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Prohibited Methods of Obtaining and Presenting Evidence

Report for Singapore

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Obtaining Evidence

1. Describe briefly the legal rules in your country that restrain persons from obtaining evidence in breach of fundamental rights, such as physical and moral integrity, privacy

***Constitutional aspect*:** If the reference to 'fundamental rights' is intended as a reference to rights that are constitutionally entrenched, the first thing to note is that the fundamental liberties protected under Part IV of the Singapore Constitution do not include any right to 'physical and moral integrity' or to 'privacy'; the closest is the prohibition against slavery and forced labour in Article 10, which is not relevant for present purposes.

***Protection under general law*:** Certain methods of obtaining of evidence are criminal or wrongful under general law. For example, it is both a crime and a tort to extract a confession from a suspect by physically assaulting him. The rules that make this conduct criminal and tortious are general in the sense that they are not aimed specifically at regulating the process of obtaining evidence for a criminal prosecution.

***Rules regulating methods of obtaining evidence*: *search warrant and legal professional privilege*:** Some legal rules do have that specific aim. For example, the Criminal Procedure Code[1] requires the police to obtain a search warrant before they may conduct a search of premises for incriminating evidence and the court will grant the warrant only if certain conditions are satisfied.[2] A matter that has not been settled in this context is whether legal professional privilege can be raised as a ground for withholding documents. Confidential lawyer-client communication receives some explicit statutory protection: a number of statutes which confer information-gathering powers on specialized investigative bodies expressly exempt such communication from compelled disclosure.[3] Where there is no express statutory exemption, it is unclear whether there is an implicit and general right to resist production where the document sought by the law enforcement agency is privileged.[4] In Singapore, there is at present no authority on the extra-curial effect of the privilege.

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* General note on citation: SLR(R) refers to 'Singapore Law Reports (Reissue)' and MLJ refers to 'Malayan Law Journal'.

[1] This Code is not in force but widely expected to take effect very soon (likely from January 2011). This paper assumes that the Code is already in force.

[2] Section 24 Criminal Procedure Code 2010. See generally Tan Yock Lin, *Criminal Procedure* (Singapore: LexisNexis, 2007) vol 1, ch IV.

[3] eg, section 66(3), Competititon Act (Cap 50B, 2006 rev ed), and, sections 30(4)(b)(ii), 30(9)(a) and 35(2), Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (cap 65A, 2000 rev ed).

[4] This matter has troubled the Singapore Law Society. See its journal, *The Singapore Law Gazette*, August 2009 issue, at pp 38-40, and the Law Society of Singapore, *Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009* (17 February 2009), chapter 6; the report is available at: http://www.lawsociety.org.sg/feedback_pc/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf

***Taking of statements from suspects and accused persons: confessions and oppression*:** There are no published rules regulating the process of taking statements from suspects and witnesses.[5] However, the police must not hold out any inducement, threat or promise to the accused when taking a statement and they must not subject the accused to oppressive treatment. Only voluntary statements are admissible. Any statement caused by an inducement, threat or promise from a person in authority that would give grounds for supposing that making the statement would gain an advantage or avoid an evil in reference to the proceedings is inadmissible.

The statement will also be excluded where it was obtained by the authority in oppressive circumstances. In this connection, Singapore courts have cited and followed English common law cases such as *R v Priestly*[6] and *R v Prager*.[7] The doctrine was recently put in statutory form and now appears as an 'explanation' to the 'voluntariness' test above: section 258(3), Explanation 1, of the Criminal Procedure Code 2010 now provides (emphasis added):

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

The defence has seldom succeeded in getting a statement excluded on the ground of oppression. This is because the treatment of the accused has to be very bad indeed to satisfy the standard of oppression: there must be a 'sapping of free will'. Here are a few illustrations:

- In,[8] the High Court explained its rejection of the oppression argument thus:

> the accused said that the circumstances in which he made the statement were so oppressive that his will was sapped or broken with the result that the statement was not one made on his own free will. When he was arrested he was handcuffed and was made to squat at the car porch for a long time and then he was handcuffed to the chair in a room and from mid-afternoon after midnight he was given nothing to eat or drink. He was tired and hungry and in a daze and a state of confusion when the statement was given, but not such . *of shock, exhaustion or fatigue that he had no will to resist making any statement which he did not wish to make.* The doctor who saw him before and after the statement was taken said he was alert and the interpreter said that he looked normal.

[5] A schedule to the Criminal Procedure Code that contained standards was repealed in 1977, and no standards have been introduced since despite urgings by the President of the Law Society in *The Singapore Law Gazette*, June 2010, pp 1, 4

[6] (1967) 51 Cr App R 1.

[7] [1972] 1 WLR 260, 266.

[8] *Public Prosecutor v Tan Boon Tat* [1990] 1 SLR(R) 287 at 31, aff'd [1992] 1 SLR(R) 698.

