

PRIOR INCONSISTENT STATEMENTS: FAIRNESS, STATUTORY INTERPRETATION AND THE FUTURE OF ADVERSARIAL JUSTICE¹

There has been much judicial activity in the field of prior inconsistent statements in Singapore. This discussion identifies two major themes in judicial attempts to make sense of the major amendments of 1976 which made prior inconsistent statements substantially admissible – the need to draw the line between legitimate statutory interpretation and judicial legislation, and the need to respond adequately to the reality that the use of prior inconsistent statements (together with other like developments) has shifted the criminal process in Singapore far beyond the traditional adversarial system which was inherited from the English common law.

Statutory interpretation and adversarial injustice

1 Jurisdictions claiming a common law heritage, of which Singapore is one, have traditionally traded on the assumption that there is in place what is essentially an adversarial process of settling legal disputes.² The focus of legal regulation is the trial. Rules and principles of law, both great and small, prescribe what can and cannot be done at the trial. Little or nothing is said about what goes on before the trial – for what happens then, as the adversarial orthodoxy would have it, is not important enough to merit much attention. However, there have been significant legal developments inimical to the spirit of adversarial justice. These events concern the introduction and use of incriminatory statements made in the course of police investigations at the trial. An early and major inroad was the admissibility of confessions contained in statements given to the police in the course of investigations.³ Another watershed was reached when the Court of Appeal overruled previous authority to hold that confessions of a co-accused incriminating the accused can ground a conviction *per se*.⁴ The purpose of this discussion is to explore a third, and no less important, phenomenon – the admissibility

1 The basic ideas were first expressed in the Singapore Academy of Law Seminar, “Recent Developments in Criminal Law and Criminal Evidence”, 20 Apr 2002.

2 See, *eg*, Datuk David Marshall, ‘Facets of the Accusatorial and Inquisitorial Systems’ [1979] 1 MLJ xxiv; Sir Anthony Mason, ‘From Procedure to Substance and Refinement of Legal Principle’ (1995) 7 SAcLJ 253.

3 See Michael Hor, “The Confessions Regime in Singapore” [1991] 3 MLJ lvii.

4 *Chin Seow Noi v PP* [1994] 1 SLR 135; see Michael Hor, “The Confession of a Co-Accused” (1994) 6 SAcLJ 366.

and use of prior inconsistent statements of prosecution witnesses, obtained in the course of police investigations and employed to incriminate the accused⁵ in the face of testimony unfavourable to the prosecution at the trial.⁶ These three developments demand a major shift in the way we should assess the relative importance of the different stages in the criminal process. The adversarial assumption that the trial is the more crucial stage is no longer correct. The vast majority of cases are decided primarily on statements obtained by the police long before the trial.⁷ The impressive array of rules designed to ensure fairness at the trial must be adapted and translated for use in the pre-trial process. To persist in the adversarial fiction that the pre-trial process is unimportant, and hence does not need regulation, is to have the worst of both worlds – strong protection at the trial where it is too late, and no protection at the pre-trial stages (and especially in the course of police investigations) where practically everything of moment is happening. This article tracks significant new developments in the law of prior inconsistent statements with a view to assessing their impact on the overall fairness of the proceedings to see if this fear is borne out.

2 The law of prior inconsistent statements in Singapore is complicated by unclear legislative intent in the relevant statutory provisions caused largely by the failure to rationalise existing statutes with more recently introduced amendments.⁸ The great amendments of 1976⁹ fundamentally altered the law to provide for substantive admissibility of prior inconsistent statements, but little else was done to reconcile them with existing (and now co-existing) provisions which limit the admissibility of pre-trial statements in general. Problems with statutory interpretation abound and

5 There is no reason in theory why the use of prior inconsistent statements cannot *aid* the accused, for example, where a witness for the defence testifies inconsistently at the trial and ends up incriminating the accused unexpectedly, but the possibility is practically insignificant.

6 Two others have examined this before – Tan Yock Lin, “Weight of Oral Evidence in Criminal Proceedings” [2000] SJLS 443; Jeffrey Pinsler, “Statements of Witnesses to the Police – A Story of Strange Bedfellows in the Criminal Procedure Code and the Evidence Act” [2001] SJLS 53, and “Previous Inconsistent Statements: Scope of Section 147(3) of the Evidence Act and its Applicability where the Witness does not Testify to the Facts Mentioned in his Previous Statement” (2001) 13 SAclJ 1.

7 Going by the reported decisions, rare is the case where some incriminatory police statement does not figure as a major part of the prosecution evidence.

8 See Pinsler, “Statement of Witnesses to the Police ...”, *supra*, note 6.

9 Evidence (Amendment) Act 11 of 1976 and Criminal Procedure Code (Amendment) Act 10 of 1976. The introduction of substantive admissibility for prior inconsistent statements has, until recently, been shadowed by a much more famous, or infamous, concurrent amendment – that which permitted adverse inferences on trial and pre-trial silence.

courts have been faced with the dilemma of either following the spirit of the amendments to the detriment of the older provisions, or of adhering to the logic of the existing law and curtailing an expansive operation of the amendments. Sensitive decisions have to be made, and if they are to be made correctly, the impact of alternative interpretations on the overall fairness of the proceedings must be examined and taken to heart.

The problem of police statements

3 The vast majority of potential prior inconsistent statements which the prosecution might want to use are police statements – statements given by prospective witnesses in the course of police interviews.¹⁰ The admissibility and use of prior inconsistent statements is specifically dealt with in s 147(3) of the Evidence Act:¹¹

“Where ... a previous inconsistent ... statement made by a person called as a witness ... is proved ... that statement shall ... be admissible as evidence of any fact stated therein. ...”

4 The admissibility of police statements, on the other hand, is governed by s 122 of the Criminal Procedure Code:¹²

“(1)*Exceptas provided in this section*, no statement made by any person to a police officer in the course of a police investigation ... shall be used in evidence ...

(2) When any witness is called ... the court shall refer to any statement made by that witness to a police officer in the course of a police investigation ... and the statement *may be used to impeach the credit of the witness in the manner provided* by the Evidence Act. [Emphasis added.]”

5 The problem is easily explained. Section 147(3) was introduced into the Evidence Act by the amendments of 1976.¹³ The old law was that prior inconsistent statements could only be used to destroy the credit or

10 This article does not wish to enter into a discussion of how the court has come to regard specialist law enforcement officials (eg Narcotics Officers) not as police officers for the purpose of legislation governing police investigation (see, eg, *Cheng Siah Johnson v Public Prosecutor* [2002] 2 SLR 481, difference described as “fundamental”)—suffice it to say that this position is completely devoid of a rationale save semantic pedantry. A short discussion exists in Hor, *supra*, note 2. At least, the normative portions of this discussion can be taken to include such enforcement officers, clothed with official powers of investigation, as police officers.

11 Cap 97, 1997 Rev Ed, Singapore Statutes.

12 Cap 68, 1985 Rev Ed, Singapore Statutes.

13 *Supra*, note 9.

credibility of the witness¹⁴ – the amendment allows them to be used as substantive evidence. The relevant provisions of the Criminal Procedure Code were untouched by the 1976 amendments. There is no doubt that they allow the use of police statements “to impeach the credit” of a witness, but do they also allow the use of police statements as substantive evidence?

6 For a long time *after* the 1976 amendments came into force, it appeared that police statements of witnesses were not admissible as substantive evidence. As recently as 1992, the Court of Appeal in *Somwang Phatthanasang v Public Prosecutor*¹⁵ ruled in no uncertain terms (in the context of police statements) that:

“We do not think that the principle of law is in any doubt: a previous statement made by an accused which has been used to impeach his credit, is only admissible for that limited purpose, ie to impeach his credit, and *not as substantive evidence* of the content thereof. [Emphasis added.]”

While this pronouncement has yet to be definitively overruled, it now seems fairly clear that the tide has turned and that if the issue were to be re-visited in the Court of Appeal, it would probably be decided in favour of the substantive use of prior inconsistent police statements.¹⁶ Representative of this new line of cases is *Public Prosecutor v Sng Siew Ngoh* which articulates most clearly the reasons for this change of heart.¹⁷ A number of them are given and it is worth our while to investigate them in some detail. They are conveniently divided into two kinds of justification.

