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APPROACHES TO THE EVIDENCE ACT: THE JUDICIAL DEVELOPMENT OF A CODE

Introduction

1 Many former students will attest that the Law of Evidence was the most difficult (not a few have said “painful”) subject that they had to study in the Faculty of Law. Their teachers are not disheartened by such a reaction for it reveals a manner of study essential to the proper interpretation of a statute frozen in time in the face of the evolving common law. Some of the challenges may be exemplified by the following questions: What is the relationship between the Act and common law principles established after its enactment? Does the common law apply if the Act does not cover an evidential issue? What if a section does have some bearing on the evidential issue but appears incomplete or imprecise in the face of a related common law principle? What if the Act recognises part of a common law doctrine which has since been developed beyond the scope of the Act. What if a common law principle is not consistent with the pertinent sections of the Act but could operate in the context of another section which is not literally pertinent. What if a common law principle interferes with the framework of the Act? These difficulties are exacerbated by the demands placed on the judiciary to ensure interpretive consistency in its approach to the Act. Moreover, to the extent that the courts are willing to apply a purposive or non-literal interpretation to the Act, they have to assume the responsibility of applying their own philosophy or policy in an area of law which has been traditionally governed by the legislature.

Interpretation of a code

2 The law of evidence is (or is supposed to be) primarily dictated by a 111-year-old code¹ which consolidated English law on the subject as it stood in the early 1870s.² The Evidence Act, enacted in 1893,³ was largely based on the Indian Evidence Act of 1872 which had been drafted by Sir Fitzjames Stephen as a complete formulation of the law of evidence.⁴ The statute, though a code,⁵ is not exhaustive of the rules of evidence. Other statutes may make provision generally or in relation to specific

1 As the primary source of law in Singapore.

2 See Stephen's *Digest* (5th Ed, 1886), p 1 (the “*Digest*”).

3 Act 3/1893.

4 For Stephen's criticism of the system of Evidence in 19th century England, see his “Introduction to the Indian Evidence Act, 1872”.

5 His approach is explained in the *Digest* and his “Introduction to the Indian Evidence Act, 1872”.

matters. However, it is in the nature of the relationship between the Evidence Act and the common law that considerable difficulty of interpretation often arises. In their endeavour to establish some form of symbiosis, the courts have had to take controversial approaches to the statute. The principle governing the link between the Act and the common law is formulated by s 2(2) of the Act:

“All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.”

3 This provision was intended to exclude the operation of any court ruling inconsistent with the Act at the time it came into force.⁶ It has also been applied so as to exclude subsequent inconsistent common law authorities.⁷ The difficulty raised by s 2(2) is the precise meaning of “inconsistency”. Inconsistency can occur in different contexts. In *Mahomed Syedol Ariffin v Yeoh Ooi Gark*,⁸ Lord Shaw, in delivering the conclusion of the Privy Council, stated:

“... the rule and principle of the Colony must be accepted as it is found in its own Evidence Ordinance, and that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect.”⁹

4 The courts have shown a preparedness to be more flexible when the common law rule may assist in the interpretation of a provision of the Evidence Act. In *Shabban v Chong Fook Kam*¹⁰ (which concerned the interpretation of a provision of the Criminal Procedure Code), the Privy Council, while acknowledging “that the law of Malaysia has to be taken from the Code and not from cases on the common law,” stated:

“... where as here, the Code is embodying common law principles, decisions of the courts of England and of other Commonwealth countries in which the common law has been expounded, can be helpful in the understanding and application of the Code.”

5 This pronouncement is not entirely consistent with the view of the House of Lords in *Bank of England v Vagliano*¹¹ which considered the

⁶ See *Bank of England v Vagliano* (1891) AC 107, 144–145.

⁷ See, for example, *Jayasena v R* [1970] AC 618.

⁸ (1916) 2 AC 575, at p 581.

⁹ Also see *Bank of England v Vagliano* (note 6).

¹⁰ [1969] 2 MLJ 219, at 222.