- In the High Court case of,[9] the Judicial Commissioner excluded a statement taken from the accused on the ground that it had been obtained by oppression. The judge based his finding of oppression on the following facts:

  In another case, the Judicial Commissioner excluded the accused's statement because the accused was without food for about seven hours before the recording of his statement and his distress was compounded by the anxiety of his arrest and being charged with a capital offence so that by the time the statement was recorded, his free will was sapped. However on appeal[10]

  > '[W]hile it is basically a question of fact as to whether failure to offer an accused food and drink constitutes a "threat" or an "inducement" which might render any statement he made involuntary within the terms of s 122(6) of the Criminal Procedure Code [now renumbered as s 258(3) of the Criminal Procedure Code 2010, see above], there will be varying degrees of seriousness as far as such failures are concerned. An accused might be continually grilled for days on end without being given food and drink or he might go without such sustenance for a few hours. The failure to offer sustenance might be a deliberate ploy to weaken the accused's will or it might be a genuine oversight amidst the flurry of investigative activity. The point is, it does not appear to us to be realistic to take the sweeping stand that every failure to offer an accused sustenance constitutes a "threat" or an "inducement" of such gravity as to automatically render any statement he makes involuntary. There are numerous factors to be taken into account. In the present case, the appellant was without food and drink for seven hours within the same day, *ie* 21 November 1990. Prior to his arrest at the airport at about 3.00pm, he had eaten a meal on board the plane. At no point during the interrogation... did he ask for a meal or complain of hunger pangs. He was medically examined twice on 21 November 1990, once at 8.21pm by Dr Chin Wen Chiang and again at 11.40pm by Dr Jenny Lim Tang Wah: *neither medical report made any mention of his having been in a state of collapse or even in a physically weakened state due to hunger and thirst*. With the greatest respect to the learned judicial commissioner therefore, *it did not appear to us that the omission to offer the appellant sustenance in the present case was so serious and engendered such grave consequences that the appellant's will might have been completely overborne*.'

- Exceptionally, and only in the most extreme of cases, the defence has succeeded in having his statement to the police excluded under the doctrine of oppression. One example is *Public Prosecutor v Lim Kian Tat*.[11] The statement in question 'was taken during an 18-hour interrogation, with an hour's break. It was taken during the fourth night in a row in which the accused did not have any adequate sleep.' The High Court was 'satisfied that the accused had spoken, after the police had rejected his earlier versions, and had spoken when he would not have otherwise' and excluded the statement on the finding that it was obtained in oppressive circumstances.

[9] *Public Prosecutor v Fung Yuk Shing* [1993] 2 SLR(R) 92 at 14.

[10] *Fung Yuk Shing v Public Prosecutor* [1993] 2 SLR(R) 771 at [17]. Emphasis added.

[11] [1990] 1 SLR(R) 273.

Police questioning – power and procedure for taking statement - and privilege against self-incrimination: Section 22(1) of the Criminal Procedure Code 2010 gives the police the power to question 'any person who appears to be acquainted with any of the facts and circumstances of the case', including the suspect. Under section 22(2) of the same Act, the person who is being questioned has the privilege against self-incrimination and 'need not say anything that might expose him to a criminal charge, penalty or forfeiture.' However, it was held by the Court of Appeal in *Public Prosecutor v Mazlan bin Maidun*[12] that the police need not inform the person of this right when they take a statement from him and a failure to do so 'is not a breach of his consitutional rights under Art 9(1) of the Constitution'. (Art 9(1) provides simply that 'No person shall be deprived of his life or personal liberty save in accordance with law.') This position was recently put in statutory form; it is now explicitly stated in Section 258(3), Explanation 2(d), of the Criminal Procedure Code 2010 that a statement will 'not be rendered inadmissible merely because.... the accused was not warned that he was not bound to make the statement'.

In the same case, the Court of Appeal also held that the position is different where the police positively misrepresents the law, for example, by telling the person that he is bound to state truly everything he knows about the case and does not qualify this with any reference to the privilege against self-incrimination. According to the Court of Appeal, this may amount to an inducement for the purposes of the 'voluntariness' test in section 258(3) (see above).[13]

When a statement is taken from a person under section 22(1) of the Criminal Procedure Code 2010, the police have to follow certain procedure: the statement must be in writing, it must be read over to him; if he does not understand English, it must be interpreted for him in a language that he understands; and it must be signed by him. The police also has the power under section 23 of the Criminal Procedure Code to take a statement from a person when they charge him for an offence or informed him that he may be prosecuted for a specified offence. A prescribed notice in writing must be served and read out to him informing of the charge, inviting him to make a statement and advising him that his failure to mention any relevant fact may make it less likely for the judge to believe him if he raises it only at the trial.[14] Again, any statement that the accused makes in response to the section 23 notice must be in writing; it must be read over to him; if he does not understand English, it must be interpreted for him in a language that he understands; and it must be signed by him.

2. What are the legal/procedural consequences of such breaches?

***General*:** Where the state has obtained evidence obtained illegally or wrongfully, how should the law respond? Unlike in some other countries, the Constitution of Singapore is silent on the matter. Illegal or improper conduct in obtaining evidence is deterred or restrained by other (weaker) means. For example, police officers who act illegally in obtaining evidence may be subject to internal disciplinary investigations and sanctions. Also, depending on the circumstances, a civil action may, at least in theory, be brought against the errant officers; this, however, hardly ever happen in practice.

***Exclusion of improperly obtained confession*:** Some rules pertain to particular wrongful methods of obtaining evidence or specific types of evidence. For example, any statement

[12] [1992] 3 SLR(R) 968.

[13] This argument was raised but rejected by the High Court in *Ong Seng Hwee v Public Prosecutor* [1999] 3 SLR(R) 1 on the reasoning that the 'inducement' in the positive misrepresentation did not 'cause' the accused to make the statement which he did.