7 The first set of reasons tries to foreclose the issue at “surface level” statutory interpretation – if the legislature has addressed the matter, then whatever the pros and cons, that must still be the law. Chief Justice Yong Pung How said:¹⁸

¹⁴ It was customary to cite the old colonial decision of *Muthusamy v PP* [1948] 1 MLJ 57 as authority for the pre-1976 law.

¹⁵ [1992] 1 SLR 850, p 862.

¹⁶ There have been a string of High Court decisions, especially with the Chief Justice sitting, which have refused to follow this pronouncement. The case of *Tan Khee Koon v PP* [1995] 3 SLR 724 seems to have the start of this line. The Court of Appeal itself in *Ukthunthod v PP* [1994] 1 SLR 225, where the earlier pronouncement was declared *obiter*, and having been made without advertence to s 147(3). The court was however very clear in its intention not to make any “definitive pronouncement”. The voice in the wilderness here is that of Kan Ting Chiu J in *PP v Sagar s/o Suppiah Retnam*, Criminal Case 6 of 1994, HC, (unfortunately unreported) who felt that the protection to the accused contained in s 122(1) of the Criminal Procedure Code should only be lifted by clear and unequivocal legislative language.

¹⁷ [1996] 1 SLR 143.

¹⁸ *Ibid*, p 152.

“[Section] 122(2) specifically provides for the use of prior inconsistent statements ... [I]t is contended that s 122(2) does not operate as a sufficient exception as it deals solely with the use of prior inconsistent statements to impeach the credit of the witness ... [S]uch an approach is altogether too narrow. ... [A]fter the introduction of s 147(3), *the notion of impeachment has been altered* ... [T]he intention of the legislature ... must be given effect to. [Emphasis added.]”

8 The problem is there is nothing to show what the intention of the legislature was. Indeed, it is most likely that the legislature never applied its collective mind to the issue. The sentiment of Professor J D Pinsler carries much force.¹⁹

“One would assume that if section 147(3) was intended to impinge so dramatically upon the long established provisions in section 122, this would have been more clearly brought out in the Parliamentary address or Explanatory statement ... Section 147(3) was apparently passed without consideration of the provisions in section 122 CPC.”

9 It is not so much the “notion” of impeachment which has changed – the idea of impeaching the credit of the witness, *ie* persuading the court not to believe the witness, has always existed, and continues to exist. What does appear to have changed fundamentally is the *consequence* of impeachment. Although prior inconsistent statements in general are substantively admissible, it can surely not be so patently absurd for the legislature to have intended that police statements can only be used to impeach credit. Indeed, the plain meaning of s 122(2) inescapably allows police statements to be used only to impeach credit and nothing else. The criticism levelled at this approach was that it is “too narrow” – but “narrow” by what measure? The burden must be on those who wish to depose the only plain reading of the provision. There is no doubt that the court in *Sng Siew Ngoh* was anxious to extend the logic of s 147(3) into s 122(2). If it is artificial or too subtle to distinguish between impeachment of credit and substantive admissibility,²⁰ then that must be so for police statements as for other statements. Yet what has happened to the logic of s 122 – that the admissibility and use of police statements must be closely and carefully restricted to precisely what is allowed under that section? Where is the legislative determination that the logic of s 147(3) is to override the logic of s 122?

¹⁹ *Supra*, note 8, pp 67–68.

²⁰ The 11th Report – Evidence (General) – of the Criminal Law Revision Committee (1972, Cmnd 4991) of the United Kingdom, which was the primary inspiration for the amendment in Singapore, described it as “too subtle a distinction”.

10 In fact the legislature has not spoken, or spoken clearly enough for all of us to hear. The court assumes the role of policy maker when it intends to depart from the plain meaning of the statute. The court in *Sng Siew Ngoh* came down firmly on the side of an expansive operation of s 147(3), wrenching the guts out of s 122 in the process:²¹

“[I]t was argued that the prohibition in s 122(1) ... was intended to protect the accused against over-zealous police officers and untruthful witnesses ... The recording of statements in criminal proceedings ought to be closely regulated, yet it is doubtful that the deprecatory attitude towards police officers should be condoned in these times. There is every reason for the courts to accept the professionalism of police officers and the efficiency of their training.”

This is perplexing language on a number of counts. There, of course, can be no reason for the existence of the exclusive language of s 122(1) apart from the need to deal with “over-zealous police officers and untruthful witnesses”:

“*Except as provided in this section*, no statement made by any person to a police officer in the course of a police investigation ... shall be used in evidence ... [Emphasis added.]”

What the court means by doubting this “deprecatory attitude towards police officers” is a mystery. One would have thought that as long as the section existed, that “deprecatory attitude” is legislatively enshrined and not for the courts to doubt. Yet, for some unarticulated reason, police statements, the court says in the next breath, “ought to be closely regulated”. The court does not explain why it ought to be so, if we are no longer to be suspicious of police statements. The court also does not say, quite apart from what ought to be the case, whether police statements are currently closely regulated enough. If this is what was meant to be implied, there is no indication as to how this close regulation is now exercised. That moment of apparent wavering passed and the court reverted to its ringing declaration of faith in the integrity and competence of the police. The court asserted that there is “every reason” to so believe, but did not spell out any. The source or substantiation of the court’s policy choice, which runs directly in the face of the spirit of s 122, must remain in the realm of speculation.²²

²¹ *Supra*, note 17, pp 150–151.

²² It may be that the court wished to adopt governmental assurances akin to those given in Parliament, *eg*, 25 Aug 1994, Parliamentary Debates Vol 63 Col 377–385. Suffice it to say that they amount to little more than exhortations to trust in internal disciplinary procedures.

11 It is not the purpose of this discussion to dwell on this admittedly crucial matter. It would suffice to say that the framing of the issue in polar opposites is unhelpful. No one is saying that the police are to be presumptively undeserving of belief. If that were so, it is not likely that mere rules of evidence will be able to remedy the situation. Nor can it be maintained that our police force, exceptional amongst police forces around the world, is incapable of mistakes and impropriety. Section 122 is a recognition that unreliable or improper statements are a *significant possibility* in any police investigation because of the cloak of authority, apparent and real, which clothes the police in the eyes of the person being questioned; and because of the occasionally thin line between police zealotry and overzealousness.²³ It is also a decision to respect the presumption of innocence – that there is value in doing all that is reasonably possible to prevent the conviction of the innocent. Yet s 122 is not insensitive to the perceived need to use police statements to fulfil the evidential requirements of the prosecution. That is why exceptions are carefully carved out in the section itself.²⁴ These exceptions must, however, not be allowed to be construed so expansively by the courts as to swallow the rule. Instead, the safe course is to treat them conservatively and in accordance with the reason for the existence of the section in the first place. Police statements are admissible in so far as the legislature has clearly decreed it to be so.²⁵ The legislative history of the amendments to s 147 of the Evidence Act reveals no legislative consciousness as to any decision that an exception was to be made to the general rule against admissibility of police statements.²⁶ What it does show is a decision to create a new hearsay exception for prior inconsistent statements *in general*. The substantive inadmissibility of prior inconsistent police statements stemmed from two sources – the prohibition against hearsay and the strict regulation of police statements. It is clear that the legislative decision was to create an exception to the hearsay rule, and not necessarily the rule against police statements. It is also clear that further decision must await legislative determination and it was premature for the court to have made that choice in its stead.

23 “Police lying” has become the focus of scholarly work. See, eg, David Dorfman, ‘Proving the Lie: Litigating Police Credibility’ (1999) 26(3) AJCL 455.

24 The most notable exception is the admissibility of *self-incriminating* statement in s 122(5).

25 We are not immediately concerned with whether or not it would be right for the legislature to so decree. That discussion follows.