¹¹ (1891) AC 107, 144–145. Although *Vagliano* was considered by Privy Council in *Shabban*.

resort to existing cases to be inappropriate or at least of incidental value.¹² *Mahomed Syedol*, *Vagliano* and *Shabban* represent varied approaches to establishing the balance between the integrity of a code and the judicial desire to be pragmatic or the paramountcy of statutory law and the need for flexibility. But this is too simply put, for the cases reveal a level of abstruseness which may lead one to wonder whether the formulation of a clear and precise doctrine is possible at all.

Vague and imprecise provisions

6 The common law can certainly be applied when a provision of the Evidence Act is unclear or vague and the common law is consistent with and clarifies the section. This would not be contrary to Lord Shaw's view in *Mahomed Syedol Ariffin* (which assumes that the provision is clear and unambiguous making the application of the common law inappropriate)¹³ and would accord with the Privy Council's view in *Shabban* that the common law can "be helpful in the understanding and application of the Code".¹⁴

7 A more difficult situation arises where one has an apparently vague provision of the Act which could be interpreted in the context of a more precise common law principle. These circumstances arose in *PP v Yuvaraj*.¹⁵ The Privy Council had to determine the extent of proof required to rebut the presumption of corruption which arose pursuant to the Prevention of Corruption Act.¹⁶ It considered the definition of "proved" and "disproved" in s 3(3) and (4) of the Evidence Act:

"(3) A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

12 The House of Lords stated that the proper approach "... is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was".

13 See the extract in the main text at note 9.

14 *Ibid.*

15 [1969] 2 MLJ 89.

16 The Malaysian Act of 1961.

(4) A fact is said to be “disproved” when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.”

8 In the view of the Privy Council, it could not have been the intention of the Evidence Act “to abolish the historic distinction fundamental to the administration of justice under the common law..”.¹⁷ Yet, although Stephen was aware of these specific standards in civil and criminal cases,¹⁸ he indicated that the distinction might be arbitrary in certain situations¹⁹ and preferred to introduce the more flexible concept of how a “prudent man” would decide the case. He considered that “the degrees of probability attainable in ... judicial enquiries are infinite, and do not admit of exact measurement or description”.²⁰ It must follow that the Privy Council was not correct in its conclusion in *Yuvaraj* that the Act could not have intended to abandon the specific tests of “reasonable doubt” and “balance of probabilities.” In effect, the Privy Council imposed its own view because it could not accept what it perceived to be the imprecision of the Act’s definition of proof. The court *corrected* rather than *clarified* the Act.

9 This approach was even more apparent in *Liew Kaling & Anor v PP*,²¹ in which Thomson CJ considered the Act’s standard of proof provision to be too simplistic. His Lordship ruled that the trial judge had been wrong to apply the Act’s definition of “proved” because “it must be a matter of almost insuperable difficulty [for a jury] to appreciate such a philosophical distinction as that between believing a fact to exist and considering its existence so probable that a hypothetically prudent man ought to act upon the supposition that it does exist”. The learned judge disapproved of the judicial practice in Malaysia and Singapore of “quoting the actual words of

17 [1969] 2 MLJ 89, at 91.

18 “Introduction to the Indian Evidence Act, 1872”, at pp 36 and 37.

19 For example, he indicated that a higher standard than balance of probabilities might be appropriate in civil cases involving serious imputations. See the cases cited in note 26.

20 Introduction to the Indian Evidence Act, 1872, p 36.) He further states: “... what sort of doubt is reasonable in criminal cases is a question of prudence”. (*Ibid.*) He criticizes the expression “beyond all reasonable doubt” because in his view “reasonable” “... denotes a fluctuating and uncertain quantity of probability ... and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence”. (*Ibid.*, at 37.)

