess", and that "the courts are invited to search for the free will which no longer exists at the expense of focusing on reliability."[64]

35 While these are valid concerns in both the UK and Australia, they do not apply with equal force in Singapore. It is important to note that *Singapore's voluntariness test is not synonymous with the English common law formulation of the test*. According to the UK Judges' Rules, a statement is voluntary if it has not been obtained from him by fear or prejudice or hope of advantage. This is also the position in Australia.[65] This common law rule differs markedly from s 122(5) of the CPC, which has the additional words – "*sufficient*, in the *opinion of the court*, to give such person grounds which *would appear to him reasonable for supposing* that he would gain any advantage or avoid any evil". According to the Court of Appeal in *Tan Boon Tat v PP*,[66] *Chai Chien Wei Kelvin v PP*[67] and *Gulam bin Notan Mohd Shariff Jamalddin v PP*,[68] the test in s 122(5) is partly objective and partly subjective. The objective limb entails the consideration of whether the circumstances are such that it would have given the accused *reasonable grounds* to suppose that he would gain an advantage or avoid an evil. These additional words impart a much more objective perspective to the exclusionary rule.

36 Our courts have adopted a similar objective approach with respect to the ground of oppression. Although the common law concept of oppression was not statutorily enacted in s 122(5) of the CPC, it has been an established ground for vitiating the voluntariness of a

64 Hor, *supra* n 46, at lxv. Earlier in this article, Hor noted the voluntariness test, being a translation of the flawed privilege of self-incrimination, fails to address reliability concerns. He subsequently considered the concept of oppression while discussing the conceptual difficulties in the confession regime. He pointed out that this concept has been unable to break free from the futility of the protection against self-incrimination. Oppression has been described in *Regina v Prager* [1972] 1 WLR 260 at 266 as "something which tends to sap, and has sapped, that *free will* which must exist before a confession is voluntary" and oppressive questioning as "questioning which … so affects the mind of the subject that his will crumbles and he speaks *when otherwise he would have stayed silent*" [emphasis added]. In this context, Hor comments that there really is no free will when a suspects confesses.

65 *McDermott v The King* (1978) 76 CLR 501 at 511.

66 [1992] 2 SLR 1 ("*Tan Boon Tat*") at 9, [31].

67 [1999] 1 SLR 25 ("*Chai Chien Wei Kelvin*") at 56, [53].

68 [1999] 2 SLR 181 at 200, [45].

confession.[69] The common law ground of oppression was defined in terms of "free will" and "voluntariness"; it had to be shown that the accused's free will was sapped to such an extent that he could not resist making the confession in question: *R v Priestley*.[70] In Singapore, the courts seem to have interpreted the concept of oppression in the light of the objective limb in our voluntariness test. For instance, in *Fung Yuk Shing v PP*, the Court of Appeal, in analysing the alleged oppressive conduct, considered whether it constituted a threat or an inducement of such gravity as to automatically render any statement made by the accused involuntary.[71] In using such a reasoning process, the Court appeared to subject oppression to the objective test of reasonableness. Hence, there is clearly no perception by our courts that the term "voluntariness" should be interpreted literally. In fact, the word "voluntariness" is not even utilised in s 122(5); that term has been borrowed from the common law exclusionary rule. It is therefore submitted that there is relatively less uncertainty in Singapore concerning the ambit and elements of the voluntariness test. This point will be elaborated on more in section VI.

B. Is there absurdity in the courts' application of the test?

37 Notwithstanding the greater clarity of the elements of the voluntariness test in Singapore, our courts seem to have over-emphasised the objective limb of s 122(5). This tendency is especially evident in the cases on alleged oppression of the accused. In several of these cases, the court was reluctant to hold that there was oppression though the suspects were deprived of sustenance while being interrogated.[72] An academic has thus commented that it was ludicrous to say in *Tan Boon Tat* that the accused *exercised his free will* to confess, although he had been detained for ten hours without food or refreshment and under conditions of great

69 In certain cases such as *Ong Seng Hwee v PP* [1999] 4 SLR 181, *Tan Boon Tat*, *supra* n 66 and *Seow Choon Meng v PP* [1994] 2 SLR 853, the courts seem to consider oppression as a separate head from the presence of threats, inducements or promises. In other cases, oppression seems to be viewed as part of the voluntariness test: *Fung Yuk Shing v PP* [1993] 3 SLR 421.

70 (1967) 15 Cr App R 1.

71 [1993] 3 SLR 421. The holding in *Fung Yuk Shing v PP* was quoted with approval in *Chai Chien Wei Kelvin*, *supra* n 67 and *Abdul Malik bin Abdul Jamil v PP* [2002] 2 SLR 234.

72 See *Fung Yuk Shing v PP*, *supra* n 69 and *Tan Boon Tat*, *supra* n 66.

stress.[73] There is a strikingly similar criticism in Australia, where the Law Reform Commission noted that the meaning of "voluntariness" appears to have been stretched till breaking point.[74]

38 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.[75] Be that as it may, this does not imply that the test is defective. It has already been established above that "free will" and "voluntary" are not to be construed literally in the context of the voluntariness test in Singapore. They are convenient terms that enable the court to determine when statements have been made under circumstances which the court deems to constitute coercion or unwarranted inducement. In cases such as *Tan Boon Tat,* the court was merely expressing its own view that it did not find that the acts of the investigating authority were sufficiently serious to induce the accused to make a confession. The courts' decision on the sufficiency of the particular threat, inducement, promise or acts of oppression is ultimately a question of fact and of judicial evaluation, as was pointed out in *Tan Boon Tat* and *Chai Chien Wei Kelvin*. Invariably, there will be differing interpretations on what is essentially a question of fact. As such, the fact that the courts have been strict in certain decisions does not necessarily reflect poorly on the utility of the voluntariness test.

73 Hor, *supra* n 46, at lix, wrote that, in Singapore, the privilege against self-incrimination is not breached by showing the mere existence of pressure, as the law allows some degree of pressure to be exerted on the suspect to confess. It becomes impossible to say at which point of intensity of pressure the privilege is breached. At lxvi, Hor commented, with respect to the concept of oppression, that it was difficult to understand why free will existed in *Tan Boon Tat*, *supra* n 66, but did not exist in *PP v Lim Kian Tat* [1990] SLR 364, where the suspect was subject to two periods of interrogation of about six to seven hours each. In his view, it would have been more fruitful for the court to direct its mind to the question of reliability: Were the conditions such that the accused would have been likely to confess falsely or without regard to its truth, to escape from those conditions?

74 In a New South Wales decision, the trial judge was satisfied beyond reasonable doubt that a confession was voluntary despite the fact that the accused had been questioned for 17½ hours in a period of 23¾ hours, which included a period of almost continuous interrogation from 7.30pm to 9.30am the next day. This decision was reached even though "when the interrogation finished, ironically enough [the police interrogator] collapsed with mental and physical exhaustion and was disoriented". See Report No 26, *supra* n 63, at para 378.

75 The few cases in which the court held that the confessions were involuntarily obtained include *PP v Lim Kian Tat*, *supra* n 73; *Tan Choon Huat v PP* [1991] SLR 805, *Poh Kay Keong v PP* [1996] 1 SLR 209 and *PP v Selvakumar Pillai s/o Suppiah Pillai* [2004] 4 SLR 280.