26 The point is forcefully made in *PP v Sagar*, *supra*, note 16.

12 The discussion must now move to a more normative level – should a hearsay exception created for prior inconsistent statements in general be extended to police statements? While it is not the place of the judiciary to question the legislative decision to make this exception, it cannot be forgotten that prior inconsistent statements are significantly different from in-court testimony. It is hearsay, and although the maker of the statement is present and testifying, the fact that the declarant has now resiled from his earlier (incriminatory) statement makes cross-examination rather less meaningful.²⁷ The witness who had previously incriminated the accused, but who has now retracted that statement cannot be effectively cross-examined on the truth or accuracy of *the substance* of the previous statement. If anything, cross-examination (or examination) is confined to an issue one step removed – whether the witness was lying *in general* in the previous incriminatory statement.²⁸ There is no denying that there is no complete substitute for contemporaneous cross-examination. The amendments of 1976 to s 143(3) do however represent a legislative decision that, notwithstanding the absence of contemporaneous cross-examination, prior inconsistent statements are to be substantively admissible. To find a convincing reason for this decision is not as straightforward as one might think. Parliament adopted the language of the United Kingdom 11th Report of the Criminal Law Revision Committee²⁹ when it focused on the artificiality of the old rule that they were only admissible to impeach credit and not to prove assertions therein.³⁰ The main impetus seems to have been the desire to do away with what was felt to be an “impossible” task of explaining the difference to a lay jury – that could not, and cannot, have any force in Singapore which did away with juries long before 1976.³¹ Again, in the context of a prior inconsistent statement being supportive of other incriminatory evidence, there is likely to be little practical difference

27 Even the United States Supreme Court in *California v Green* (1970) 399 US 149, which tried to make light of this in ruling that the substantive admissibility of prior inconsistent statements does not infringe the confrontation clause, had to admit, at 160, that “[i]t may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement”. The Canadian Supreme Court was almost equally dismissive of the absence of “contemporaneous cross-examination”: *R v B (KG)* [1993] 1 SCR 740.

28 Unless one of the two conflicting versions is in itself or in the light of other evidence clearly false, the inquiry turns from the truth of what happened to whether the witness/declarant had a stronger motive to lie on either occasion.

29 *Supra*, note 20.

30 The relevant portions of the sponsoring Minister’s speech is conveniently excerpted in *PP v Sng Siew Ngoh*, *supra*, note 16.

31 See Andrew Phang, “Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution” (1983) 25 MLR 50.

between substantive and limited admissibility,³² but where the only evidence is a prior inconsistent statement, it is the difference between sure acquittal and potential conviction.³³

13 Singapore is not alone in allowing for substantive admissibility of prior inconsistent statements,³⁴ but it is no longer possible to ignore the “political” dimension of this change. The pressure for full admissibility grew in the liberal democratic world in the context of the rise of due process rights in favour of the accused,³⁵ and of the urgent need to deal with crimes for which there is likely to be little else apart from a prior inconsistent statement (where the principal prosecution witness does not perform to cue – sex crimes in the family in particular).³⁶ Singapore must strike its own balance; however, it has struck for prior inconsistent statements in general,

32 Where there is evidence of guilt apart from the prior statement, then the prior statement simply supports that other evidence, and it makes little practical difference whether one speaks of credibility or substantive admissibility. In theory, once credibility is impeached, the slate is wiped clean as far as that particular witness is concerned – but this is where the distinction becomes, conceivably, psychologically too subtle for the mere mortal trier of fact. The temptation is strong, perhaps too strong, for the trier of fact to use the prior statement to support other evidence of guilt.

33 Here, however, whatever happens inside the brain of the trier of fact, the court simply cannot, as a matter of law, convict.

34 The United States Supreme Court, *supra*, note 27, declared such admissibility to be constitutional. The Federal Rules of Evidence (Rule 801(d)(1)(A)), however, limit substantive admissibility to statements “given under oath and subject to the penalty of perjury”. State law is divided, containing a spectrum of pre-conditions: see generally, Barbara Bergman and Nancy Hollander, *Wharton’s Criminal Evidence* (15th Ed, 2001) §6:11. Australian Commonwealth (Federal) and State law are in favour of substantive admissibility: s 60, Commonwealth Evidence Act 1995; s 60, New South Wales Evidence Act; s 101, Queensland Evidence Act 1977; s 81L, Tasmanian Evidence Act 1910. There is a High Court discussion of the New South Wales provision in *Adam v The Queen* [2001] HCA 57, but the judges could not unanimously agree whether there was a pre-condition of “substantive probative value”. The Canadian Supreme Court has also countenanced substantive admissibility, but has been much more concerned about “adequate assurances of reliability” which are thought to outweigh the “hearsay dangers”: *R v B (KG)* [1993] 1 SCR 740. Interestingly, Pennsylvania jurisprudence has also revealed a judicial cutting back on over-admissibility by the imposition of reliability pre-conditions: Jeanine Kasulis, “Commonwealth v Lively: Pennsylvania Imposes Limitations on the Substantive Admissibility of Prior Inconsistent Statements of Non-Party Witnesses to Ensure Statement Reliability” (1993) 38 Villanova L Rev 285; John Gismondi, “Prior Inconsistent Statements Under PA Law” (1999) 1 No 17 Lawyers Journal 3.

35 *Eg*, the United States Supreme Court, *supra*, note 27, made its pro-admissibility decision soon after the period (in the 1960s) in which the court was most active in its advocacy of civil liberties.

36 *Eg*, the factual context of the Canadian Supreme Court’s decision in *R v U (FJ)* [1995] 3 SCR 764, where we see the Court bending over backwards by diluting its own reliability-driven conditions to admissibility.

and the equation is fundamentally altered when we are concerned with statements extracted from witnesses in the course of police investigation. We have no jury, we have no reason to believe that domestic sex crimes are a particularly difficult problem, nor has there been any increase of due process rights.³⁷ To extend near-universal admissibility to all police statements, where independent scrutiny of police investigations is minimal,³⁸ would appear to strike the balance at the wrong place.

14 It is now necessary to deal with some arguments that have been made by the court in *Sng Siew Ngoh* to persuade us that this is not all that bad. Two reasons were offered as to why we should not be alarmed. First, it was said:³⁹

“The position of a mere witness is in any event quite different from that of the accused. The accused may be expected to be exposed to the danger of pressure and harassment, but the mere witness would not be.”

This argument fails almost immediately for it is often that we do not know whether someone being interviewed will ultimately be the accused, or just a prosecution witness. Indeed, police investigations are meant to provide information to the prosecution concerning whom and how to charge. It stands to reason that the police will bother to interview only those with some connection with the crime, and it is only in the course of investigations that the person being interviewed is to be treated as the accused or a witness. So the “danger of pressure and harassment” which is to be “expected” is no less. The argument might just hold true for the innocent bystander-witness who was never under suspicion, but in the context of reported cases on prior inconsistent statements, those witnesses (who subsequently change their story) are rare indeed. More importantly, the “mere witness” is exposed to a danger not evident with accused persons – while the sense of self-preservation may stand as guarantee for the reliability of self-incriminatory confessions, the same sense of self-preservation encourages the “mere witness” to lie and lay all or most of the blame on

37 It would be tedious to recount the consistent string of due process set-backs in recent years. See, generally, Michael Hor, “Singapore’s Innovations to Due Process” (2001) 12(1) Criminal Law Forum 25.

38 It is worth bearing in mind the great concern for “reliability”, and hence police propriety, exhibited by the Canadian Supreme Court in *R v B (KG)*, *supra*, note 34; and by the Supreme Court of Pennsylvania in *Commonwealth v Lively* (1992) 530 Pa 464, and *Commonwealth v Wilson* (1998) 550 Pa 518. This last case went so far as to declare that for substantive admissibility, police statements must be electronically recorded, either audio or video.

39 *Supra*, note 17, pp 154–155.

the accused.⁴⁰ There is surely, in addition, the danger of these witnesses striking a deal with the police or the prosecution to provide incriminatory statements in exchange for some concession beneficial to them.

15 A second reason was articulated:⁴¹

“For the court to close its eyes to the evidence in the inconsistent statement may be to deny itself a possible source of evidence. The very fact of its inconsistency would indicate that either the testimony in court or the inconsistent statement should contain the truth.”