[14] Section 23(1) Criminal Procode 2010.

given by an accused person will be excluded as a matter of law (and not as a matter of discretion) if it was wrongfully obtained by 'inducement, thread or promise' held out by a 'person in authority': see the 'voluntariness' test alluded to above. In the reported cases, the 'voluntariness' of a confession is frequently challenged by the defence but seldom with success. See further the answer to Question 5 below.

As noted above, sections 22 and 23 set out the procedure the police must follow when they take a statement from the suspect or accused. While the police is required to follow the prescribed procedure, the failure to comply fully with the procedure does not of itself render the statement inadmissible (although it may affect the weight to be given to it[15]). This was established by case-law and it is now expressly provided in s 258(3), Explanation 2(e), of the Criminal Procedure Code 2010 that a statement is not 'inadmissible merely because 'the recording officer or the interpreter of an accused's statement... did not fully comply with' the relevant section under which the statement was taken.

***Discretion to exclude improperly obtained evidence and entrapment*:** In Singapore, state entrapment is not a basis for acquitting the accused (it is not a defence) and, unlike in England and Canada, state entrapment is also not a basis for a stay of prosecution.[16] It is however a mitigating factor in sentencing.[17] An issue that has received much attention from the Singapore courts is whether the trial judge has any discretion to exclude the evidence obtained in the improper entrapment. The High Court has recently stated in *Law Society of Singapore v Tan Guat Neo Phyllis*[18] that the trial judge has no discretion to exclude evidence obtained illegally by the state, and this is so whether the evidence was obtained through an entrapment or in some other illegal way. A discussion of the historical development of the law and the relevant cases follows.

Prior to the decision in *Law Society of Singapore v Tan Guat Neo Phyllis*,[19] it was the settled view that criminal judges had some discretion to exclude evidence that was illegally obtained. In *Cheng Swee Tiang v PP*,[20] the majority of the High Court, sitting as court of three judges, held: 'It is undisputed law…that while evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence, if its reception would operate unfairly against an accused.' The court referred to common law cases which suggested that the improper manner in which the evidence was obtained might of itself be a basis for the exercise of this discretion. A much narrower view of the discretion was taken by the House of Lords in *R v Sang*,[21] a case which has been frequently cited in Singapore.[22] In *R v Sang*, Lord Diplock defined the scope of the discretion thus:

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[15] eg, *PP v Tan Kiam Peng* [2007] 1 SLR(R) 522 at [45] (appeal dismissed in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1).

[16] For a comparative study, see Hock Lai Ho, 'State entrapment'. Legal Studies, no. doi: 10.1111/j.1748-121X.2010.00176.x (forthcoming).

[17] See eg, *Tan Boon Hock v PP* [1994] 2 SLR(R) 32.

[18] [2008] 2 SLR(R) 239.

[19] [2008] 2 SLR(R) 239. See generally J Pinsler, 'Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings' (2010) 22 SacLJ 335.

[20] (1964) 30 MLJ 291 at 291.

[21] [1980] AC 402.

[22] Two examples are *How Poh Sun v PP* [1991] 2 SLR(R) 270 at [19] (Court of Appeal) and *Ajmer Singh v PP* [1985-1986] SLR(R) 1030 (High Court).

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.[23]

Lord Diplock, while acknowledging the existence of judicial discretion to exclude evidence, severely restricted the grounds on which it may be excluded simply on the basis that it was illegally or unfairly obtained. In *S M Summit Holdings Ltd v PP*,[24] the Singapore High Court held that the discretion available to the judge in Singapore was wider than suggested by Lord Diplock in *R v Sang*. *S M Summit Holdings Ltd v PP* was:

> 'not the usual case of entrapment… where a law enforcement officer who is out to trap a seller of counterfeit products pretends to be a genuine purchaser and purchases a counterfeit product…. What [the private investigator] did here was to bring eight counterfeit masters [of CD-ROMs] and ask the petitioners to replicate them…. This was a clear case where the illegality preceded the crime and was designed to bring about the commission of the crime.'[25]

In *Wong Keng Leong Rayney v Law Society of Singapore*,[26] Rajah J interpreted *S M Summit* to have, in effect, 'carve[d] out another *exception* to to *Sang*' by recognising that the court may exclude evidence on the ground that it had been obtained illegally in a situation additional to those recognised in *Sang*. This additional situation is described variously by the judge as one:

- where 'where the illegality of the investigating authority precedes the commission of the offence',[27] or
- where 'the *illegal* methods of an investigator precedes and forms part of the illegal conduct for which the accused is being charged',[28] and
- 'when the *agent provocateur* himself engages in prior illegal conduct in order to procure the offence for which the accused is charged'.[29]

In 2007-8, Singapore law took a different turn in a number of disciplinary cases which arose 'from a series of well-executed sting operations designed to obtain evidence of touting by certain law firms suspected of procuring conveyancing work from real estate agents by giving them referral fees'[30] The leading authority is *Law Society of Singapore v Tan Guat Neo*

[23] [1980] AC 402 at 437.

[24] [1997] 3 SLR(R) 138.

[25] Ibid, at [41]; the Singapore High Court at [52] followed *Ridgeway v R* (1995) 129 ALR 41 in drawing the distinction mentioned in the quotation.

[26] [2006] 4 SLR(R) 934 (High Court).

[27] Ibid at [61].

[28] Ibid at [60].

[29] Ibid at [69].

[30] *Law Society of Singapore v Tan Guat Neo Phyllis*, above, at [1].