39 It is submitted that the relative strictness or leniency shown to the accused ultimately hinges not on the wording of the exclusionary rule, but on the judicial attitude particular to each jurisdiction and each judge. The voluntariness test has proven amenable to varied and diverse interpretations. The Australian Law Reform Commission, when it highlighted the strictness of the court's application, acknowledged in the same breath that in some cases the focus on inducements resulted in the exclusion of statements even when the inducement was innocuous. These differences in opinion will still prevail under the reliabilty test, as was the case in the UK. An overly-indulgent attitude was displayed in the decision in *R v Waters,*[76] where the mere fact of a denial by the accused was perceived to render any confession which immediately followed it unreliable. In stark contrast, in *R v Week,*[77] a police officer implied during an interview that if the defendant did not say what the police wanted to hear, he would remain in custody. Although the trial judge concluded that there was a clear risk that the accused might have been induced to admit more than his true involvement in the offence, the English Court of Appeal decided that the confession was admissible, being of the view that the accused had continued to deny other allegations put to him and had shown himself at the *voir dire* to be astute and experienced at being interviewed. It is therefore evident that the courts, under both the voluntariness and reliability tests, will have differing views on what conditions may be deemed sufficient serious to forcibly extract a confession. Criticism of the outcomes of certain decisions should not be translated to criticism of the test that was applied by the courts.

40 To conclude on this section, it is submitted that there is bound to be some degree of diversity in the application of the voluntariness test. The outcome is, after all, dependent on each judge's postulation of the accused's reaction to the circumstances surrounding his interrogation. Nevertheless, the voluntariness test may still fulfil its intended purpose, if the courts continue to pay heed to the exhortation in *DPP v Ping Lin*[78] to adopt a common-sense approach in applying the test to each case, bearing in mind that facts vary infinitely from case to case.

76 [1989] Crim LR 62, CA.
77 [1995] Crim LR 52.
78 *Supra* n 16, at 600.

V. Whether the voluntariness test reflects the reliability principle

A. The criticism

41 The next, somewhat related, criticism of the voluntariness test is that it fails to adequately fulfil the reliability rationale. It has been observed by an academic that the voluntariness test reflects more accurately the privilege against self-incrimination than the concern for reliability. Although there may be substantial overlap between the reliability rationale and the privilege against self-incrimination, the reliability of a suspect's statement is not always suspect every time he says something when he would have preferred not to. It was thus recommended that voluntariness be replaced by a direct reliability criterion.[79] The UK Law Reform Commission appeared to share this view, since it stated that reliability was the main principle underlying the law, and proposed a rule that a threat or inducement should render a confession inadmissible, only if it was likely to render the confession unreliable. The Australian Law Reform Commission made a similar decision to jettison the voluntariness test and replace it with a "truth test", one which excluded confessions made in circumstances that were likely to adversely affect the truth of the confessions.

B. Is the criticism valid?

42 It is not disputed that a confession that was made involuntarily may nonetheless be true and thus constitute reliable evidence. There is therefore a valid concern that a strict application of the rule may result in the removal of evidence that could be useful to the ends of justice. Notwithstanding the possibility that reliable evidence may be slipping past the courts' scrutiny, such instances probably fall within the minority of cases on confessions. In most circumstances, there will be a considerable risk that false confessions might have been given as a result of the use of coercion or promises. The Australian Law Commission conceded that this was so, stating that the factors affecting voluntariness of a statement were also likely to affect its truthfulness.[80] It stands to reason that the danger of unreliability is great whenever the voluntariness principle has been transgressed. More importantly, as was submitted above at para 25, it is not known at the *voir dire* stage whether the confession was in fact reliable evidence. It is therefore prudent to err on

79 Hor, *supra* n 46, at lxiv.
80 Report No 26, *supra* n 63, at para 764.

the side of caution and to exclude confessions whenever there is a *potential danger* of unreliability. In this respect, Pollock CB in *R v Baldry* held that "the ground of exclusion is that *it would not be safe* to receive a statement made under any influence or fear".[81] It is thus submitted that the voluntariness test is a satisfactory barometer of the reliability of the confession.

C. Why not use a "reliability test"?

43 It may seem, however, that the voluntariness test is an unnecessarily indirect mode of upholding the concern for reliability. The UK and Australian approaches of expressly acknowledging the reliability principle appear to be less complicated. Nonetheless, it has been argued above that the reliability principle should not be the sole rationale underpinning the exclusionary rule in s 122(5); it is of paramount importance that the protective principle be upheld as well. Any statutory modification of the present rule to expressly acknowledge the reliability rationale should therefore not compromise the protective facet of the test. It is submitted that the imposition of a direct reliability test in Singapore may result in the diminution of the equally crucial principle of protection of the accused. More significantly, the reliability test may not necessarily resolve the problem of the exclusion of credible evidence. The English and Australian statutory regimes will now be analysed to amplify these views.

VI. The UK and Australian approaches

A. The UK experience

44 The origin of the common law exclusionary rule in the UK was briefly explained above at para 5. To recapitulate, the exclusionary rule in England was a common law creature, the clearest enunciation of it being made in *Warickshall*[82] in the mid-eighteenth century. It was the case of *Warickshall* which articulated the "reliability principle" by stating that a confession forced by the flattery of hope or the torture of fear was in such a questionable shape that no credit should be accorded to it. However, it was observed by Mirfield that in subsequent cases, the judges were anxious to avoid speculation on whether it was likely that an untrue

81 *Supra* n 14.
82 *Supra* n 28.

confession had been made.[83] By the middle of the 19th century, the exclusionary rule seemed to have been triggered whenever there was *any* threat or inducement.[84] There was an eschewing of the reliability test as well as a presumption that any confession would be vitiated if preceded by any threat or inducement.[85] This undesirable development prompted Erle J in *R v Baldry* to lament that "justice and common sense ha[d] been sacrificed … at the shrine of guilt".[86] The exclusionary rule was eventually crystallised in principle (e) of the 1964 Judges' Rules, which stated that any statement made by an accused had to be voluntary, in the sense that it had not been obtained from him by fear of prejudice or hope of advantage, exercised by a person in authority, or by oppression.

45 It was against the backdrop of dissatisfaction with the current state of law that the UK Criminal Law Revision Committee assessed the voluntariness test in its Eleventh Report on Evidence. Registering its doubts about the rule, it highlighted several decisions which aptly illustrated how mild and slight inducements had resulted in confessions being ruled inadmissible. It suggested that the rule should be modified to exclude confessions made in response to threats or inducement "of a sort *likely, in the circumstances existing at the time, to render unreliable* any confession which might be made by the accused in consequence thereof".[87] However, inadmissibility on account of oppression was to remain.

83 Mirfield, *supra* n 42, at p 48.

84 See *Cass* (1784) 1 Leach 293n; 168 ER 249 where a publican promised a man suspected of stealing from him that he would be favourable to him if told where his property was and Gould J instructed the jury to acquit him "for that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession". See also *Sexton*'s case in *Chetwynd's Supplement to Burn*'s *Justice of the Peace and Parish Officer* (1823) at p 103, where Sexton, suspected of burglary, the told police that he would tell all about it if given a glass of gin.

85 Wolchover terms this the presumption of causation, *supra* n 15, at para 4-021.

86 *Supra* n 14, at 574. Parke B in *R v Baldry* lamented at the degree of latitude shown towards prisoners and said that he could not look at the decisions "without some shame when [he] consider[ed] what objections have prevailed to prevent the reception of confessions in evidence". Wigmore, *supra* n 22, at para 865 also said that the precedents had given "an appearance of sentimental irrationality to the law".

87 *Supra* n 26, at para 65 (emphasis added); cl 2(2)(b) of draft bill annexed to report.