That a rule of evidence should deny to the court a “*possible* source of evidence” should not surprise – that is what rules of evidence are there to do. The question is whether there is good reason to do so. There is no need to repeat the twin rationale of shutting out prior inconsistent police statements – the absence of contemporaneous cross-examination⁴² and the need to restrain the use of statements obtained in the course of investigations. Is there something about “the very fact of inconsistency” which should significantly affect our judgment on admissibility? It is not quite true that either the testimony or the inconsistent statement must contain the truth – both could be false. More to the point, there being two inconsistent versions cannot by “the very fact of inconsistency” help us decide which is the one that is to be believed. A likely scenario is this; the witness gives the police an incriminatory statement, but at the trial, retracts the incriminatory statement saying that he was threatened into giving the statement. One of two possibilities must be true – that the witness was really threatened into false incrimination of the accused, or that the witness had been bought off by the accused.⁴³ What tools do the courts have for deciding between these stories? What happens during police interviews is a closed book and the familiar swearing contest between the police and the person being interviewed is likely to be resolved in favour of the police, for no particularly satisfactory reason.⁴⁴ What happens after the statement is taken is also impenetrable – the prosecution witness will deny either being

40 Co-accused confessions, which are fully admissible (s 30, Evidence Act), have, at least, the requirement that the declarant fully incriminate himself or herself before it can be used against someone else: see generally, *supra*, note 3.

41 *Supra*, note 17, p 156.

42 And, of course, the other hearsay dangers of the absence of an oath or affirmation, and the unavailability (at the trial) of contemporaneous witness demeanour.

43 Or has been known to happen in domestic contexts, the witness regrets getting a family member in trouble.

44 The phenomenon of a *de facto* presumption of police credibility is discussed in the context of self-incriminatory confessions in Michael Hor, “A Review of Legislative and Judicial Reform of Criminal Evidence” in *Review of Judicial and Legal Reforms in Singapore Between 1990 and 1995* (1996, Butterworths), pp 124–126. See also the discussion of Dorfman, *supra*, note 23.

bought off or that he or she is suffering from remorse. The prosecution can normally have little more to offer except assertions that the witness is now lying. Jurisdictions which have countenanced the use of prior inconsistent police statements as substantive evidence have also laid down pre-conditions to ensure that the circumstances surrounding the taking of the statement are conducive to reliability.⁴⁵ In Singapore, neither the statute nor the cases have been similarly concerned. If what happens after the taking of the statement cannot be reasonably controlled,⁴⁶ at least the process of taking the statement and the events leading up to it can be supervised much more meaningfully.⁴⁷

16 To be fair, *Sng Siew Ngoh* is not without academic support. Professor Tan Yock Lin writes:⁴⁸

“The recollection [in a s 147 statement] at an earlier moment nearer in time to the events in question may be superior to a later recollection [in court]... The risk of [police] indoctrination must not be exaggerated, for any witness who has been interrogated will bear, even at the trial, the effects, if any, of the interrogation when it is used as a device of indoctrination ... There may be an unarticulated fear of statement extraction or of fabrication or concoction by the investigators, tempted to get a good statement in case the witness should prove inconsistent, coupled with [unfounded] scepticism that the exercise of judicial discretion can moderate or effect an appropriate restraint.”

17 Indeed, an earlier recollection “may be superior” to a later one, but then again, it may not. Psychological phenomena are much too complicated

45 The United States Supreme Court (although holding that there is automatic violation of the confrontation clause) requires a case-by-case scrutiny of whether admissibility on the particular facts would be unconstitutional: *California v Green*, *supra*, note 27. The Supreme Court of Pennsylvania requires “an electronic, audiotaped or videotaped recording” to “ensure ... the requisite degree of reliability”: *Commonwealth v Wilson*, *supra*, note 38. The Canadian Supreme Court also, generally, requires videotaping, and in addition, a *voir dire* to determine reliability and voluntariness: *R v B (KG)*, *supra*, note 34. On the other hand, the Australian High Court, apparently on the basis of literal statutory interpretation, does not seem to be similarly concerned: *Adam v The Queen*, *supra*, note 34. The High Court has yet to embark on any kind of normative discussion, and the dissent of Gaudron J which attempted to tack on a condition of “substantial probative value” is noteworthy. See, however, the general concern of the High Court for the reliability of police statements: *supra*, note 16.

46 To ensure that there is no witness tampering by the accused.

47 It is, of course, entirely within the power of the police to put in place mechanisms conducive to reliability. See the sentiments of the Australian High Court in *McKinney v The Queen* (1991) 171 CLR 468 which established a “rule of practice” that the absence of an electronic recording of police statements will be viewed with grave suspicion.

48 *Supra*, note 6, pp 461–62.

for workable generalisations. All we can say is that sometimes nearer is better, sometimes not. Reliable recollection may be dimmed with time in some situations, or it may be improved with reflection in others. However, in the case of police statements one is more concerned, not with accuracy, but with mendacity. In the context of the opacity of police activity, it is practically impossible to tell if one has “exaggerated” the possibility of police indoctrination in the sense of the likelihood of the police behaving in this manner, but surely, it is unrealistic to think that police indoctrination will leave marks which a court will be able to detect at the trial. A perusal of reported decisions will reveal that marks of any kind are few and far between. It may be that a complete fabrication might bear some tell-tale signs, but s 147 statements are more likely to be given by an accomplice who will tell a story which is largely true, and yet carefully tweaked to lay the blame on the accused (if indeed the accomplice is lying). It is now well accepted that demeanour and body language are at best unpredictable tools to determine credibility. All these are no secret, and those in the police force who are minded to “get a good statement” by hook or by crook know that. Therefore, judicial discretion cannot be expected to be any kind of “restraint”, especially when there is a steady stream of judicial *dicta* declaring faith in the police and proclaiming that it is not their judicial function to discipline the police.⁴⁹

18 It remains for this discussion to rise above the nitty gritty details to observe the larger movement involved in the massive use of prior inconsistent statements by the prosecution when its witnesses do not perform to its liking. Grave doubts must now be cast on the common assumption that we practise an adversarial system of justice – for in that kind of system, events of moment happen at the trial and the great due process rights accrue to the accused in recognition of that. What we have now is a criminal process in which almost everything of importance has happened before the trial. What the substantive admissibility of prior police statements does is to render less significant what the court testimony of prosecution witnesses is – for if they stray from the prosecutorial straight and narrow, a prior inconsistent statement will be admitted in place of the inclement testimony. The reported cases show how practically impossible it is for the accused to persuade the court to accept the testimony rather than the prior police statement.⁵⁰ The problem with prior inconsistent statements taking the limelight is that the existing due process rights (of the accused) do not bite at that stage, but have been left languishing at the trial. Fairness demands that the great show of impartiality at the trial be

49 *Supra*, note 21; see the Singapore High Court’s enthusiastic embrace of Lord Diplock’s classic “washing of hands” in *R v Sang* [1980] AC 402: *SM Summit Holdings v PP* [1997] 3 SLR 922.

50 I have failed to identify even one such example in the reported Singapore decisions.

brought home to where the real decisions are made – at the taking of potential prior inconsistent statements by the police. The cue should be taken from inquisitorial systems of justice⁵¹ – the taking of the statement ought to be presided over by a judicial officer, not the police, and certainly not in conditions of secrecy. Judicial supervision of the trial itself is no longer sufficient, nor is the right to participate and challenge incriminatory evidence at the trial alone. Opportunity must be given to the accused to mount a challenge, at least by cross-examination of the accuser, when the statement is made (or as soon as is reasonably possible), not when the accuser has changed his or her story. Needless to say, the right to have representation by legal counsel must be exercisable by then. Inquisitorial due process rights must accompany inquisitorial realities⁵² – grand adversarial rights in an inquisitorial world cloaked in an adversarial fiction is like administering expensive medicine to the dead, pretending they are alive.