Phyllis.[31] This case involved a 'show cause' application brought by the Law Society against the respondent for the alleged professional misconduct of touting. The High Court held that 'the court has no discretion to exclude illegally obtained evidence',[32] reasoning that the Evidence Act does not explicitly provide for such a discretion and that even though the discretion exists at common law, the common law is not applicable to the extent that it is inconsistent with the Act.[33]

Although *Law Society of Singapore v Tan Guat Neo Phyllis* is only a high court decision (the high court is just below the Court of Appeal, which is the highest court in Singapore) and although the view expressed about the absence of exclusionary discretion was strictly speaking an *obiter dictum*, this judgment carries great weight for the following reasons:

- The High Court was sitting as a court of three judges, including the Chief Justice (who delivered the unanimous judgment of the court) and a Judge of Appeal (there are only two Judges of Appeal in Singapore). Hence, two out of the three most senior judges sat in this case.
- In the earlier case of *Wong Keng Leong Rayney v Law Society of Singapore*,[34] the Chief Justice, in delivering the judgment of the Court of Appeal, specifically deferred detailed discussion of the present topic to the judgment in *Law Society of Singapore v Tan Guat Neo Phyllis*.
- *Law Society of Singapore v Tan Guat Neo Phyllis* has been cited or applied in the number of later High Court cases, including *Law Society of Singapore v Bay Puay Joo Lilian*;[35] *Law Society of Singapore v Liew Boon Kwee James*[36] (in both cases, the judgment of the court was delivered by the Chief Justice).
- In the Court of Appeal judgment of *Lee Chez Kee v Public Prosecutor*,[37] V K Rajah JA , who was the only Judge of Appeal not to have sat in *Law Society v Tan Guat Neo Phyllis*, described the view expressed in the latter case as a persuasive ruling.

On a literal reading of the ruling in *Law Society of Singapore v Tan Guat Neo Phyllis*, it would seem that the trial court has no discretion at all to exclude any evidence that is technically admissible.[38] But it is doubtful that the High Court meant to go that far. Elsewhere in the judgment, it suggested that *R v Sang* remained good law in Singapore because it is consistent with the Evidence Act.

What is relatively clear from *Law Society of Singapore v Tan Guat Neo Phyllis* is that the court has no discretion to exclude evidence merely because it was obtained by an entrapment.

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[31] Ibid.

[32] Ibid at [150].

[33] Restriction of the application of the common law is provided for in s 2(2) of the Evidence Act. The court also based its decision on a technical reading of s 138 of the same Act which states in mandatory form that 'the court *shall* admit the evidence if it thinks that the fact, if proved, would be relevant'.

[34] [2007] 4 SLR(R) 377 at [27].

[35] [2008] 2 SLR(R) 316.

[36] [2008] 2 SLR(R) 336.

[37] [2008] 3 SLR(R) 447 at [106].

[38] This decision was interpreted by V K Rajah JA in *Lee Chez Kee v PP* ibid at [106] as having ruled that 'persuasively ruled that apart from the confines of the EA, there is no residual discretion to exclude evidence which is otherwise rendered legally relevant by the EA.'

In practice, the court has rarely exercised its discretion to exclude illegally obtained evidence. One notable instance where it has done so is *PP v Dahalan bin Ladaewa*[39] (this case was decided before *Law Society of Singapore v Tan Guat Neo Phyllis*). The accused was arrested and interviewed by a police officer. The latter took notes of the interview on a piece of paper instead of his police pocket book (as was the proper thing to do) and his excuse was that he did not have his pocket book with him. The interview was conducted in English and without a translator even though the accused was clearly not proficient in the language. It was only four hours after the interview that the officer recorded an expanded version of the notes in his police pocket book and after this was done, he destroyed the paper on which he had taken notes. The recorded statement used English words that the accused could not have used. The failure to carry and maintain the police pocket book and the destruction of the original notes went against the directions contained in the Police General Orders ('PGO'). As we saw, under section 121 of the Criminal Procedure Code (now section 22 of the Criminal Procedure Code 2010), the officer was required to record the statement in writing, to read back the statement to the suspect and to get him to sign it. None of these was complied with. The trial judge excluded the police statement in the exercise of his discretion. While non-compliance with the procedure in section 121 would not render the statement legally inadmissible, this was an exceptional case where the court felt compelled to exercise its discretion to exclude the evidence because the violations of the relevant statutory procedure and internal police general orders were 'flagrant'.

3. Do the consequences vary with the gravity of the matter (eg, are there special rules for serious crimes)?

No.

4. Do the rules that apply to evidence obtained by the prosecution differ from those that apply to the defense?

There is no legal authority on whether evidence obtained illegally by the state must be treated differently from evidence obtained illegally by the defence. It is likely that they will be treated the same. Some indirect support for this can be found in the recognition by the courts that there is 'no distinction in principle between state-directed entrapment and private entrapment'.[40] In an earlier case, it was suggested that the court should be less reluctant to intervene in a private entrapment than a state entrapment because '[t]here is no public interest in the members of the public undertaking' entrapment and in them assuming the role of policemen. [57] This view has since been rejected.[41]

5. Describe the practical effect of these rules and how they are applied by the courts.

It is extremely rare for the court to exercise its discretion to exclude evidence that is technically (ie, legally) admissible. After the decision in *Law Society of Singapore v Tan*

[39] [1995] 2 SLR(R) 124; the trial judge's exercise of discretion was upheld by the Court of Appeal: *PP v Dahalan bin Ladaewa* [1996] 1 CLAS News 75. See also *Kong Weng Chong v PP* [1993] 3 SLR(R) 453 at [27]-[28] (oral statement allegedly made by accused to police officers excluded because of procedural impropriety in the recording of the statement). Cf. *Public Prosecutor v Ismil bin Kadar and Another* [2009] SGHC 84 [158]-[171] (*PP v Dahalan bin Ladaewa* distinguished).