21 [1960] MLJ 306.

the Evidence Ordinance to juries”²² and applied the test of “beyond a reasonable doubt” which had been established by the English cases.²³

10 Both the appellate Court²⁴ in *Liew Kaling* and the Privy Council in *Yuvaraj* seemed to be revising rather than interpreting the Act. The approach is not consistent with the fundamental principle of interpretation of a code formulated in *Vagliano, Mohd Syedol and Shabban*.²⁵ The phrases “beyond a reasonable doubt” and “balance of probabilities” are now established tests for the standard of proof in Singapore and have served the interests of justice. However, recent jurisprudence may vindicate Stephen’s view that fixed standards of proof may not always be appropriate. Apart from the issue of a higher standard of proof in civil cases involving serious allegations,²⁶ questions have been raised about the traditional standards of proof from the perspective of both prosecution and the accused. Such a view has been propagated in the criminal context on the basis that a distinction should be made between serious and minor offences so that, in the case of the latter, the prosecution should only bear the burden of proof on a balance of probabilities.²⁷ Conversely, the courts in various countries have acknowledged that an accused person, against whom a legal presumption operates, may (in appropriate circumstances) discharge his burden adducing sufficient evidence not amounting to proof on a balance of

22 Citing *Ismail bin Abdullah v Public Prosecutor* [1959] MLJ 269 at 270 to this effect.

23 “It is probably true to say that nowadays, whatever may have been the case a few years ago, there is clearly a preponderance of judicial opinion in favour of directing a jury in the traditional way that they must be satisfied beyond reasonable doubt.” ([1960] MLJ 306.) Also see *Tikan bin Sulaiman v R* [1953] MLJ 131, in which the Court of Appeal endorsed this approach.

24 The name of the court is not indicated in the judgment.

25 Indeed, in *Saminathan v PP* [1955] 1 MLJ 121, Buhagiar J stated: “In view of the Evidence Ordinance, 1950, I do not see how ‘proved’ in any statutory presumption can mean anything but ‘proved’ as defined in that Ordinance. Whatever view one may take of the policy of the legislation, there is also some policy in giving words a consistent meaning and that is hardly done if ‘proved’ is given a different interpretation from that in the Evidence Ordinance, 1950. For reasons which I have set out earlier the expression ‘beyond reasonable doubt’ and ‘probability’ ... are liable to create confusion in view of the special provisions of the Evidence Ordinance, 1950.”

26 As evident from the judicial observations in such cases as *Clarke Beryl Claire (as personal representative of the estate of Eugene Francis Clarke) & Anor v SilkAir (Singapore) Pte Ltd and other actions* [2002] 3 SLR 100; *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258; *Min Hong Auto Supply Pte Ltd v Loh Chun Seng & Anor* [1993] 3 SLR 498; *Peng Ann Realty Pte Ltd v Liu Cho Chit & Ors* [1994] 3 SLR 576.

27 This was the view of the Attorney-General in “The Criminal Process – The Singapore Model” (the 10th Singapore Law Review Lecture) (1996) 17 SLR 431 at 501.

probabilities.²⁸ The currency of this view indicates that – contrary to Thomson CJ’s criticism in *Liew Kaling* of the impracticality of the wording of s 3²⁹ – Stephen’s less than precise approach incorporates a flexibility which acknowledges the difficulties inherent in the application of fixed burdens of proof. If so, the common law should not have been so readily applied on this issue.

Omission of common law principle

Complete absence of a doctrine

11 Whereas the courts may give a specific interpretation to what they perceive to be vague or imprecise statutory terminology, a more difficult challenge faces the judiciary where there is no provision in the Act which governs an evidential issue recognised by the common law. It might be argued that the common law should apply because there is nothing (in the Act) for the common law to be inconsistent with. The counterpoint is that if a code, which is intended to be a comprehensive formulation of the law, does not express a principle, that principle should not be recognised (even if it was developed after the Act came into force). Furthermore, the introduction of a principle to “fill a gap” may interfere with the structure or scheme of the statute. This was strikingly illustrated in *Cheng Swee Tiang v PP*,³⁰ which involved the question of whether the court has a discretion to exclude admissible evidence improperly obtained by the police or other enforcement authorities. The majority of the court (Wee Chong Jin and Chua JJ)³¹ applied the common law and ruled (without referring to the position of the Evidence Act on the issue) that the court does have such a discretion.