More problems: “voucher” and the forgetful witness

19 The debate over the ambit of s 147(3) is not yet exhausted. Recent decisions have thrown up two other difficulties with an expansive approach towards the substantive admissibility of prior inconsistent statements. The first has to do with the necessary pre-condition that the witness must be under “cross-examination”. Section 147(3) grants substantive admissibility only where the statement is “proved by virtue of this section”, and “this section” requires the “cross-examination” of the witness. “Cross-examination” is defined thus in s 139(2):⁵³ “The examination of a witness *by the adverse party* shall be called his cross-examination. [Emphasis added.]”

20 Accordingly, cross-examination, properly so called, can only be conducted by the “adverse party”, not the party who called the witness. It is true that, by s 156,⁵⁴ the calling party may, in the court’s discretion, be permitted “to put any questions to him which might be put in cross-examination by the adverse party”, and this is routinely granted where the witness testifies in a way as to damage the party who called him or her. Yet this does not make it a “cross-examination” – s 139(2) is very clear about

51 The point has been made with respect to the erosion of the privilege against self-incrimination: Gregory O’Reilly, “England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice” (1994) 85 JCL & Crim 402; Michael Hor, “The Privilege Against Self-Incrimination and Fairness to the Accused” [1993] SJLS 35.

52 There are, of course, details to be ironed out but the important question now is not whether such reforms are technically feasible, but whether there is a will, political or otherwise, to embark on such a change.

53 Evidence Act.

54 *Ibid.*

that. What all this means is that a plain reading of the relevant provisions in the Evidence Act yields the result that substantive admissibility is only possible when it is the adverse party who wants it to be so. What this means in the context of a prosecution witness not living up to prosecutorial expectations is this – a prior inconsistent statement may still be used to impeach his credibility, as before, but the prosecution cannot have substantive admissibility of that statement.

21 When the matter emerged in the High Court in *Rajendran s/o Kurusamy v PP*,⁵⁵ the plain meaning of the statutory provisions was rejected:

“I found [the argument that s 147(3) applies only to cross-examination by the adverse party] *attractive, but untenable*. [The definition in s 139] is not exhaustive. ... [T]hrough the working of s 156, the examination-in-chief of a hostile witness ... effectively turned the testimony of the witness to cross-examination. Ultimately, whether a witness gave evidence during his examination-in-chief or cross-examination was dependent not by who called him but rather by the procedure in which the examination was conducted.”

22 The concession that the argument was “attractive” must mean that the court itself thought that it was the only plain meaning of the statutory provisions. The judgment that it was “untenable” implies that the court felt that the plain meaning was plainly absurd, justifying the purposive extension of the definition of “cross-examination” beyond the words of s 139(2). We need to ask if the “adverse party rule” is indeed without a rationale.

23 History tells us that the common law once had a witness “voucher” rule⁵⁶ – the party calling the witness must vouch for, and not challenge, the testimony given at the trial. That seemed rather harsh when the witness unexpectedly turned against the calling party, and so the law allowed the calling party to cross-examine the witness in order to impeach his or her credit.⁵⁷ The concession was to allow the calling party to cancel out the ill effects of the “turncoat” witness. The question now is whether the amendments of 1976 *inexorably* allowed the calling party to go beyond this and put prior inconsistent statements in as substantive evidence. We must again look at this in the context of the kind of adversarial dynamics described previously. The primary danger identified was the significant shift of crucial events from testimony at the trial to the extraction of

⁵⁵ [1998] 3 SLR 225, pp 245–246.

⁵⁶ See the description of the United States Supreme Court in *Chambers v Mississippi* (1973) 35 L Ed 2d 297.

⁵⁷ Section 157(c), Evidence Act.

statements by the police in the course of investigations, where due process rights and independent judicial supervision are minimal. The temptation to focus police investigation and evidence gathering on the procurement of incriminatory statements by potential accomplices is strong. Why bother about what the witness will say at the trial? If he or she repeats the incrimination, well and good; if not, then there is always the prior inconsistent statement to stand in its place. In the mirk of our primitive pre-trial process, it is difficult indeed to persuade the court to disbelieve the statement.⁵⁸ The historic “voucher rule” and its modern incarnation, the “adverse party rule”, would be a significant obstacle to this kind of development, for substantive admissibility would only be possible at the behest of the adverse party, the accused. It is entirely rational to hold that substantive admissibility can only be allowed at the instance of the adverse party,⁵⁹ for then there is no danger of one party using prior statements of its own witnesses as the foundation of its case. It may well be that not all will agree on how serious this danger is, but it is not for the court to overturn the only plain meaning of a statute for which there is a rationale that is not absurd.

24 The other pre-condition which has proven to be troublesome is the requirement for a “previous *inconsistent* or *contradictory* statement”. What if the witness does not really give a contradictory account in the course of testifying, but claims to have forgotten? Chief Justice Yong in *Heah Lian Khin v PP*⁶⁰ was decidedly in favour of giving the terms “inconsistent” and “contradictory” an expansive meaning:

“Due to the varying permutations of inconsistent statements, it would be unduly restrictive and unrealistic to confine the operation of the statutory provisions to a situation where the witness gives two

⁵⁸ For to disbelieve the prior statement would almost inevitably be to cast aspersions on police propriety in obtaining the statement.

⁵⁹ Even in the context of impeachment of credit *simpliciter* the Evidence Act draws a clear distinction between adverse party impeachment and own witness impeachment – by s 157, adverse party impeachment is a matter of right, own witness impeachment is only by consent of the court – presumably judicial discretion is necessary to prevent abuse of own witness impeachment. A working system would be to allow own witness impeachment only if there was no awareness before the trial that the witness will change his or her story. A similar discretionary filter could have been held to apply to s 147(3) by reading the distinction drawn in s 157(c) into s 147(1) – but this does not seem to have been argued by the parties or considered by the court in *Rajendran s/o Kurusamy, supra*, note 55. Interestingly, the laws of New Jersey also draw a distinction between substantive use of prior inconsistent statements – statements of own witnesses are admissible only if additional conditions of reliability (*eg*, where there is a signed statement or sound recording made under “circumstances establishing its reliability”) are demonstrated: New Jersey Rule of Evidence 63(1)(b). See also Warren Brody, “Admissibility of Prior Inconsistent Statements: NJ vs Federal Rules”, July–August, *New Jersey Lawyer* 28.

⁶⁰ [2000] 3 SLR 609, pp 626–629.

affirmative versions of the facts. A less semantic approach ... is preferred. ...When the witness falsely claims to have no recollection of the material events, he contradicts the essence of his previous statement which contains a detailed account of the facts. Such a witness is *no different* from a witness who gives false oral evidence. Both have essentially refused to provide a truthful account in court. The previous statement constitutes *a valuable source of evidence* which could enable a court to ascertain the truth. To exclude such statements by a rigid and semantic construction ... would [import] an unwarranted restriction of the use of the previous inconsistent statement. [Emphasis added.]”

25 This decision drew an impassioned critique from Professor Pinsler:⁶¹

“Section 147(3) was never intended to allow the previous statement to *replace* the testimony of the reluctant or forgetful witness. Rather its purpose is to ensure that testimony in court is properly assessed in the context of what the witness has said about the facts on a previous occasion. ... A more lax construction of s 147(3) EA would render it a dangerous weapon in the hands of any party, who would be able to rely on the full substantive effect of an unverified and potentially unreliable out of court statement by merely having to show that his witness is not responsive in court.”

26 The court once again adopted a purposive interpretation over the plain meaning of the statute – surely a forgetful witness, feigned or otherwise, does not give testimony which is inconsistent or contradictory with the assertions in his or her prior police statements.⁶² Would it be patently absurd for the court to give effect to that distinction? Two reasons exist to show that it is not irrational to insist on a different treatment of the prior statements of the contradictory witness, as opposed to a witness who is merely unresponsive. This is at the core of Professor Pinsler’s disquiet. The close association of s 147(3) (which provides for substantive admissibility) with the rest of s 147, which deals with impeachment of credit, leads us to think that it can only be employed in a situation where there is testimony in court which needs to be impeached in the first place. A witness whose testimony asserts nothing exculpatory or inculpatory of the accused does not need impeachment, it is simply useless to either

61 “Previous Inconsistent Statements ...” *supra*, note 6, p 32.