[40] *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [47], agreeing with the view of V K Rajah J in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 (see [65] et seq).

[41] *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [43]-[47].

Guat Neo Phyllis, it is doubtful that the court even has the discretion to do so. In *Cheng Swee Tiang v PP*,[42] the majority of the High Court bench formulated the competing considerations thus:

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

It is arguable that in Singapore the latter interest has traditionally been accorded more weight than the former interest. This can be seen, for example, in how the law on confession evidence is applied. Although evidence of a confession is inadmissible if it was obtained by the police through 'inducement, threat or promise', we find that, in practice, the defence has seldom succeeded in challenging admissibility on this ground. When such a challenge is raised, the prosecution bears the burden of proving the 'voluntariness' of the confession beyond reasonable doubt. It is perhaps telling that, instead of emphasising the strictness of this standard of proof, courts have tended to caution against an overly strict interpretation. Thus, in *Panya Martmontree v Public Prosecutor*,[43] the Court of Appeal noted:

> '*The police work in difficult circumstances. If they were required to remove all doubt of influence or fear, they would never be able to achieve anything.* What, in our view, is required of a trial judge in a *voir dire* is to decide whether the evidence of the accused alleging, inducements, threats, promises or assaults, taken together with the Prosecution's evidence has raised a reasonable doubt in his mind that the accused was thus influenced into making the statement.'

In a later case, the High Court cited *Panya Martmontree* for the proposition that: "It is not incumbent on the prosecution... to prove that there is no lurking shadow of doubt or minute vestiges of fear in the mind of the accused before a statement is recorded'.[44] In *Seow Choon Meng v PP*,[45] the Court of Appeal was forthright in stating: 'Robust interrogation is, in our opinion, an essential and integral aspect of police investigation.'

Presenting Evidence

6. Does the law in your country prohibit certain means of presenting evidence (eg, hearsay testimony) due to concerns about its probative value?

It is not entirely clear what is meant by 'means of presenting evidence'. The reference to 'hearsay testimony' suggests that the question may be asking about rules that exclude certain types of evidence due to concerns about their reliability.

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[42] (1964) 30 MLJ 291 at

[43] [1995] 2 SLR(R) 806 at [29].

[44] *PP v Lim Thian Lai* [2005] SGHC 122 at [32]; decision upheld on appeal [2006] 1 SLR(R) 319.

[45] [1994] 2 SLR(R) 338 at 353.

Hearsay: It may be said, perhaps somewhat inaccurately, that hearsay evidence is generally inadmissible in Singapore unless it falls under an exception to the rule.[46] The conventional rationale for the exclusion has to do with the concern that the original maker of the statement is not available in court to be cross-examined and hence the reliability of the evidence cannot be properly tested.

There are many exceptions to the hearsay rule. They can be found in the Evidence Act[47] and the Criminal Procedure Code 2010.[48] Under both Acts, the main exceptions apply only when the original maker of the statement is unavailable to be called as a witness and to be cross-examined, such as where he has died or cannot be found.[49]

Under the Evidence Act, the hearsay statement sought to be admitted must also fall under one of the prescribed categories; these include 'dying declarations', business records and statements against the self-interest of the maker.[50] These are cases where it is thought, rightly or wrongly, that there may be reason to believe in the reliability of the statement.

A number of procedural safeguards in the admission of hearsay are provided in the Criminal Procedure Code 2010. These include the requirement to serve on the opponent a notice of intent to adduce hearsay evidence (which notice must include information relating to the statement and its maker[51]) and a provision which directs the court to take into account certain factors in assessing the weight of the hearsay statement (such as possible incentives for the maker of the statement to conceal or misrepresent the facts).[52]

Similar fact and bad character evidence: Another major rule on admissibility is the 'similar facts rule'. This rule applies when the prosecution seeks to rely on evidence of the previous misconduct of the accused in support of the charge against him (for example, evidence of the fact that he had committed a crime previously which is similar to the crime for which he is being charged). Singapore cases have adopted the English common test set out in cases such as *DPP v Boardman*[53] and *DPP v P*[54] by reading the test into the relevant provisions of the Evidence Act.[55] According to this test, the evidence is admissible only where its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime; to put this shortly, the

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[46] There are technical problems pertaining to the source and framework of the law on hearsay evidence in Singapore, in particular, relating to the correct interpretation of the Evidence Act. The argument has been made (for eg, by Rajah JA in *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 at [66]-[75]) that the Act is inclusionary in its approach, with the result that (hearsay) evidence is admissible if and so long as if falls under one of the provisions in Part 1 and that the common law approach to hearsay has no application in Singapore; accordingly, the notion of a general exclusionary rule that is then qualified by 'exceptions' does not sit well with the framework of the Act. This argument has yet to become the received wisdom. The idea that hearsay evidence is generally inadmissible and that it is admissible only if it falls under an exception is presently still the orthodoxy in Singapore; this, at any rate, is the approach adopted in the Criminal Procedure Code 2010: see 268.