28 See *R v Lambert* [2001] 1 All ER 1014; *R v DPP, ex parte Kebilene* [2000] 2 AC 326; *State v Mbatha* [1996] 2 LRC 208 at 218 (South Africa); *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 (Hong Kong); *R v Oakes* (1986) 26 DLR (4th) 200; *R v Whyte* (1988) 51 DLR (4th) 481, at 493 (Canada). For a discussion of the issues, see Michael Hor, “The Burden of Proof in Criminal Justice” (1992) 4 SAclJ 267; Michael Hor, “The Presumption of Innocence” [1995] SJLS 365.

29 See main text at note 21.

30 [1964] MLJ 291.

31 This was a magistrate’s appeal first heard by Tan Ah Tah J. On the application of the appellant, the case was ordered to be heard before a court consisting of three judges (pursuant to under s 295(3) of the Criminal Procedure Code (Cap 132)).

12 Part one of the Evidence Act, which governs the admissibility of evidence, does not acknowledge such a general judicial discretion to exclude evidence.³² It is provided in s 5 of the Act that evidence may be given of the existence or non-existence of any fact in issue and relevant fact.³³ No general discretion is expressly vested in the court to exclude evidence which is admissible under the Act.³⁴ Therefore, one might conclude that as the exercise of such a discretion would limit the admissibility of evidence in a manner unauthorised by the Act, the principle is inconsistent with the statute's admissibility framework. No doubt, the existence of a judicial discretion to exclude evidence is in the interest of justice (which explains why the principle is now well established),³⁵ for it provides the court with a precise mechanism ensuring that evidence relied upon is not unduly oppressive³⁶ or inappropriate in another context.³⁷ However, the means by which this principle was extracted leaves much to be desired. One might argue that a principle which could significantly impinge upon the scope of admissibility³⁸ should, at the very least, be formulated as a statutory provision.³⁹

Limitation of doctrine to certain proceedings

13 A lacuna or gap may also occur where a section of the Act recognises a doctrine but limits its parameters to a specific area of legal practice. In *Public Prosecutor v Knight Glenn Jeyasingam*,⁴⁰ the High

32 The most likely reason being that the general principle governing the discretion to exclude was not well established before 1940. For an account of the history of the principle, see *R v Sang* [1980] AC 402 at 410, 433 (per Lord Diplock). The dissenting judge in *Cheng Swee Tiang*, Ambrose J, was of the view that the common law on this point was not consistent with the Evidence Act.

33 *Ie*, relevant facts admissible pursuant to ss 6-57.

34 Section 138(1) of the Act requires the court to admit facts which are relevant.

35 See *Yusof bin A Samad v PP* [2000] 4 SLR 58; *PP v Heah Lian Khin* [2000] 3 SLR 609; *PP v Sng Siew Ngoh* [1996] 1 SLR 143; *PP v Teo Ai Nee & Anor* [1995] 2 SLR 69; *Chan Chi Pun v PP* [1994] 2 SLR 61; *Chi Tin Hui v PP* [1994] 1 SLR 778; *How Poh Sun v PP* [1991] SLR 220, [1991] 3 MLJ 216.

36 To the extent that its prejudicial effect outweighs its probative value. (See *R v Sang* [1980] AC 402.)

37 As when it would otherwise cause unfairness.

38 *Ie*, where a judge decides to exercise his discretion to exclude.

39 See, for example, s 78(1) of the Police and Criminal Evidence Act 1978 (England), which states: "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

40 [1999] 2 SLR 499.