62 The statement “I cannot remember who did it” is not inconsistent, substantively, with the prior statement “I saw the accused do it” – for the declarant/witness could have forgotten in the interval between the statement and the testimony in court.

side.⁶³ To compare an in-court assertion with a contradictory out-of-court assertion at least gives equal emphasis to trial testimony and pre-trial statements – to let in the out-of-court statement with no appreciable testimony to match it with is to exalt the pre-trial process over the trial itself. This ties in with the second reason (para 13), which pertains to how “valuable” a source of evidence it really is. Chief Justice Yong himself was not inadvertent to this, for it was in *Sng Siew Ngoh*, it will be remembered, that the primary value of a prior inconsistent statement was articulated to be this:⁶⁴

“The very fact of its [the prior statement’s] inconsistency would indicate that either the testimony in court or the inconsistent statement should contain the truth.”

27 Where the witness, in court, claims to have forgotten, there is only one account before the trier of fact, not two. The special position of prior inconsistent statements, attributed to the unique opportunity presented to the trier of fact to choose between two conflicting accounts of what happened, does not hold true for the forgetful witness. If it is difficult enough for the accused to assail the prior incriminatory statement even when there is favourable testimony in court, then the task of rebutting the only account from the witness (in the prior statement) becomes almost impossible. Needless to say, there can be absolutely no meaningful cross-examination of a witness who insists that he or she has forgotten. To make true inconsistency or contradiction a pre-condition of substantive admissibility is very far from being absurd.⁶⁵

63 See also David Greenwald, “The Forgetful Witness” (1993) 60 U Chi L Rev 167, who in the context of the Federal Rules of Evidence, says that “the turncoat [witness] who only clams up does less damage than the one who offers contradictory testimony, and only in the latter will offer the trier of fact an opportunity to ‘observe [the witness’s] demeanour ... as he denies or tries to explain away the inconsistency’ ”.

64 *Supra*, note 41.

65 Support for the inconsistent-unresponsive distinction comes from the United States Supreme Court in *California v Green*, *supra*, note 27, pp 168–169:

“[The prosecution witness] claimed at trial that he could not remember the events ... and hence failed to give any current version. ... Whether [the witness’s] apparent lapse of memory so affected [the accused’s] right to cross-examine as to make it a critical difference ... is not ripe for decision ...”

The courts of Maryland have also been vexed by the problem of the forgetful witness, resulting in a series of inconsistent decisions pulled one way by judicial suspicion of presenting triers of fact with only one version of the events, and the other way by the need to deal with witness intimidation: see Lynn McLain, “The Problem of the Intimidated Witness: The Need to Shore up the Nance Doctrine Regarding the Admission of Prior Statements” (1999) 30 U Baltimore L F 5. Missouri is wrestling with the allied situation of a witness who denies making any prior statement at all: David Cosgrove, “Perpetual Confusion: The Use of Prior Inconsistent Statements in Certain Criminal Proceedings” (1997) 53 J Mo B 381.

28 If, as the court thinks, the forgetful witness is for all intents and purposes the same as a contradictory witness, then we stand at an important evidential threshold. It must follow that the very pre-condition of inconsistency or contradiction is itself an “unwarranted restriction” on the use of prior statements. It no longer matters what the witness says or refuses to say at the trial, or whether the witness’s forgetfulness is false or genuine; nor does it matter whether the witness is at the trial at all. So long as the witness does not repeat at the trial in *relevant*⁶⁶ entirety the incriminatory statements he or she has made to the police (for whatever reason), the prior statement becomes “a valuable source of evidence” and substantively admissible. If a witness who claims forgetfulness is no different from a witness who testifies in contradiction to an earlier statement, then there can be no difference between the witness who fails to turn up (or who refuses to testify) and the forgetful witness. The prior statement (for it now no longer has to be inconsistent) will then have completely cast off its “impeachment moorings” and become a free-standing exception to the hearsay rule⁶⁷ – an exception so wide that the hearsay rule itself can no longer claim meaningful existence in its wake. It is doubtful if the court in *Heah Lian Khin* intended to go this far, its ratio going only as far as the witness whose claim of forgetfulness is demonstrably false, but of its ultimate logic there can be no doubt.

⁶⁶ The contradictions or omission must, of course, be “material”: *Mohammed Zairi bin Mohamad Mohtar v Public Prosecutor* [2002] 1 SLR 344.

⁶⁷ There is in fact something resembling just such an exception in s 380, Criminal Procedure Code which provides for the admissibility of documents “setting out the evidence which a person could be expected to give as a witness ... prepared for the purpose of any pending or contemplated proceedings, whether civil or criminal”. Indeed, Professor Pinsler suggests that the feigned forgetful witness should be considered under this provision instead, ‘Previous Inconsistent Statements ...’, *supra*, note 6. Unfortunately, s 122 (the provision governing police statements) contains no exception for s 380 statements. Section 380 itself is remarkably complex (and incidentally came into force in the same amendments of 1976): statements of a witness who refuses to be sworn or affirmed (or, being non-compellable, refuses to testify) are not admissible if given “after the commencement of investigations”; but statements of a person who “has been or is to be called as a witness”, but who is “unable or unwilling to give oral evidence” are admissible if they are “prepared for the purpose of ... contemplated proceedings” subject to a finding by the court that it would be in the interests of justice in the particular circumstances of the case. This probably means that, although there is judicial discretion to grant admissibility, a strong presumption exists against its favourable exercise. Section 381 also imposes a significant limitation on the probative value to be ascribed to such statements: the court is to consider whether the person who recorded the statement “had any incentive to conceal or misrepresent the facts” – the possibility of the police having such an incentive is not easily dispelled without independent verification of what happens in the interview room.

Opportunities to redress the imbalance: voluntariness and discovery

29 The dramatic expansion of the substantive use of prior inconsistent statements ought to have prompted the courts to try to restore the balance by carefully regulating the process of adducing such statements. Indeed the court was twice presented with such an opportunity, but there has yet to be any sign of judicial consciousness about how the generous use of prior inconsistent statements might have an adverse impact on the fairness of the criminal process. In *Thiruselvam s/o Nagaratnam v PP*,⁶⁸ counsel for the accused advanced the seemingly modest argument that s 24 of the Evidence Act should be construed so as to impose a requirement of voluntariness, and hence of a *voir dire*, for statements covered by that section:

“A confession made by an accused person is irrelevant [meaning inadmissible]⁶⁹ in a criminal proceeding if the making of the confession appears to the court to have been [involuntary].”

30 The Court of Appeal dismissed such a suggestion in these terms:⁷⁰

“[T]hese words are capable of a construction which suggests that the section is applicable to a confession made by a person who, at the time he made it, was an accused person with reference to the proceedings against him, but who is not an accused person in ‘a criminal proceeding’ in which he merely appears as a witness. ... S 24 is confined to a confession made by a person who is an accused person in the criminal proceedings in which he is being charged. It has no application where the confession ... is used in other proceedings in which the person who made it is not an accused person but merely a witness. ... [W]here s 147 is invoked ... what is required to be proved is that the statement was made by the witness. There is no requirement under s 147 to prove further that the witness made the statement voluntarily. ... It does not follow that the court can ignore the question of voluntariness in the making of the statement. [Involuntariness] is certainly an important factor to be considered in determining the weight to be accorded.”

⁶⁸ [2001] 2 SLR 125.

⁶⁹ For historical reasons, the Evidence Act rather inconveniently uses the term “relevant” to mean “admissible”,

⁷⁰ *Supra*, note 68, pp 137–139.

31 More recently, Chief Justice Yong in *Sim Bok Huat, Royston v PP*⁷¹ added:

“[I]n the absence of any statutory direction enjoining the conduct of *voir dire*s for witness statements, to hold that the admissibility of a witness statement is conditioned upon it being found to have been given voluntarily would be tantamount to judicial legislation.”