[47] eg, s 32 Evidence Act.

[48] See ss 269-277 Criminal Procedure Code 2010.

[49] Section 32 Evidence Act and ss 270(1)(b) and 272(2)(c) Criminal Procedure Code 2010.

[50] Section 32(a),(b) and (c) Evidence Act respectively.

[51] Section 271(2)(3) Criminal Procedure Code 2010.

[52] Section 273(3) Criminal Procedure Code 2010.

[53] [1975] 1 AC 421.

[54] [1991] 2 AC 447.

[55] Sections 14, 15 and 11(b) Evidence Act. See *PP* v *Teo Ai Nee* [1995] 1 SLR(R) 450; *Tan Meng Jee* v *PP* [1996] 2 SLR(R) 178; *Lee Kwang Peng* v *PP* [1997] 2 SLR(R) 569.

probative force of the previous misconduct must exceed its potential prejudicial effect. Related to this is the rule that an accused person generally cannot be crossed-examined on his bad character;[56] again, the underlying rationale is to protect the accused from unfair prejudice. The concern about prejudice is arguably a concern about reliability in the sense that prejudicial evidence is the sort that is likely to lead the fact-finder to give the evidence more weight than it objectively deserves.

***Exercise of caution in accepting evidence of suspect categories of witnesses ('corroboration'); discretion to exclude evidence*:**When the prosecution calls certain categories of 'unreliable' witnesses to give evidence in support of its case, the court must exercise caution in relying on the evidence.[57] These categories include accomplices,[58] and, controversially, children[59] and complainants of sexual offences.[60] There is also judicial power in limited circumstances to prevent an unreliable accomplice from taking the stand: the High Court has held that the trial judge has the 'discretion…to exclude the accomplice's evidence on the ground that there is an obvious and powerful inducement for him to ingratiate himself with the Prosecution and the court'[61] and, in a separate decision, has expressed the view that 'it would be irregular for the prosecution to call an accomplice to give evidence against whom proceedings had been brought but not concluded.'[62]

Confession of co-accused: Where the accomplice is also charged and jointly tried with the accused, he assumes the status of a co-accused. Where the confession of an accused person (A) also implicates a co-accused (B), a controversial statutory provision allows A's confession to be 'taken into consideration' against B.[63] In the past, this provision was interpreted to mean that A's confession can play only a supportive role in a prosecution's case against B; it cannot by itself sustain B's conviction. To get the court to convict B, the prosecution must produce other independent evidence of guilt. The law was dramatically changed in the landmark case of *Chin Seow Noi v Public Prosecutor*.[64] The Court of Appeal held that the confession of a co-accused should be treated like any other substantive evidence

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[56] Section 122(4) of the Evidence Act protects the accused from being cross-examined on:

> '(a) the fact that he has committed, or has been charged with or convicted or acquitted of, any offence other than the offence charged; or
>
> (b) the fact that he is generally or in a particular respect a person of bad disposition or reputation.'

There are however exceptions to this rule. The accused can be cross-examined on any of these matters where, to put it loosely, the defence has attacked the character of a prosecution witness (s 122(7)) or the accused has given evidence against a co-accused (s 122(8)) or he has given evidence of his good character (s 56).

[57] This area of the law is commonly known as the law on corroboration. See generally, J Pinsler, *Evidence and the Litigation Process* (LexisNexis: Singapore, 3rd ed, 2010) ch 13.

[58] There is no mandatory obligation to give a corroboration warning with respect to accomplice evidence: s 135 Evidence Act. But caution must be exercised.

[59] *Lee Kwang Peng* v *PP* [1997] 2 SLR(R) 569 at [67]: 'there is no special rule requiring a trial judge to direct himself as to the dangers of convicting without corroboration where the only evidence is that of a child witness, although he or she must remain sensitive to the requirement of corroborative evidence or alternatively consider that corroboration is not required because of the maturity and reliability of the witness.'

[60] eg, *PP v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [37] et seq.

[61] *Roy S Selvarajah v PP* [1998] 3 SLR(R) 119 at [59].

[62] *PP v Syed Abdul Aziz bin Syed Mohd Noor* [1992] SGHC 197, citing the English cases of *R v Pipe* (1967) 51 Cr App R 17 at 20 and *R v Turner* (1975) 61 Cr App R 67 at 78. (Appeal was allowed but without affecting the present point in *Syed Abdul Aziz v PP* [1993] 3 SLR(R) 1.) Note that the power exists as a matter of discretion or practice; an accomplice is, as a matter of law, competent to give evidence against an accused person: s 135 Evidence Act.

[63] Section 258(5) Criminal Procedure Code 2010 (formerly section 30 Evidence Act).