Court ruled that representations made to the Attorney-General's Chambers with a view to consensual case disposal without trial (including offers to plead to a lesser or related offence, representations made for withdrawal of charges and pleas for leniency) may not be admitted as evidence at trial.⁴¹ The court referred to common law authorities in various jurisdictions in support of this principle.⁴² Although the court acknowledged that s 23 of the Evidence Act limits the inadmissibility of negotiations for the purpose of settlement ("without prejudice" communications) to civil cases,⁴³ it concluded that the policy of this provision could be extended to the criminal realm. The fact that the section clearly excludes criminal cases did not prevent the court from regarding the Evidence Act as a facilitative statute which invites a purposive (or not literal) approach to interpretation in the interest of manifesting "the will and intention of Parliament".⁴⁴

14 While there can be no question that important policy considerations⁴⁵ require that such representations should not be admitted as evidence, the court's methodology in leading to this conclusion must be called into question. Part one of the Evidence Act, including s 23, governs the admissibility of evidence in Singapore. Neither that, or any other, provision in Part one precludes the admissibility of representations in criminal cases.⁴⁶ In reality, the application of the underlying policy of s 23 to criminal cases amounted to a judicial extension rather than a purposive interpretation of the provision.⁴⁷ The court sought to justify this approach on the basis that a literal interpretation would not have given effect to the "intent and will of Parliament".⁴⁸ Yet, it is quite clear that "intent and will" behind the Evidence Act was very much that of Stephen which the legislature at that time adopted.⁴⁹ Far from being a facilitative statute, the Evidence Act is

41 *Ibid*, at para 54. This principle extends to "representations made to the average Singaporean's representative in Parliament during Meet the People Sessions". (*Ibid*, at 71.)

42 [1999] 2 SLR 499 at paras 29–41.

43 Section 23 states: "In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."

44 [1999] 2 SLR 499 at paras 56–60

45 *Ibid*, at paras 42–52.

46 As noted by the court in *Knight-Glenn Jeyasingam*, at para 53.

47 Although the court was of the view that this amounted to a "consistent extension of the policy recognised under s 23 of the Evidence Act". (*Ibid*, at para 55.) Also see Michael Hor, "Evidential Privilege: Sacrifice in the Search for Truth" [2001] SJLS 410–432.

48 [1999] 2 SLR 499 at para 57.

49 *Ibid*, at para 60. No privileged attached to representations made for the purpose of consensual resolution of a criminal case in Stephen's day.

a code which was created with the specific objective of reformulating the law of evidence as it stood at the end of the 19th century. To apply the “intent and will” of a modern day Parliament to a code in such circumstances would be tantamount to pouring new wine into old wine skins. It will be shown that such an approach can indeed “burst” the scheme of the Act.⁵⁰ Part of this problem lies in s 9A of the Interpretation Act which omits any reference to sources which might reveal the approach and purposes of the draftsman relevant to the understanding of older statutes such as the Evidence Act.⁵¹

Limitation of doctrine itself

15 *Glenn Knight* concerned the problem of a statutory provision which restricts the operation of a doctrine (communications for the purpose of consensual determination of a case) to civil suits. The related situation of s 128 of the Evidence Act concerns the limitation of a doctrine (legal professional privilege) rather than the sphere of litigation in which it operates. This section sets out the elements of the privilege which attaches to communications between a lawyer and his client.⁵² It does not recognise “third party” or “litigation” privilege – essentially that the communication is privileged if it is made for dominant purpose of legal proceedings – which only became a well established common law principle subsequent to Stephen’s time.⁵³

16 The principle of “third party” or “litigation” privilege is integral to the adversarial process. So much so that the courts have applied it⁵⁴ despite

50 See below: “Common law’s effect on the Act’s framework” (after note 106 in the main text).

51 In *Lee Kwang Peng v PP* [1997] 3 SLR 278 at para 46, the Chief Justice noted that such works are “conspicuously absent” from the list of interpretive aids. (See main text from note 110.)

52 Also referred to as “legal advice privilege”.

53 Section 128(1) states: “No advocate or solicitor shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.” See Pinsler JD, “New Twists in Legal Professional Privilege: Communications for the purpose of litigation and between lawyer and client.” [2002] 14 SacLJ.