32 It is first necessary to deal with this rather surprising counsel of caution against “judicial legislation”. The forgoing discussion amply demonstrates that the court was quite willing to embark on “judicial legislation” to clear the way for an expansive operation of s 147(3). In any event, for a court to adopt an interpretation of a statutory provision, where, according to the Court of Appeal, the “words are capable” of such a construction, cannot by any stretch of imagination be judicial legislation. That the absence of “statutory direction enjoining the conduct of *voir dire*s” should be held against the suggestion to conduct a *voir dire* for s 147 statements is odd – there is similarly an absence of statutory direction to conduct a *voir dire* for self-incriminatory statements, but that has not prevented the courts from creating such a process and devising elaborate rules to govern it. The *voir dire* in Singapore is entirely judge-made.⁷²

33 The courts could have, at least, held that s 24 covered s 147 statements. Its words were, admittedly “capable” of such a construction. More than that, the strongest rationale for the requirement of voluntariness (and hence a *voir dire*) applies with equal force, whether it is the confessor, or someone else who is on trial – the same concerns of reliability and police impropriety apply with full force. The one difference is that s 147 statements do not implicate the privilege against self-incrimination, but that privilege, which is a state of advanced decay (at least in Singapore),⁷³ need not detain us. Yet even this concession would not have been enough, for it does not cover statements which are not also incriminatory of the maker. We find our inspiration not in s 24 alone, but also in s 122(5) of the Criminal Procedure Code⁷⁴ – a more modern expression of the

71 [2001] 2 SLR 348, p 356.

72 See generally, Hor, *supra*, note 44, pp 124–131.

73 It would seem by the combined action of the legislature (*eg*, in introducing adverse inferences from silence – s 123, Criminal Procedure Code) and the judiciary (*eg* in cases like *PP v Mazlan bin Maidun* [1993] 1 SLR 512, which declared that no good reason exists for the privilege).

74 As with s 24 of the Evidence Act (which deals with statements given to all persons “in authority”), s 122(5) of the Criminal Procedure Code (which concerns police statements specifically) can be read so as to impose a requirement of voluntariness where the declarant either was or was ultimately charged with an offence, although he or she is not on trial now. Presumably, that possibility has been dismissed as well. Where the declarant is a co-accused, however, it appears that voluntariness is a requirement: *Loganatha Venkatesan v Public Prosecutor* [2000] 3 SLR 677.

voluntariness rule which does not limit itself to “confessions”, but to any statement made to a police officer in the course of investigations. That the maker of the statement also incriminates himself or herself can speak only in favour of its reliability – it does not make any sense to subject the potentially more reliable statement (*ie* the confession), but not the less reliable statement (*ie* a statement incriminatory of only the accused) to a voluntariness *voir dire*. The logic and concerns, if not the words, of s 24 and s 122(5) make the imposition of a *voir dire* to determine the voluntariness of s 147 statements imperative, and it is entirely in the judicial province to create procedures to preserve the fairness of its proceedings. The common law judges of old created the voluntariness rule and the *voir dire* for that very reason. Understandably, they did not create it for prior inconsistent statements because they were then not substantively admissible. Now that they are, our judges of today must complete the task. Nor will they be the first judiciary in the world to do so.⁷⁵

34 The interposition of a voluntariness rule and a *voir dire* would have been both a pragmatic and a symbolic move by the court to recognise the reality that the extensive use of s 147 statements has fundamentally changed the nature of the traditional adversarial process – judicial scrutiny must set in at the pre-trial stage where these statements are being taken. It does not appear fair for courts, at the same time, to depart from the words of the statute to promote an expansive use of s 147 statements, and then to insist that there must be statutory direction for them to supervise the manner in which those statements are taken. The Court of Appeal in *Thiruselvam* quite rightly said that the question of voluntariness remains “an important factor” in assessing the weight of the s 147 statement. This is perhaps not the place to explore the merits of a *voir dire*, but suffice it to say that a *voir dire* process has significant advantages, both psychological and symbolic. The entire trial pauses to adjudge the circumstances under which the statement was taken. If involuntariness is found, it is symbolically “thrown out” without further ado. Merely to assess the weight of such a statement at the end of the day pales in comparison. The court has much else to do at that stage – its attention will not be devoted solely to the manner in which the statements were taken.

35 One would have thought that, with the ascendancy of witness statements at the trial, the need for the court to be aware of them and the need for the accused to be apprised of them well before the trial should

⁷⁵ The Canadian Supreme Court, as a pre-condition of substantive admissibility, requires the conduct of a *voir dire* to determine not only voluntariness, but also specified circumstances conducive to reliability: *R v B (KG)*, *supra*, note 34; and it may be added, it Has done so without specific statutory guidance.

correspondingly heighten.⁷⁶ In particular, if it is so valuable for the court to look at prior inconsistent statements where the prosecution witness refuses to incriminate the accused at the trial, it must be equally valuable for the court to be in possession of prior inconsistent statements where the prosecution witness does indeed incriminate the accused at the trial. Surely the use of prior inconsistent statements must, in all fairness, be allowed to cut both ways. Section 122(2)⁷⁷ has presciently provided for this situation:

“When any witness is called ... the court *shall, on the request of the accused* or the prosecutor, refer to any statement made by that witness to a police officer in the course of police investigation ... and *may* then, if the court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy of it; and the statement may be used to impeach the credit of the witness. [Emphasis added.]”

What could be clearer? At the request of the accused, the court “shall” (*ie* must) call for and examine all prior police statements of the witness in question. Only then does the court have a discretion (*ie* “may”) to provide the accused with a copy of them, if the interests of justice so dictate. Chief Justice Yong in *Rosli bin Othman v PP*⁷⁸ yet again set his face against the plain meaning of the provision in this fashion, and it bears quoting at some length:

“[Defence counsel contended that] the word “shall” ... connoted an obligation without discretion on the part of the court ... I took the view that counsel’s arguments, though highly attractive, were misconceived ... [U]nless and until counsel showed, to the court’s satisfaction, grounds for belief that the witness statement ought to be referred to, more often than not because the statement was in contradiction to the witness’s testimony in court, the court shall not refer to the said statement. Without this inherent checking mechanism, any criminal court would invariably receive a floodgate (sic) of frivolous applications based on pure speculation ... This approach not only discouraged the abuse of s 122(2), but also served as some form of sieving mechanism preventing vexatious and groundless applications. ... [Counsel was] on a ‘fishing

⁷⁶ See John Douglass, “Balancing Hearsay and Criminal Discovery” (2000) 68 Fordham L Rev 2097 who argues convincingly that an increased admissibility of hearsay ought to be balanced by a corresponding strengthening in discovery rights. Only then will evidence not testable by traditional cross-examination be subjected, in compensation, to the additional scrutiny it deserves.

⁷⁷ Criminal Procedure Code.

⁷⁸ [2001] 3 SLR 587, pp 598–601.

expedition', making use of the court under the guise of s 122(2) to conduct a discovery of the prosecution's evidence ... Time and time again, I have made the observation that the form of trial prescribed in our CPC has never been to provide for any form of pre-trial or trial disclosure by the prosecution. ... This position is not necessarily the most ideal However, it is for Parliament to decide if it wants to enact these revisions ...”

36 At the risk of being tedious, these are important pronouncements which ought to be examined in some detail. At least, the court found the plain meaning of the provision “highly attractive”, and no wonder – the courts’ jurisprudence on s 147(3) is replete with declarations of how valuable a source of evidence a prior inconsistent statement is. Surely, it cannot be less valuable simply because it now works to the benefit of the accused. If a prior inconsistent (and exculpatory) statement of a prosecution witness exists, then it must be a travesty of justice that it never sees the light of day in court. All such statements are of course in the exclusive possession of the police (and normally, the prosecution⁷⁹). Neither the accused nor the court will even be aware of them unless the prosecution (or the witness when testifying) either advertently or inadvertently reveals them. Section 122(2) addresses this directly – if the accused so desires, the court is to call for and examine all statements made by that particular witness in the course of investigations, and if there is evidence of significant contradiction or inconsistency, the accused is to be furnished with the relevant statements in order to decide whether it would be to the advantage of the accused to use them. To leave the revelation of such statements to the prosecutor, without a firm obligation on the part of the prosecution to reveal them, or to chance, is simply ridiculous.