46 This proposal, together with other more controversial recommendations, did not find favour with the UK Parliament. It was later revived in 1984 in s 76(2) of the Police and Criminal Evidence Act 1984 (c 60) ("PACE"), which provided:

> If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained —
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was *likely, in the circumstances existing at the time, to render unreliable* any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.
>
> [emphasis added]

47 In essence, the enactment of this new statute tacitly approved of the Criminal Law Revision Committee's view that the exclusionary rule on confessions should be predicated on the reliability principle. It also seemed to agree with the Committee that oppression should be a separate ground of inadmissibility, as "it would not be right, or acceptable to public opinion, to make any exception to inadmissibility where there has been oppression". Section 76 was but part of a three-pronged approach in PACE to reliability. It was complemented by s 78(1), as well as s 77(1). The former provision conferred on the court the discretion to exclude confessions when the probative value was outweighed by its prejudicial effect.[88] The latter section was a special provision to underscore the risk of

88 Section 78(1) provides:

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

unreliability in cases of mentally-impaired accused.[89]

B. Applicability of the UK reforms to Singapore

(1) Differing contexts

48 There is a vast difference between the context of England's legislative reform and the current legal development on the law of confessions in Singapore. In particular, the UK Criminal Law Revision Committee was concerned that the common law voluntariness test was being applied in a manner that was excessively lenient to the accused. This was due, in no small part, to the phraseology used in the common law rule, which was noted at para 35 to be lacking an objective element. In contrast to Singapore's version of the voluntariness test, there was no need for the English court to consider the sufficiency of the threat, inducement or promise; neither was there a requirement to evaluate whether the accused had reasonable grounds to believe that he would gain an advantage or avoid an evil by confessing. It sufficed for the court to find that the confession was obtained by fear of prejudice or hope of advantage.

49 There is no similar defect in Singapore's application of s 122(5) of the CPC. As adverted to at para 35, there is no uncertainty over the subjective and objective components of the voluntariness test, which were succinctly set out in *Chai Chien Wei Kelvin v PP*. The local exclusionary rule, modelled on Stephen's Indian Evidence Act, is not a replica of the common law rule which was primarily subjective in nature. Furthermore, the Singapore courts have emphasised the objective elements of the test, refusing to rule that a confession may be rendered inadmissible by mild promises or threats such as vague promises to render assistance and

89 Section 77(1) provides:

> Without prejudice to the general duty of the court at a trial on indictment to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial —
>
> (a) the case against the accused depends wholly or substantially on a confession by him; and
>
> (b) the court is satisfied —
>
> (i) that he is mentally handicapped; and
>
> (ii) that the confession was not made in the presence of an independent person,
>
> the court shall warn the jury that there is special need for caution before convicting the accused in reliance on the confession, and shall explain that the need arises because of the circumstances mentioned in paragraphs (a) and (b) above.

common exhortations to the accused to tell the truth. In fact, the likely criticism to be directed at our local decisions is not that there is excessive leniency towards the accused, but that the courts seem to have over-emphasised the objective element of the test, resulting in immense difficulty for the accused in proving that the confession was indeed involuntarily obtained. The situation prevailing in the UK before 1984 is a far cry from Singapore's jurisprudence on confessions. It is therefore difficult to see how the impetus in the UK to radically alter the voluntariness test applies in Singapore. There would be no reason to impose an even stricter statutory regime than the existing one.

(2) How effective will the reliability test be?

50 The only plausible reason to adopt the UK approach, notwithstanding the different context, is to reflect the reliability rationale more accurately. Yet, even on this ground, statutory reform is not justified. Framing the exclusionary rule in the likeness of s 76 of PACE may not effectively fulfil the reliability principle which *Warwickshall* espoused. The Criminal Law Revision Committee explained that the judge's task under the proposed reliability test was to imagine that he was present at the interrogation and hearing the threat or inducement. Taking into account the strength of the inducement and having regard to the seriousness of the offence, he then had to consider whether:[90]

> … at the point when the threat was uttered or the inducement offered, any confession which the accused might make as a result of it would be *likely* to be unreliable". [emphasis added]

To reiterate this point, it was specifically stipulated in s 76(1) of PACE that once the test is satisfied, the confession should be inadmissible "notwithstanding that it may be true".

51 If Singapore were to adopt the PACE approach, the effective change will be from evaluating the court's view of the effect of acts done on the *voluntariness* of the accused, to assessing the *probable effect on the truth* of the accused's statement. While there is a diversion of the court's attention to the reliability of the statement, it is not clear that there will be any discernible difference in the way the test will be applied. Both essentially are objective tests entailing the court's imposition of its own view on the likely effects of interrogation. The difference between the UK common law rule and PACE is, in comparison, more pronounced, since

90 *Supra* n 26, at para 65.

in the case of the former rule, the English courts were inclined to focus on merely finding *any* threat or inducement and failed to analyse the possible effect on the accused. Given the fact that the difference between PACE and Singapore's voluntariness test is not as marked, it is highly probable that the local courts, in applying the reliability test, may still refer to the considerations used in the voluntariness test. It is, after all, logical to reason that a confession is likely to be untrue if it was forced or cajoled out of the accused.

52 This prediction is fortified by the English decisions on s 76(2) of PACE. The UK Court of Appeal laid down a structured approach in *R v Barry*[91] for determining an issue under s 76. First, the judge had to identify the thing said or done, which required him to take into account everything said and done by the police. The second step was to ask whether what was said or done was likely to render unreliable a confession made in consequence, *the test being objective.* The final step was to ask whether the Prosecution had proved beyond reasonable doubt that the particular confession was not obtained in consequence of the thing said or done, which was *a question of fact to be approached in a common-sense way.*

53 This suggested approach is remarkably similar to the present law in Singapore. As the Court of Appeal held in *Tan Boon Tat,* the court has to consider whether there was any threat, inducement or promise which caused the confession to be made. This step resembles the first step in *Barry* of identifying the external factors that could have had an impact on the mind of the accused. The next step – considering whether there were reasonable grounds for the accused to suppose that he would avoid an evil or gain an advantage by making the statement – is also an objective enquiry akin to *Barry*, except that the standard to be applied is not the reliability yardstick. In addition, it has also been held in Singapore, just as in *Barry*, that the objective analysis should be approached in a common-sense way in the light of all the evidence: *Tan Boon Tat,*[92] *Seow Choon Meng*[93] and *Chai Chien Wei Kelvin*[94] following *DPP v Ping Lin.*[95] This fact-specific approach necessitates taking into account the accused's peculiar characteristics, the realities of the methods of police investigation, the seriousness of the offence and even the probability of the contents of the

91 (1992) 95 Cr App R 384.
92 *Supra* n 66.
93 *Supra* n 69.
94 *Supra* n 67.
95 *Supra* n 16.

confession made.[96] The burden of proof is also the same as stated in *Barry*. Once voluntariness of a statement is challenged, the Prosecution bears the burden of proving beyond a reasonable doubt that the confession was made voluntarily: *Koh Aik Siew v PP*.[97] There is, in short, little difference between the approaches under PACE and Singapore's CPC.