54 See *Wee Keng Hong Mark v ABN Amro Bank NV* [1997] 2 SLR 629, at 630–631; *Brink’s Inc & Anor v Singapore Airlines Ltd & Anor* [1998] 2 SLR 657; *The Patraikos No 2* [2001] 4 SLR 308.

the omission of any reference to it in the Act.⁵⁵ This approach is reminiscent of the decision of the majority of judges in *Cheng Swee Tiang* to recognise the common law discretion to exclude evidence in the absence of such a principle in the statute.⁵⁶ The same arguments might be canvassed as to whether there can be any inconsistency where the common law principle is not recognised by, and, therefore, does not conflict with, the Act. However, there is a difference between the two situations in that the discretion to exclude is not expressed in the Act as an independent principle whereas the “dominant purpose” test is part of a more general doctrine of legal professional privilege recognised by the Act in the context of lawyer and client communications.⁵⁷ As the Act actually addresses the doctrine of legal professional privilege, albeit in the limited context of lawyer and client communications, it may be argued that its intention (in its present, unamended state) is not to recognise “litigation” privilege. If so, the application of the common law principle may not be consistent with the Act.

17 Other examples of the limitation of doctrines in the Act as compared to the common law include the subjects of corroboration and opinion evidence. The only express “corroboration” provisions concern accomplices,⁵⁸ the effect of a witness’s previous statement⁵⁹ and corroboration by linked circumstances.⁶⁰ The Singapore courts have developed their own jurisprudence concerning corroboration or evidence in support of the testimony, particularly in relation to children and victims of

55 In *Glenn Knight*, the High Court was compelled to consider the Evidence Act because the statute specifically addresses the doctrine (privilege pertaining to negotiations with a view to settlement) that was examined in that case.

56 See main text at note 30.

57 *Ie*, governed by ss 128–131 of the Act.

58 Section 135(2) states: “Any rule of law or practice whereby at a trial it is obligatory for the court to warn itself about convicting the accused on the uncorroborated testimony of an accomplice is hereby abrogated.” Also note s 116, para (b), which states: “an accomplice is unworthy of credit and his evidence needs to be treated with caution”.

59 Section 159 provides: “In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved”. Also see s 147(7): “Notwithstanding any other written law or rule of practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement which is admissible in evidence by virtue of this section shall not be capable of corroborating evidence given by the maker of the statement.”

60 Section 158(1) states: “When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the court is of the opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact to which he testifies.”

sexual offences.⁶¹ With regard to opinion evidence, the Act limits the circumstances in which a non-expert witness may give evidence and omits the more recently developed principle that a non-expert witness may give his opinion if this would effectively convey relevant facts concerning the issues in the case.⁶² The Act also restricts expert evidence to testimony given in court and treatises offered for sale⁶³ but does not address the circumstances in which an expert may refer to other materials such as reports and statistics for the purpose of giving his opinion.⁶⁴ Nevertheless, the courts have, as a matter of necessity, admitted such evidence in practice.⁶⁵

Clash between Act and common law

Direct conflict

18 The scenarios contemplated above involve the approach to be taken to the omission, vagueness or imprecision of a statutory provision. No less difficult is the situation in which both the Evidence Act and the common law adopt different approaches to an issue. One assumes that a head-on confrontation would be easier to resolve because in this event it is clear that the common law principle should be disregarded as required by s 2(2). Hence, in *Jayasena v R*,⁶⁶ the Privy Council determined that the allocation of the burden of proof to the defendant to prove self-defence pursuant to s 107 of the Act⁶⁷ could not be varied by a common law rule which only

61 See *Rosli bin Othman v PP* [2001] 3 SLR 587; *Lee Kwang Peng v PP* [1997] 3 SLR 278; *Teo Keng Pang v PP* [1996] 3 SLR 329 (sexual offences against children); *Tang Kin Seng v PP* [1997] 1 SLR 46; *Khoo Kwoon Hain v PP* [1995] 2 SLR 767; *John Benjamin Cadawanaltharayil v PP* [1995] 3 SLR 805 (victim of sexual offence).