37 How then is this “misconceived”? It is so, the court says, because it will attract a flood of “frivolous”, “vexatious and groundless” fishing expeditions, which will be an “abuse” of s 122(2). Alas, it is the court which misconceives when it tries to introduce devices drawn from, perhaps, civil proceedings into the criminal process. The adversarial tradition is probably more alive in civil justice – the assumption of rough equality of resources is not as strange as it would be in a criminal case. There are, in civil procedure, important considerations of privacy and a waste of manpower and resources. These factors, which loom so large in civil proceedings, can have no currency in a criminal prosecution where it is undeniably the prosecution and the police who completely dominate the

⁷⁹ It is not inconceivable that the police may conceal such a statement from the prosecution, but it is certainly hoped that, if it happens at all, it is rare.

evidence gathering process,⁸⁰ and where the stakes can be so high⁸¹ that any concern for privacy, secrecy or cost ought surely to be over ridden. What of the much afearred flood of frivolous applications? Where the accused does not know and cannot reasonably be expected to know of the existence and content of statements potentially in the exclusive possession of the prosecution, how can it be frivolous for the accused to ask the court to ascertain it? And if there be a flood, let it flow, for the earth may be parched. Put another way, nobody complains about the prosecution using resources to uncover prior inconsistent statements where its witnesses fail to incriminate the accused in court – why then does it become unbearable for the court to do it, or for the court to require the prosecution to do it when it is to the benefit of the accused?⁸² The court was eager to find a “checking mechanism” – what it ought to have realised was that the section has decreed that the court itself is the sieve, ensuring that irrelevant but sensitive material does not get into the hands of the accused.

38 There is nothing “inherent” about the obstacle that the court puts in the way of the accused who seeks access to potential s 147 statements – a showing that there are grounds for believing that there is in existence a prior statement and that it is significantly inconsistent. The court chose to put it there when it could have chosen not to. This requirement is the death knell for any sort of parity between prosecution and defence – for how can the accused ever succeed in making such a showing? The accused is never privy to the twists and turns of the criminal investigation process apart from his or her own interviews with the police. Indeed, if grounds for believing in the existence and content of such a statement were somehow leaked to the accused (apart from prosecution or prosecution witness revelation), the accused and the informant are in grave danger of being charged with offences under the Official Secrets Act.⁸³

80 Even if the accused had recourse to private investigators, the cost is likely to be prohibitive, and, of course, private investigators have no comparable power to investigate and interrogate witnesses.

81 There are certainly crimes of varying severity, but surely, the criminal process cannot be designed on the basis of the more minor offences.

82 See the judgment of the Privy Council (appeal from Jamaica) in *Berry v The Queen* [1993] 96 Cr App Rep 77, p 82 which upheld the “rule of practice under which Crown counsel owes a duty to inform the defence of any material discrepancy between the contents of a witness’s statement and the evidence given by that witness at trial”. In England, failure of the prosecution or police to disclose prior inconsistent statements is a “material irregularity: *R v Michelle Ann Taylor* [1994] 98 Cr App Rep 361.

83 Cap 213, 1985 Rev Ed, Singapore Statutes, s 5.

39 “[T]he form of trial prescribed in our CPC”, the court says, “has never been to provide for any form of pre-trial or trial disclosure by the prosecution”.⁸⁴ This “form of trial” is the adversarial fiction that returns to haunt us. In an adversarial world, it is heresy to ask the court to enlist one party to help the other in proving its case. There is no doubt that the adversarial picture is more fiction than fact in the context of the modern criminal trial in Singapore.⁸⁵ Yet the court not only seems to believe in it, but wields it like a club to clobber any attempt to shape the criminal process in response to reality.⁸⁶ The truth of the matter is that it is the police and the prosecution who are the initial inquisitors, and if the court chooses not to be involved until the trial itself, then the least it can do is to assume the position of the inquisitor at the trial, using all means within its power to find out where the truth lies. This is not done unless all prior inconsistent statements of prosecution witnesses are brought before the court to determine if the testimony in court is reliable. There is a glimmer of hope in the court’s realisation that “this position is not necessarily the most ideal”, but this is never explained. The belief that it is for “Parliament to decide if it wants to enact ... revisions” leaves us with rather less hope. The court did not wait for Parliament to clear away the seemingly intractable statutory obstacles to an expansive reading of s 147(3), when it operated in favour of the prosecution. Why must it continue to wait for Parliament when clear statutory words allow, indeed dictate, some sort of meaningful discovery of s 147 statements in favour of the accused?⁸⁷

Morals of the story

40 There are a few morals of the story, and it is a virtue to be brief. Legislative changes to the criminal process must be conducted with a high degree of sensitivity to the rules that remain and these rules should co-exist

⁸⁴ *Supra*, note 78.

⁸⁵ *Supra*, note 51.

⁸⁶ As the Privy Council in *Berry*, *supra*, note 82, p 82 declared – though “practice varies between different jurisdictions in the common law world”, “the key is fairness to the accused”. This is not the place for a lengthy discourse on comparative law, but suffice it to say that the major common law jurisdictions certainly impose a duty on the prosecution to reveal prior inconsistent statements: *eg*, *R v Stinchcombe* [1991] 3 SCR 326 (SC, Canada); *Jencks v United States* (1957) 353 US 657 (SC, US), specifically denying the need for a preliminary showing of inconsistency. See also cases in *supra*, note 82.

⁸⁷ Courts around the common law world have not waited for the legislature: see the cases in *supra*, notes 81 and 85. Indeed Arts 9 and 12 of the Constitution of the Republic of Singapore, 1999 Rev Ed, (which guarantee a criminal process “in accordance with law”) enjoin the courts to ensure the fundamental fairness of criminal proceedings: *Haw Tua Tau v PP* [1980–1981] SLR 73 at p 76.

with the changes. On a technical level, the saga of s 147(3) is the tale of a complete failure in this regard. It was a pro-admissibility amendment which flew in the face of the carefully crafted police statement regime of s 122 – the legislature can and ought to have told us which was to prevail. On a normative level, if the philosophy of s 147(3) is to govern, then it must be recognised (by the legislature or the judiciary, as the case may be) that this is a significant shift from the adversarial ideal. And in the context of a number of other similar changes, judicial supervision and due process rights must kick in at a stage much earlier than the trial, when the statements are being recorded. An increasing emphasis on police statements coupled with a studious refusal to enhance scrutiny of the manner in which they are taken cannot possibly be conducive to a fair process. The judiciary is, of course, not at liberty to conduct unrestrained law reform. Where the legislature has perhaps not spoken as clearly as it ought to have, the mantle falls on them to make the best of the situation by ensuring the overall fairness of the proceedings within the bounds of legitimate statutory interpretation. Where the words of the statute are capable of only one plain meaning, it must prevail unless that meaning would result in absurdity. Where it is not absurd, but the court merely disagrees with it, it cannot adopt a meaning which the words cannot (linguistically) bear, under the guise of purposive interpretation.⁸⁸ Where purposive interpretation is legitimate,⁸⁹ the courts must be keenly aware that in complex social institutions like the criminal justice system, there is often, in the most difficult issues, more than one purpose to be served and more than one set of interests that are to be heeded. The final chapter on s 147(3) has yet to be written. It can only be hoped that in the pages that follow, the plot will evolve into one of greater sensitivity to the need to ensure fairness, and the appearance of fairness, in a world where police statements rule the criminal process.

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⁸⁸ Section 9A, Interpretation Act, Cap 1, 1999 Rev Ed clearly envisage “purposive interpretation” as preferring one meaning (out of two or more possible meanings) which best serves the underlying purpose of the statute. But that meaning must nevertheless be a meaning which the words bear. Greater latitude may be extended where the only possible meanings are patently absurd.

⁸⁹ Singapore courts have held that “purposive interpretation” is permissible even where there is no “ambiguity or inconsistency”: *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201 (Constitution of the Republic of Singapore Tribunal), subsequently quoted with approval in regular courts. Even so, it must be interpretation and not re-writing – however thin the line may be in some contexts, it must nevertheless be maintained.

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