54 Several other UK cases further illustrate this submission. In *R v Phillips*,[98] the Court of Appeal, in deciding that inducements in the form of promises of bail and taking further offences into consideration could have led to an unreliable confession, drew guidance from cases decided prior to PACE. Notably, the court referred to, and approved of, the exhortation in *DPP v Ping Lin*[99] to adopt a common-sense approach in applying the voluntariness test. Undoubtedly, the same decision would have been arrived at if the voluntariness test had been utilised. In another case, *R v Matthias*,[100] a senior police officer told the accused that he would not be prosecuted provided he was willing to give information about a corrupt customs officer. The Court of Appeal decided that the offer made by the officer was a plain inducement. Under Singapore's exclusionary rule in s 122(5) CPC, it would have been decided that the offer was sufficiently serious to induce the making of the confession and that the

96 See for instance *PP v Selvakumar Pillai s/o Suppiah Pillai* [2004] SGDC 84, where the district jduge found it incredible that the accused, who was charged with committing theft, would suddenly open up to the police officer despite staunchly refusing to confess for the earlier two interviews. It was also highly suspicious that all three officers who had been interviewing the accused left the accused alone with another officer, and that the accused later readily confessed. On appeal, the High Court in [2004] 4 SLR 280 did not reverse these findings, holding that the circumstances surrounding the confession were strange. See also *Ng Ah Soi v PP* [1996] 1 SLR 534, where the High Court held that the statement was made involuntarily due to the absurdity of its content.

97 [1993] 2 SLR 599.

98 [1988] 86 Cr App R 18. The Court of Appeal referred to *R v Northam* (1968) 52 Cr App R 97 and *DPP v Ping Lin*, *supra* n 16, amongst other cases.

99 *Supra* n 16. See also *supra* n 78.

100 *The Times* (24 August 1989).

confession was thus inadmissible.[101] It is clear, therefore, that the reliability test will not make a great difference to Singapore's existing law on confessions. Given the vague way in which the reliability test has been phrased, it is highly plausible that the courts will continue to draw guidance from the relatively more detailed and structured test in s 122(5) of the CPC. Since the nature of the court's evaluation of the facts will remain largely the same, there is hardly any necessity to modify the present law along the lines of PACE.

(3) The reliability test does not seem workable

55 It may be argued, however, that the reliability test will be immensely useful in preventing the indiscriminate exclusion of involuntary confessions which are in fact true. While this proposition may, in theory, seem reasonable, it is doubtful whether the vague reliability test will enable a judge to detect such cases. The voluntariness test offers the court tangible and workable criteria – threats or promises that may have caused fear of evil or hope of advantage – to facilitate an objective analysis of the facts. Beyond assessing the voluntariness of a statement, it is exceedingly difficult to discern when the accused told the truth despite being coerced or tempted by promises. The question of whether the accused's statement was reliable is technically impossible to determine at the *voir dire* stage. As the UK Criminal Bar Association and the Release Lawyers' Group pointed out in 1972, the new test demands of the judge a journey into the realm of conjecture. It is inevitable that the average judge would simply put himself in the defendant's shoes and conjecture *his own reaction,* instead of imagining what it was like to be the accused. It was suggested that the judge "would treat any inducement from a menial policeman with lofty contempt and would never dream of

101 Mirfield, *supra* n 42, was of the view that the change in the law would alter the results in certain cases decided prior to PACE. In *R v Richards* [1967] 51 Cr App R 266, a policeman told a man suspected of hosue-breaking that it would be better from him to make a statement and say exactly what had happened. Mirfield thought that the court would be likely to regard a confession made in these circumstances as reliable. Equally, the first confession *R v Smith* [1959] 2 QB 35 was made only a short while after the regimental sergeant-major put his company on parade and indicated that they would be kept until somebody confessed to the offence of murder. Mirfield found it hard to believe that any innocent person would have confessed so soon after the threat had been made. However, these cases would probably not have been decided similarly under Singapore's voluntariness test, which was shown at paras 35–36 of the main text, to be stricter than the UK common law exclusionary rule. It was likely that Singapore would decide that the threats or inducements held out were not sufficiently serious to induce a confession. Accordingly, the reliability test will not make a great difference in Singapore.

making a false confession".[102] While Lord Hailsham, in response to this criticism, expressed that he did not doubt the judges' imaginative ability in view of their experience,[103] there is some truth to the concerns raised. Determining whether threats or inducements have operated on the accused's mind already requires some degree of inference and projection on the part of the judge. Assessing whether such threats *effectively caused an untrue admission* is, arguably, a quantum leap. It is questionable whether judges are able to divine the accused's state of mind at this level. As such, the acceptance of the reliability test in Singapore may not necessarily lead to the detection of confessions that are involuntarily obtained but are nonetheless true.

(4) Problems with the reliability test in the UK

56 Apart from the questionable utility of the reliability test, importing this test into Singapore may also have negative ramifications. At first glance, a judge confronted with this test will be tempted to think that a confession may still be admissible even if made in response to threats or promises, if he was of the view that the accused's confession must have stated the truth and was, consequently, reliable evidence. However, that would be an erroneous approach, for the test only enjoins the judge to consider the *likely effect* of the acts done on the reliability of the confession, and *not the actual reliability* of the confession. There is a risk that the judge's view on actual reliability may become a factor that is unintentionally considered in the *voir dire*. In the UK, this blurring of the distinction between actual and potential reliability is viewed as a serious mistake because it is the jury that ought to eventually decide on the reliability of a confession that is admitted in evidence. The same issue should not be decided by both judge and jury. Hence, in *Wong Kam-ming v R,* the Privy Council by a majority held that in a *voir dire,* there should be no questions asked in cross-examination of the defendant with the object of establishing the truth of the statement. Lord Edmund-Davies reasoned:[104]

> If the defendant denies the truth of the confession … the question whether his denial is itself true or false cannot be ascertained until after the voir dire is over and the defendant's guilt or innocence has been

102 Criminal Bar Association Memorandum on the Eleventh Report (January 1973) at p 28; *Guilty Until Proved Innocent?: An Assessment of the Criminal Law Revision Committee's Eleventh Report, "Evidence (general)"* (Release, 1973) at 35.

103 UK, House of Lords, *Parliamentary Debates*, vol 455 at cols 1148 and 1207.

104 *Supra* n 39, at 256.

> determined by the jury — an issue which the judge has no jurisdiction to decide.

57 In Singapore, the danger of the issue of reliability being addressed more than once is not as pronounced, there being no existence of the jury. Nevertheless, the blurring of the distinction between admissibility and weight of the evidence (evaluation of reliability) is still undesirable, as reliability and admissibility are separate issues which should not be conflated. As Yong CJ held in *PP v Huang Rong Tai*,[105] the admissibility of a statement did not mean that it then acquired infallible status. The statement could still be rejected during the trial because of unreliability. If the question of reliability were to be pre-empted at the *voir dire* stage, it may be potentially prejudicial to the accused, since an inquiry as to the admissibility of the confession should not become an indirect inquisition of the accused. Such an error is easily committed. Mirfield correctly commented that there will be a:[106]

> … strong temptation for [the judge], consciously or unconsciously, to decide the issue of admissibility *based on his assessment of the reliability of the confession* actually before him. [emphasis added]

In the UK, confusion over potential and actual reliability reigned in several cases. In *R v Tyrer*,[107] the Court of Appeal found that the trial judge had come dangerously close to confusing the tests to be imposed by judge and jury by taking into account during the *voir dire* the evidence given at the trial by another witness which indicated that the confession could have been true. In *R v Cox*,[108] *R v Kenny*[109] and *R v Sylvester*,[110] it was also held that the trial judge had wrongly focused on the actual reliability of the statements. Lord Lane CJ underscored the error in *R v Cox*:[111]

> It seems to us that the true question was not whether the confession was unreliable or untrue so much as whether the confession, true or not, was obtained in consequence of anything done which was likely to render any confession unreliable, the burden being on the prosecution to prove beyond reasonable doubt that it was not so obtained. One emphasises as well as the word "likely", the words "in the circumstances existing at the time".