[64] [1993] 3 SLR(R) 566.

and that B can be convicted solely on the confession of A provided that it satisfies the court beyond reasonable doubt of B's guilt.[65] This decision has drawn academic criticisms.[66]

[Since the right of silence is not based on probative concerns, the erosion of that right in Singapore is not discussed. Briefly, silence may be taken as evidence in Singapore: an adverse inference can be drawn from the failure of the accused to disclose relevant information to the police and also from his failure to take the witness stand.[67]]

7. What are the legal/procedural consequences of presenting evidence by such means?

A reversal of the trial court's decision or a new trial will not necessarily be ordered when inadmissible evidence has been wrongly admitted or excluded. It depends on whether the admission or exclusion of the evidence would have made a difference in the decision[68] and whether there has been a 'failure of justice'.[69]

In this connection, courts have been influenced by the fact that cases in Singapore are tried by judges and not by jury. (The jury system was abolished entirely in 1970.) In *Wong Kim Poh v Public Prosecutor*,[70] prejudicial and irrelevant evidence (which showed the accused to be a pimp and living on the 'immoral earnings' of his girlfriend) was wrongly admitted at the trial. The Court of Appeal held that this wrongful admission of evidence was not a good reason for allowing the appeal. It found

> 'no basis to suggest that the trial judges had been adversely influenced in any way by [the prejudicial evidence] … *In a criminal trial without a jury, as in all such trials in Singapore, the wrongful admission of evidence of the bad character or disposition of the accused does not necessarily mean that the judge or judges have been adversely influenced by such evidence. We must bear in mind that judges are trained to assess evidence objectively and to sift the wheat from the chaff.* … Section 396 of the CPC [now section 423 Criminal Procedure Code 2010] makes it clear that no finding of the trial court shall be reversed unless the wrongful admission of evidence has resulted in

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[65] This remains the law in Singapore although in the recent Court of Appeal case of *Lee Chez Kee v PP*, [2008] 3 SLR(R) 447 at [113], Rajah JA noted that 'it does seem a bit out of the ordinary for a co-accused's confession ... to be attributed so much weight to the extent of it being able to secure a conviction on its own. The need to reconsider this decision may come in the future.'

[66] eg, Michael Hor 'Co-accused confessions: the third anniversary' (1996) 8 Singapore Academy of Law Journal 323-343; 'The confession of a co-accused' (1994) 6 Singapore Academy of Law Journal 366-391.

[67] Sections 230(1)(m) and 261 Criminal Procedure Code 2010.

[68] Section 169 of the Evidence Act provides: 'The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.' See *Halsbury's Laws of Singapore*, vol 10, *Evidence*, 2006 Reissue (LexisNexis: Singapore) at [120.030].

[69] Section 423 of the Criminal Procedure Code 2010 states that:

> 'any judgment, sentence or order passed or made by a court of competent jurisdiction may not be reversed or altered on account of —
>
> (a) an error, omission or irregularity in the...proceedings before or during trial...; ...
>
> (c) the improper admission or rejection of any evidence,
>
> unless the error, omission, improper admission or rejection of evidence, irregularity… has caused a failure of justice.'

See further Tan Yock Lin, *Criminal Procedure*, vol 2, (Singapore: LexisNexis, 2007) at [1253] et seq.

[70] [1992] 1 SLR(R) 13.

> a miscarriage of justice. In this case, we did not think that there was any miscarriage of justice….'[71]

8. Do the consequences vary with the reliability of the evidence and its necessity for the record?

If inadmissible evidence was wrongly admitted at the trial, this will count as an error of law. It remains an error of law even if the evidence is in fact reliable. But the consequences of that error (eg, whether the court will grant a retrial) will depend on whether the error has caused a failure of justice (see answer to question 7 above).

It should be noted that the reliability of evidence figures *within* some rules of admissibility. For example, the rationale for some exceptions to the hearsay rule is based (rightly or wrongly) on the perception that there is some ground for believing that the particular type of statement is generally reliable (eg, the business record exception). Another example is the so-called 'doctrine of confirmation by subsequent fact'. Section 258(6)(c) of the Criminal Procedure Code 2010[72] provides that

> 'when any fact or thing is discovered in consequence of information received from a person accused of any offence in the custody of any officer of a law enforcement agency, so much of such information as relates distinctly to the fact or thing thereby discovered may be proved.'

This provision has been interpreted to have the following effect: suppose a confession is made by the accused in which he said: 'I stabbed the victim with a knife and I have concealed the knife in the roof of my house.' And suppose further that the confession was obtained by the police under some form of inducement, threat or promise for the purposes of section 258(3) of the Criminal Procedure Code 2010. The confession is accordingly inadmissible. But suppose the police searched the roof and found the knife. Section 258(6)(c) of the Criminal Procedure Code 2010 makes that part and only that part of the statement where the accused said he hid the knife in the roof admissible; this is because that part and only that part is 'confirmed' by the discovery of the knife in the roof.[73] The theory is that the discovery of the confirming fact renders this part of the statement reliable. Note however that when the court admits this part of the confession, it has not committed any error of law. Hence, this discussion is not strictly relevant to Question 8.

I am afraid I do not understand the reference to 'necessity for the record' in Question 8. So far as I know, Singapore law lacks any such notion.

9. Do different rules apply to the evidence relevant to the claim or the defence?

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[71] Ibid at [14]. See also *Tan Chee Kieng v PP* [1994] 2 SLR(R) 577 at [8]: 'It should be remembered that, unlike in a trial with a jury, a judge trying a case without a jury is unlikely to be influenced by prejudicial evidence which for one reason or another had been admitted, especially when, as here, the learned trial judge has cautioned himself against being influenced by it'; and *Tan Meng Jee v PP* [1996] 2 SLR(R) 178 at [48], expressing confidence 'in the ability of judges to disregard prejudicial evidence when the need arises'.

[72] This provision reproduces s 27 of the Evidence Act which will be repealed once the CPC 2010 comes into force.

[73] Borrowed from the example given by the Privy Council in *Pulukuri Kottaya v Emperor* AIR 1947 PC 67 cited by the Singapore High Court in *PP v Chin Moi Moi* [1994] 3 SLR(R) 924.