105 [2003] 2 SLR 43 at [26].
106 *Supra* n 42, at 114.
107 [1990] 90 Cr App Rep 446.
108 [1991] Crim LR 276.
109 [1994] Crim LR 284.
110 [2002] EWCA Crim 1327.
111 Transcript of judgment dated 12 November 1990 by Marten Walsh Cherer.

58 In view of the pitfalls inherent in the reliability test, it is not totally inconceivable that the test may be shifted from a partly subjective and objective one to a predominantly objective one. This is due to the fact that a judge may take the view that a statement is *actually* reliable despite factors which indicate its involuntariness, and may then admit the statement. Further, while the judge may not explicitly refer to the reliability of the statement as a reason for admitting the statement, it is plausible that his mind may be influenced by the notion that "the accused may have spoken the truth after all and thus such evidence should be admitted". Such a development will accentuate the already strict and objective complexion to the law on admissibility of statements in Singapore. It is therefore submitted that a change to the fundamental basis of the voluntariness test is unwarranted, not only because its utility is doubtful, but also because of the intractable problems which may result from adopting a reliability test. This conclusion will also be seen in an analysis of Australia's statutory reform of the common law exclusionary rule.

C. The Australian approach

59 The common law exclusionary rule used to apply in Australia, with statutory modifications made by Victoria, New South Wales, the Australian Capital Territory and New Zealand. The general voluntariness test as formulated in the UK Judges Rules was accepted, but was further widened into a general rule that a statement must be voluntary in the sense that it was "made in the exercise of a free choice to speak or be silent".[112] A typical case of a non-voluntary statement was that of a statement induced by a threat or promise by a person in authority, but that was not an exhaustive statement of factors which rendered a confession inadmissible. Brennan J in *Collins v R* summarised the law in this manner:[113]

> The ultimate question is whether the will of the person making the confession has been overborne, or whether he has confessed in the exercise of his free choice.

112 *The King v Lee* (1950) 82 CLR 133.

113 (1980) 31 ALR 257. Dixon J in *McDermott v R* (1948) 76 CLR 501 also stated the common law principle in these terms:

> If [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.

Apart from this exclusionary rule, there were residual discretions at common law to exclude confessions. One of these was the discretion to exclude if the accused had established, on a balance of probabilities, that it was unfair for the confession to be used against him: *The King v Lee*[114] and *McDermott v R*.[115] The second general discretion was to exclude confessions on the ground that they were unlawfully obtained: *Cleland v The Queen*.[116]

60 There were several statutory abrogations of the common law which expressed the exclusionary rule in terms of the reliability rationale. Notably, s 149 of the Victorian Evidence Act 1958 stated as early as 1857 that:

> No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the *inducement was really calculated to cause an untrue admission of guilt to be made*; nor shall any confession which is tendered in evidence be rejected on the ground that it was made or purports to have been made on oath.
>
> [emphasis added]

61 There is a similar provision in the Australian Capital Territory, in s 68 of its 1971 Evidence Ordinance:

> (1) Subject to the next succeeding sub-section, a confession or admission made by a person charged in a criminal proceeding is not admissible in evidence against that person unless it was made voluntarily by that person.
>
> (2) A confession or admission tendered in evidence against the person charged in a criminal proceeding shall not be rejected only on the ground that a promise, threat or other inducement (not being the exercise of violence, force or other form of compulsion) has been held out to or exercised upon the person making the confession or admission, *if the judge is satisfied that the means by which the confession or admission was obtained were not in fact likely to cause an untrue admission of guilt to be made*.
>
> (3) The judge has, in a criminal proceeding, a discretion to reject a confession or admission (whether or not it is a confession or admission

114 *Supra* n 112.
115 *Supra* n 113.
116 (1982) 151 CLR 1. This was due to the application to the special circumstances of confessions of the general rule relating to the exclusion of illegally obtained real evidence, recognised in *Bunning v Cross* (1978) 141 CLR 54.

> to which the last preceding sub-section applies) made by the person charged, if, having regard to the circumstances in which, or the means by which, the confession or admission was obtained, the judge is satisfied that it would be unfair to the person charged to admit the confession or admission in evidence.
>
> [emphasis added]

62 Another example of statutory modification is s 20 of the New Zealand Evidence Act 1908, which was legislated since 1895:

> A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, *if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.* [emphasis added]

63 However, the statutory modifications in the Australian Capital Territory and Victoria only applied to admissions that were induced by a threat or promise by a person in authority. In other words, the confession first had to be admissible according to the common law voluntariness test, before the statutory reliability test was applicable. This was explicitly stated in s 68 of the Australian Capital Territory Evidence Act. With regard to the Victorian provision, it was held in *Cornelius v R*[117] that the voluntary character of a confession must, apart from s 149 of the Evidence Act, appear before it was admissible. The further question then was whether a threat or promise, if one appears to have been made, was really calculated to cause an untrue admission of guilt.

64 The common law rule was appraised as early as 1975. The Australian Law Reform Commission in Report No 2 on Criminal Investigation recorded the numerous criticisms of this rule. It recommended that confessions extracted by violence should be excluded. All other inducements should not result in exclusion unless they were likely to cause an untrue admission of guilt. In this regard, it took a leaf from the recommendations of the English Criminal Law Revision Committee, and drew guidance from the statutes in Victoria and the Australian Capital Territory. In subsequent reports,[118] the Commission listed the precise grounds of dissatisfaction with the voluntariness test. The primary criticism was with reference to the concept of

117 (1936) 55 CLR 235.
118 Report Nos 26 and 38, *supra* n 63.

"voluntariness". The term did not mean "volunteered" but was based on the exercise of one's free will. However, the Commission found that it was difficult to determine the extent to which an individual's capacity of choice had been impaired.[119] The language of "overborne will" did not, in its opinion, provide a workable test for resolving individual cases. It also expressed dissatisfaction over the vast body of technical and unclear law dealing with the admissibility of confessions. These cases had resulted in the courts focusing attention on whether the accused's will had been overborne in some way, or whether threats or promises had been made. In practice, although the onus of proving voluntariness was on the Prosecution, it was difficult for the accused to demonstrate that the confession was involuntarily obtained. As a result of these defects, the Commission proposed that a reliability test similar to the legislation in the Australian Capital Territory should be enacted.

65 The upshot of the above was that the Commonwealth and New South Wales governments each introduced legislation substantially based on the Commission's draft legislation in 1991. Subsequently, it was agreed that a uniform legislative scheme was to be passed throughout Australia. The Commonwealth and New South Wales Evidence Acts passed in 1995, which were in most respects identical, became known as the "Uniform Evidence Acts".[120] Sections 84 and 85 of the Uniform Evidence Acts replaced the common law test of voluntariness and shifted the focus to a set of conduct or circumstances likely to render an admission unreliable. Accordingly, s 84 provided that admissions obtained or influenced by violence, threats or oppressive conduct were inadmissible.[121] Section 85, which applied only to criminal proceedings, enacted the present reliability test in Australia. Admissions obtained in the course of official questioning were inadmissible unless "the circumstances in which the

119 Report No 26, *id* at para 372.

120 The Commonwealth Act applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The New South Wales Act applies in proceedings, federal or state, before New South Wales courts and some tribunals.

121 Section 84 provides:

> (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influence by:
>
> (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
>
> (b) a threat of conduct of that kind.
>
> (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

admission was made were *such as to make it unlikely that the truth of the admission was adversely affected*".[122]

D. Possible applicability of the Australian approach to Singapore

(1) The voluntariness test still has residual application in Australia

66 It is crucial to first note that the voluntariness test was not totally abandoned within Australia. Before the passing of the Uniform Evidence Acts, the statutory modifications to the common law in Victoria, New Zealand and the Australian Capital Territory did not operate to totally preclude the applicability of the voluntariness test. As described above, s 68(2) of the Australian Capital Territory Evidence Act 1971 referred to the common law rule, stating that a confession should not be rejected only on the ground of a promise, threat or other inducement being held out to the accused. This implied that the common law rule still applied, but was to be supplemented by the statutory reliability test. However, the statutory reliability test did not apply in the case of the exercise of violence, force or other form of compulsion; in such instances, the confessions extracted would still be inadmissible. The New Zealand counterpart of the Australian Capital Territory Evidence Act utilised similar words. With regard to Victoria's Evidence Act, it was also decided in various cases that statements of the accused were still subject to the voluntariness test. Hence, prior to law reform spearheaded by the Australian Law Reform Commission, the reliability principle operated in

122 Emphasis added. Section 85 provides:

> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
>
> (a) in the course of official questioning; or
>
> (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.
>
> (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
>
> (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
>
> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
>
> (b) if the admission was made in response to questioning:
>
> (i) the nature of the questions and the manner in which they were put; and
>
> (ii) the nature of any threat, promise or other inducement made to the person questioned.

tandem with, and not to the exclusion of, the existing common law rule. Subsequently, while the Uniform Evidence Acts through s 85 shifted the courts' focus to the circumstances affecting reliability instead of voluntariness, the previous rule still had residual application in s 84. In this section, admissions influenced by "violent, oppressive, inhuman or degrading conduct" or "a threat of conduct of that kind" were inadmissible. The protective principle inherent in the voluntariness test was not completely removed. If reform of the exclusionary rule is considered in Singapore, care should also be exercised before fully replacing the voluntariness test with a reliability test. In modelling our test on the Australian reliability test without according due regard to the other related provisions, the protective elements of the voluntariness test will be lost.

(2) Differing contexts

67 Further, as in the case for the UK, the context of the reform of the common law rule in Australia is clearly distinguishable from that in Singapore. Australia's dissatisfaction with its voluntariness test stemmed from the wide and vague terms with which its courts articulated the rule. Unlike the UK, which chose to define voluntariness according to fear of prejudice or seeking for gain, the Australian courts settled on an all-encompassing description of "free choice" or "overborne will". The UK common law test was subsumed within this broader formulation. Not surprisingly, uncertainty prevailed over the exact meaning of this test. "Free choice" entailed neither a "volunteered" statement nor giving a statement with a conscious choice. However, the exact indicia of free choice were not set out. Consequently, the tendency for the courts was to emphasise specific categories of involuntariness at the expense of the general principle. Yet, even in this respect, there was a lack of clarity. Traditionally, trivial inducements were sufficient to fulfil the voluntariness test. Subsequently, there was conflict between cases which required a "real inducement" on a reasonable man basis, and cases which held that even innocent words could induce a confession.[123] Some cases also focused on the specific category of finding particular improprieties in the conduct of the police: *eg*, *The King v Lee*.[124] Other cases contradicted this position by stating that finding improper conduct was unnecessary. Furthermore, the Commission noted that it was yet to be determined whether the test was a subjective or objective one. Another

123 Report No 26, *supra* n 63, at para 141.
124 *Supra* n 112.

issue the courts were doubtful about, was whether involuntariness was limited to external factors operating on the accused's mind. It was not determined whether the accused's characteristics alone were sufficient to render a confession involuntary and thus inadmissible.[125] In short, the instances of uncertainty of the exclusionary rule are certainly aplenty.

68 There is, in this respect, a palpable difference from the development of the law on confessions in Singapore. Stephens had not drafted the voluntariness test in a similarly vague manner. There was no doubt as to the subjective and objective components of the test: *Tan Boon Tat.* While there was initially uncertainty over the degree of inducement or threat required, it has now been clearly established that the external factors that would give reasonable grounds to induce a confession cannot be trivial. They have to construed against the backdrop of each case's particular facts: *Chai Chien Wei Kelvin.*[126] The characteristics of the individual may be taken into account, but there can be no self-perceived inducement or threats: *Lu Lai Heng v PP.*[127] Ultimately, the exclusionary rule will apply not in all instances of possible involuntariness, but only when the court finds that there were external factors – threats, inducements or promises – which operated on the accused's mind. It therefore has to be recognised that the criticism directed at the Australian exclusionary rule should not be automatically directed at Singapore's voluntariness test. Statutory reform of the local rule can only be justified on the basis of actual defects in the Singapore courts' application of the voluntariness test, which differs significantly from both the Australian and English tests.

(3) Problems in the Australian reliability test

69 Unlike the voluntariness test, the exact reasons for the likelihood of unreliability need not be stated. This, coupled with the genuine danger of a judge being influenced by his own notions of the actual reliablity of the confession concerned, may result in the application of the reliability test in a predominantly objective manner. The Victorian Evidence Act seemed to suggest that an admission should not be excluded if the inducement was not "calculated" to cause an untrue admission of guilt. This was a misleading word, to say the least, as it implied that the investigating officer's subjective intention was the determining factor of

125 *Supra* n 63, at para 143.
126 *Supra* n 67.
127 [1994] 2 SLR 251 at [19].

admissibility. The court's focus would also be easily diverted to assessing whether there was actually an untrue confession. This section, if literally applied, would result in the admissibility of a confession irrespective of any threats or promises held out, so long as the court was satisfied that the truth had not been compromised. The High Court in *Cornelius v R*[128] rectified this awkward phrasing by interpreting "calculated" as "likely". Cross suggests that the phrase "really calculated" in New Zealand's Evidence Act was also changed to "in fact likely" in 1905 for the same reason. Wilson J in *R v Hammond* clarified, with respect to the New Zealand provision, that:[129]

> [T]he test to be applied in deciding this question is whether or not an innocent person in the position of the accused and in the circumstances in which he was placed would be likely to confess to a crime which he had not committed. … [F]or this purpose, *the Judge is not entitled to have regard to any view which he may have formed as to whether the admission actually made was true* but must restrict himself to the consideration of the tendency or otherwise of the accused, assuming him to be innocent, to admit guilt. [emphasis added]

70 Although this has been the stated position, there will be practical difficulties, when applying it, in successfully demarcating actual and potential reliability. In its recent Issue Paper No 28, the Australian Law Reform Commission posed the question of whether there was a need for clarification as to whether the test in s 85(2) of the Uniform Evidence Act was subjective or objective. It was observed that the language used in Report No 26 suggested that there should be a focus on the actual reliability of the statement (subjective test). However, it was of the view that the correct test should be – whether it was likely that the interrogator's conduct affected reliability and not whether it actually did.[130] That the clarity of this section is now being evaluated attests to the difficulty the reliability test has caused, and continues to cause, in Australia.

128 *Supra* n 117.

129 [1965] NZLR 257 at 258.

130 Australian Law Reform Commission, *Review of the Evidence Act 1995* (Issue Paper No 28, 2004) at paras 7.8–7.20. At para 7.20, the Committee cites Odgers, *Uniform Evidence Law* (Thomson Lawbook Co, 6th Ed, 2004) who suggests that a lack of clarity in s 85(2) may be the result of changes in the ALRC's views between the Interim Report and the final Report when it seemed that the objective test was favoured. However, this change of policy was not reflected in the legislation. The section may therefore require legislative amendment to address any ambiguity.