In general, rules of evidence apply equally to both prosecution and defence. But there are some asymmetries. For example, the standard of proof that applies to the defence (where it carries the burden of proof) is 'balance of probabilities' and the standard of proof that the prosecution carries is 'beyond reasonable doubt'. Also, the accused is allowed to adduce evidence of his good character to bolster his credibility[74] but, as discussed above, the prosecution is generally barred from adducing evidence of the accused's bad character.

10. Describe the practical effect of these rules and how they are applied by the courts.

It might be thought that the hearsay rule is unduly technical and results in withholding from the fact-finder evidence that is probative. But this is ameliorated by the fact that there are liberal exceptions to the hearsay rule, especially in criminal cases.[75]

The lack of a jury system brings into question the practicality of exclusionary rules of evidence. When an objection of inadmissibility is raised, the trial judge will have to deal with it at an ancillary hearing.[76] To decide on admissibility, the judge will have to be exposed to the evidence which is being objected to. If the judge rules that the evidence is inadmissible, he is supposed to disregard the evidence henceforth. It may seem psychologically difficult if not impossible for the judge to do this and that there is a real risk of the judge remaining under the influence of the excluded evidence, perhaps at a subconscious level. In *Tan Meng Jee v Public Prosecutor*,[77] the court rejected this as a valid argument against the similar facts rule in Singapore:

> 'No doubt, in this jurisdiction, the trial judge being the trier of fact will have to be familiar with the similar facts in order to rule as to its relevance. However, we think ingenuous the argument that a strict enforcement of the similar fact rule is futile if the evidence has already been allowed to infiltrate the mind of the trial judge. All we say in response is that we are far more confident in the ability of judges to disregard prejudicial evidence when the need arises'.

It is submitted that there is a place for exclusionary rules even in jurisdictions without a jury system because rules of evidence such as hearsay and similar facts have a normative dimension whose force remains even where the judge sits alone. Exclusion of objectionable evidence, such as hearsay or the accused's previous misconduct, expresses in an emphatic fashion the law's concern about the moral legitimacy of the reasoning the State offers in its quest to get the accused convicted.[78]

Please feel free to add any further remarks that you might have about restrictions on the methods by which evidence may be obtained or presented in your country.

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[74] Section 55 Evidence Act.

[75] There is an elaborate statutory regime for the admission of hearsay evidence in the Criminal Procedure Code 2010 (ss 269-277) which does not apply to civil cases. The exceptions for the admission of hearsay evidence under the Criminal Procedure Code regime are generally wider than the exceptions in the Evidence Act. This produces the incongruous result that it is easier to admit hearsay evidence in criminal cases than in civil cases when there should be greater concern about reliability of evidence in the criminal context than in the civil.

[76] Section 279 Criminal Procedure Code 2010.

[77] [1996] 2 SLR(R) 178 at [48].

[78] Hock Lai Ho, *A Philosophy of Evidence Law – Justice in the Search for Truth* (Oxford: OUP, 2008) at 308, and generally chapters 5 and 6.

There is a noticeable 'tough on crime' attitude exhibited by Singapore politicians. For example, in a speech delivered at the Singapore Academy of Law, Lee Kuan Yew, the then Prime Minister said:[79]

> 'The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual.
>
> In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with customs and values of Singapore society.
>
> In criminal law legislation, our priority is the security and well-being of law-abiding citizens rather than the rights of the criminal to be protected from incriminating evidence.'

According to Lee: 'These differences in approach may explain why law and order is better in Singapore than in many other new countries.'[80]

Judges too have stressed the need to take into account local conditions and values in shaping the administration of criminal justice. For example, in declining to follow Commonwealth developments in the law on entrapment, the Singapore Court of Appeal explained:

> 'in formulating the principles of law in relation to the legal issues raised in this case, we must give primacy to the objectives and values of our criminal justice system... Whilst we pay great respect to the decisions of the appellate courts in Australia, Canada and England on these issues, we must also bear in mind that the legal and social environments in these jurisdictions are not the same, and that the courts in each jurisdiction must take into account the values and objectives of the criminal justice system which they wish to promote. The common law is infused with common or universal values which are applicable in all common law jurisdictions, but, in the field of criminal law, national values on law and order may differ not only in type, but also in intensity of adherence.'

This general view is translated into a discernible reluctance to let perceived 'legal technicalities' get in the way of convicting the guilty. As the Court of Appeal put it in *Fung Yuk Shing v PP*:[81]

> 'an overly legalistic attitude on the part of the courts would ultimately form "a clog on the proper exercise by the police of their investigatory function, and indeed on the administration of justice itself". [Citing *DPP v Ping Lin*, per Lord Hailsham] Our concern is that our courts should be mindful of the pitfalls of such an attitude…'

To engage this line of argument, one needs to be clear what the local conditions and values are, and how and who gets to define the 'national values on law and order'. It is also a matter of debate what bearing cultural and social sensitivity should have, as a matter of principle, on the rights of the accused in Singapore. Even if such rights are 'clogs' on police investigation of crimes, they may exist for good countervailing reasons.

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[79] 'Address by the Prime Minister, Mr Lee Kuan Yew' (1990) 2 Singapore Academy of Law Journal 155 at 155.

[80] Ibid at 156.

[81] [1993] 2 SLR 771 at [19].