E. Assessing the UK and Australian reforms of the voluntariness test

71 In summary, there are the following difficulties in applying the reliability test as enacted in the UK and Australia to Singapore:

(a) The common law exclusionary rules in both jurisdictions differ from s 122(5) of the CPC in Singapore. In the UK, a confession is inadmissible if obtained by fear of prejudice or hope of advantage, or by oppression. Due to the absence of an objective requirement, the test has been applied in a manner that was excessively lenient towards the accused. In Australia, the broad guideline of "free choice" or "overborne will" has proven to be vague and has hardly provided a workable test for the courts. Hence, the criticism directed at the UK and Australian rules are not applicable to the local voluntariness test.

(b) The reliability test may not necessarily resolve the problem of the exclusion of confessions which, though involuntarily given, are reliable evidence. The reliability test does not entail a finding on the actual reliability of the statement, but the *likely effect* of any acts or deeds on the reliability of the statement. There will probably be no discernible difference between the Singapore courts' application of the reliability test and the voluntariness test. Both tests are essentially objective tests entailing the court's imposition of its own view on the likely effects of interrogation. It is hardly possible for a judge to discern metaphysical issues such as whether the accused indeed told the truth despite being induced by threats or promises. Also, since both tests involve questions of fact, there will continue to be stark differences in the courts' evaluation of the effects of interrogation.

(c) Adopting the reliability test may lead to negative ramifications. A judge may be influenced by his own view of the actual reliability of the statement. This not only blurs the distinction between admissibility and weight of evidence, but may also lead to a stricter application of the exclusionary rule. The protective principle that buttresses the voluntariness test will be diminished, and it is not inconceivable that the courts may admit statements that they deem to be actually reliable, notwithstanding that threats and inducements were used to extract them.

(1) Other modes of protecting the accused in the UK and Australia

72 Apart from these listed difficulties, there is also the necessity of viewing the reforms in the UK and Australia in their proper context before transplanting the reliability test into Singapore's statutory regime. The radical modification of the voluntariness test in these countries was tempered by the provision of other safeguards to the accused. One of these is the exclusion of statements that have been obtained by oppressive treatment. According to s 76(2)(b) of PACE, a confession obtained by oppression is presumed to be unreliable since there is no requirement for an assessment to be made concerning the risk of unreliability. There is thus protection against the use of torture, inhuman or degrading treatment, and the use of threat of violence (whether or not amounting to torture).[131] In the same vein, s 84 of the Australian Uniform Evidence Act provides that an admission is not admissible unless the court is satisfied that it is not influenced by violent, oppressive inhuman or degarding conduct.[132] There is *no need to satisfy the reliability test* before a confession may be rendered inadmissible by the use of oppression.

73 Another fundamental mode of protecting the accused is the additional discretion given to the courts in these jurisdictions to exclude certain evidence. Section 78 of PACE, considered one of the most important provisions in the statute, is often used together with s 76 to exclude confessions. It confers on the court the power to exclude evidence which would have an adverse effect on the fairness of the proceedings.[133] Accordingly, a confession, while admissible due to the absence of potential unreliability under s 76, could still be excluded under s 78. The discretion under this section is wider than the common law position in *R v Sang*,[134] and can be exercised in a multitude of situations, including infringements of PACE or codes which were enacted pursuant to ss 60 and 66 of PACE. In Australia, there are two other statutory bases to exclude confessions. One is s 90 of the Uniform Evidence Act, which enacted the common law discretion to exclude evidence that was unfair to the accused.[135] The other is provided in s 138 of the Uniform Evidence

131 Section 76(8) PACE defines oppression in that manner.
132 *Supra* n 121.
133 *Supra* n 88.
134 *Supra* n 45. The House of Lords held that the common law exclusionary discretion was restricted to evidence obtained from the accused by objectionable means during the investigation of an offence *already committed*. This did not apply to evidence obtained during commission of the crime by entrapment involving an *agent provocateur*.
135 This discretion was set out in *The King v Lee*, *supra* n 112.

Act, which modified the common law discretion under *The Queen v Ireland*[136] and *Cleland v The Queen*[137] to reject evidence that was illegally or improperly obtained. The cumulative effect of these additional provisions is that the mandatory exclusionary rule has been modified, but the discretion to exclude evidence on other bases has been retained.

74 The above development is a significant one to consider in conjunction with a possible reform of Singapore's voluntariness test. The viability of the voluntariness test has to be considered in the context of other related provisions. If Singapore were to adopt the reliability test and disregard the other related provisions in the UK and Australia, the reformed provision will probably have a detrimental impact on the accused. There are two reasons for this conclusion.

75 First, the failure to enact the ground of oppression as a separate ground for inadmissibility, independent of the reliability test, will result in the erosion of the protective principle. Oppressive conduct will then be construed as "threats" or "inducements" to which the strict reliability test has to be applied. In other words, it will have to be shown that this conduct probably resulted in an untrue statement being made. This is a difficult test to fulfil, in comparison to the current English and Australian provisions on oppression.

76 Second, the protective principle will be further eclipsed by the failure to import the UK and Australian statutory discretion to exclude evidence. It is not clearly established in Singapore that there is a discretion to exclude confessions that are unfairly obtained. The wide discretion formulated by Wee Chong Jin CJ in *Cheng Swee Tiang v PP*[138] was curtailed by the court's subsequent approval of the English case of *R v Sang*.[139] Admissions can thus be excluded only if it is procured after the commission of the offence, and if it led an accused to be improperly or illegally induced into providing evidence tantamount to a self-incriminatory admission. This pronouncement of the law was a retreat

136 (1970) 126 CLR 321.

137 *Supra* n 116.

138 [1964] 1 MLJ 291. In *How Poh Sun v PP* [1991] 3 MLJ 216, the Court of Criminal Appeal held that *R v Sang*, *supra* n 45, was applicable and that the defence of entrapment therefore did not apply. This position was affirmed in *Amran Bin Eusuff v PP* [2002] SGCA 20 and recently in *Ong Chin Keat Jeffrey v PP* [2004] 4 SLR 483. Although the court in *How Poh Sun* did not discuss *Cheng Swee Tiang,* it stands to reason that if *R v Sang* is applicable law, the narrower discretion set out in that decision will apply as *Cheng Swee Tiang* is irreconcilable with *R v Sang.*

139 *Supra* n 45.

from a general freedom to exclude evidence based on impropriety and unfairness, set out in *Kuruma Kaniu v The Queen*.[140] It ought to be recognised that a change from a voluntariness test to a reliability test, without any provision for a general discretion to exclude evidence that is unfairly obtained, will sound the death knell for the protective principle. If the court rules, under the new test, that there is unlikely to be potential unreliability of a particular confession – which may easily turn into a largely objective inquiry for reasons stated above – there will be no residual avenue for the confession to be held inadmissible. It is highly questionable whether such a change is desirable.

77 It is therefore submitted that the reliability test, if it were to be adopted, should not be implemented in isolation. That would result in the predominance of the reliability principle in the law of confessions, to the total exclusion of the protective principle. It was for this reason that it was suggested by an academic in 1991, that the replacement of the voluntariness principle with a direct reliability formulation should be complemented with the enactment of a general discretion to deal with impropriety in obtaining statements and confessions.[141] It was further commented by the same academic in 1993, that if the legislature and judiciary were to decide that the privilege against self-incrimination should no longer be an organising principle of the pre-trial process, then much more had to be done to ensure that the accused was protected from false or improperly obtained confessions being admitted as evidence in his trial.[142] It is submitted that this view is correct. The introduction of the reliabilty test does not seem to hold any utility without the presence of other protective measures.

(2) The use of tape-recording

78 Another safeguard that complements the reliabilty principle in the UK and Australia is the establishment of measures to ensure the accuracy of recorded confessions. In both jurisdictions, the practice of tape recording of interviews has been sanctioned. This measure facilitates the determination of factual issues relevant to admissibility, and will undoubtedly assist the court in considering the potential reliabity of the confession made. Prof Glanville Williams campaigned for the practice of routine tape-recording of police interviews in 1975, but his proposal was

140 [1955] AC 197.
141 *Supra* n 46, at lxxvi.
142 Michael Hor, "The Privilege Against Self-incrimination and Fairness to the Accused" [1993] Sing JLS 35 at 55.

only seriously considered after the Criminal Law Revision Committee recommended that experiments with the use of tape recorders by the police be carried out.[143] After various studies were conducted, the UK government approved of the practice of recording entire interviews. Section 60 of PACE places a duty on the UK Secretary of State to make an order requiring tape-recording of interviews of persons suspected of the commission of certain offences. Pursuant to this section, the Code of Practice on Tape Recording of Interviews with Suspects, Code E, was promulgated in 1992. All interviews at the police station with persons suspected of indictable offences had to be tape-recorded. A failure to tape-record could lead to a confession being excluded under ss 76 or 78 of PACE. The Royal Commission on Criminal Justice opined in 1993, that the tape-recording of interviews would be the only reasonably certain way of ensuring that the confession was made and ascertaining the exact contents of the confession. It would "also normally give some indication of the circumstances in which the confession was made, for example, whether it was the result of oppressive questioning".[144]

79 These safeguards are mirrored in Australia's statutory regime. The Law Reform Commission approved of the practice of tape-recording, stating that it would provide the context of the confession and also shed light on whether the confession was likely to be true.[145] The Commission's proposal to implement tape-recording so long as it was reasonably practicable was accepted. Section 23V of the Crimes Act 1914 (Cth) provides that a confession is inadmissible unless tape-recorded, where it was reasonably practicable to do so. The requirements apply to interviews of persons suspected of the commission of indictable offences which are held by police officers at police stations.

80 It is more viable to apply the reliability test in the light of these procedures. It was suggested above that it is almost impossible to discern when the accused was likely to have made a true confession despite being coerced to do so. The use of tape-recording will assist the court in this difficult consideration. In considering the incorporation of the reliability test into Singapore law, the necessity of tape-recording has to be acknowledged. Otherwise, it would not be feasible for the courts to

143 A minority of the Committee recommended that statements made by suspects at police stations in the major centres of population should be inadmissible in evidence unless recorded, at *supra* n 26, para 52(vi).

144 UK, *Report of the Royal Commission on Criminal Justice* (Cm 2263, 1993) at p 59.

145 Report No 26, *supra* n 63, at para 768.

properly apply the reliability principle.[146] Importing the reliabilty principle alone without the complementary procedural safeguards will pose inponderable difficulties, resulting in an even less workable test than the present voluntariness test.

(3) The danger of convicting a person based on his confession alone

81 Finally, there should be some circumspection before enacting the reliability principle in s 122(5) of the CPC because in Singapore, an accused may be convicted solely on a confession. It is now settled law in Singapore that an accused may be convicted on his confession alone, even if retracted, as long as the court is satisfied that it was made voluntarily and is true. There is no need for corroboration.[147] In the UK, it is also possible to convict a person based on confession evidence alone. The Royal Commission on Criminal Justice reached this recommendation with considerable reservations. The majority (except three) recommended that there was no need for supporting evidence to substantiate a conviction, where the confession was credible and had passed the tests laid down in PACE. However, the Commission qualified that a strong warning should be sent to the jury to draw attention to the danger of convicting based on the evidence alone, and to direct the jury to any other supporting evidence, if available.[148] The danger is accentuated in Singapore because of the existence of capital punishment.[149] There is, therefore, a heightened need in Singapore to ensure that the exclusionary rule for confessions provides adequate protection to the accused. If it is formulated in terms of the reliability principle, and safeguards such as tape-recording are not provided, it will, arguably, increase the ease with which confessions are admitted. It has already been explained above why the reliability test, as compared to the voluntariness test, is likely to lead to more draconian results.

146 In this regard, Hor, *supra* n 46, at lxxvi pointed out that the court has difficulty in deciding whether it should believe the police or the accused and that "even the most well-crafted legal regime can easily be bypassed by the absence of a reliable and neutral record of the proceedings at the police station". He thus suggested that the time was ripe for clear statutory provisions or guidelines for recording statements. The scheme of compulsory tape recording in PACE was an attractive possibility. Video recording could also be considered.

147 *PP v Rozman bin Jusoh* [1995] 3 SLR 317, *Mohamed Bachu Miah v PP* [1993] 1 SLR 249 and *Ismail bin UK Abdul Rahman v PP* [1972–1974] SLR 232.

148 *Supra* n 144, at pp 66–68.

149 In the UK, the death penalty was abolished in 1969. This move was formalised on 27 January 1999, when UK signed the sixth protocol of the European Convention of Human Rights. In Australia, the death penalty was abolished with the passing of the Crimes (Death Penalty Abolition) Amendment Act in 1973.

82 On this sombre note, it is strongly submitted that the voluntariness test need not, and should, not be radically changed into a reliability test. There is no fundamental flaw in the concept of voluntariness, and a change may not only fail to resolve the alleged problems inherent in the present test, but may result in other difficulties. Above all, a reform in this direction, without a careful comparison of the context in Singapore with that of other jurisdictions, may lead to undesirable and grave consequences for the accused.

VII. Conclusion

83 This article commenced by highlighting the twin goals of crime control and protection of the accused. The constant tension between these opposing concerns has been manifested in the development of the law on the admissibility of confessions, particularly in the interaction between the reliability principle and the protective principle. Striking the most appropriate balance between the two goals is, undoubtedly, a Herculean task. However, it is clear that neither concern should be abandoned in favour of the other; after all, a "balance" presupposes the existence of both goals. This balance has been in place in Singapore's current voluntariness test, which epitomises both the reliability and protective concerns. Also, while both the UK and Australia have reformed their exclusionary rules on confessions to give expression to the reliability principle, the protective principle has not been fully removed from the equation. It still exists through other safeguards that are accorded to the accused. This article has sought to underscore the danger of replacing the voluntariness test with a reliability test in Singapore, without due consideration of the resulting impact on the protective principle. Transplanting the reliability test from other jurisdictions into Singapore without examining the context of the statutory reforms in these jurisdictions may have dire consequences, as there is a great tendency to apply the reliability test in an objective manner. This may ultimately lead to the elevation of the crime control goal, to the detriment of the rights of the accused.

84 It is therefore submitted that while the voluntariness test may be further refined, the main concept of voluntariness should not be abolished. As Wigmore put it, voluntariness is a "shorthand for a complex

of values".[150] It should therefore not be easily jettisoned in favour of another test, especially when it is not at all apparent that the new test will resolve the difficulties inherent in the voluntariness test. It is apt, on this note, to conclude with the words of Warren CJ in the US case of *Blackburn v Alabama*:[151]

> [N]either the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, 'The abhorrence of society to the use of involuntary confessions ... also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves'. ... Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

150 Wigmore, *Wigmore on Evidence* vol 3 (Chadbourn Revision) (Little Brown and Company, 1970) at para 351.

151 361 US 199 (1960) at 207.