62 See *R v Davies* [1962] 1 WLR 1111; *Sherrard v Jacob* [1965] NI 151; *Graat v R* [1982] 144 DLR (3d) 267. Also s 385(3) of CPC, which admits opinion evidence of the non-expert witness in criminal cases for the purpose of “conveying relevant facts personally perceived by him”.

63 Evidence Act, s 62(2). The expert may also refer to real evidence (*ibid*, at s 62(3)).

64 The Criminal Procedure Code does cater to out of court statements of opinion. See s 385(1) and (2). Also see the new O 40A of the Rules of Court.

65 There is a dearth of law on how to interpret the relationship between the opinion evidence provisions and the common law rules. Also see new O 40A of the Rules of Court which endorses this practice.

66 [1970] AC 618.

67 Section 107 provides: “When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code (Cap 224), or within any special exception or proviso contained in any other part of the Penal Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.”

imposed a duty on the accused to raise a reasonable doubt as to whether he acted in self-defence. Section 107 was premised on the common law position in the 19th century which had been altered by the House of Lords in *Wooltnington v DPP*.⁶⁸ In *Jayasena*, the Privy Council concluded that s 107 requires the accused to prove defences, exceptions and qualifications according to the standard set by s 3 of the Evidence Act.⁶⁹ It rejected the argument that the duty to adduce evidence is a burden of proof and emphasized that there is one single burden of proof which can only be discharged according to the appropriate standard of proof.⁷⁰

19 However, a diametrically opposite approach to that of the Privy Council in *Jayasena* was taken by the Court of Criminal Appeal (as it then was) in *Syed Abdul Aziz v PP*.⁷¹ The Court of Criminal Appeal even went to the extent of endorsing the High Court's reliance on *Woolmington* for the proposition that an accused person has an evidential (not legal) burden to establish an alibi defence pursuant to s 105 of the Act. The approach is wholly contrary to that of the Privy Council in *Jayasena* which, incomprehensibly, was not put before or cited by the Court of Appeal or High Court. Section 105 and illustration (b)⁷² mirror s 107 in requiring the accused person to prove alibi. Either both sections impose or do not impose the legal burden. After *Jayasena*, there is no basis (unless the principle in that case is specifically departed from) for distinguishing the burdens in the two sections. Yet, in *Syed Abdul Aziz*, the Court of Criminal Appeal ruled that it was for the prosecution to prove that the accused could not rely on alibi and for the accused to prevent such proof by raising a reasonable doubt as to his presence at the crime.⁷³ In stating that "where the accused raises an alibi, the burden of proving the alibi is on the accused but this is only an

68 [1935] AC 562. Lord Diplock stated in *Jayasena (ibid, [1970] AC 618, at 625)*: "The Code [*ie*, Evidence Act] embodied the old criminal law and cannot be construed in the light of a decision that has changed the law."

69 *Ie*, the burden of proving private defence on a balance of probabilities. (*Yuvaraj v PP* is considered in the main text from note 15).

70 *Ie*, beyond a reasonable doubt or balance of probabilities. See s 3 of the Act and *Yuvaraj v PP (ibid)*.

71 [1993] 3 SLR 534.

72 Section 105 states: "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." Illustration (b) states: "*B* wishes the court to believe that at the time in question he was elsewhere. He must prove it."

73 *Ie*, the accused merely bore the evidential burden. This position has since been endorsed in cases such as *Ramakrishnan s/o Ramayan v Public Prosecutor* [1998] 3 SLR 645; *Public Prosecutor v Chang Siew Chin* [2002] 1 SLR 117.

evidential burden,”⁷⁴ the Court of Criminal Appeal in *Syed Abdul Aziz* could not have been aware of the admonition in *Jayasena* that there is only a single burden of proof in the Evidence Act.

20 There is, of course, an important distinction between the private defence (raised in *Jayasena*) and alibi (*Syed Abdul Aziz*) as defences. The former, being a plea of confession and avoidance, does not impinge on the prosecution’s duty to prove the elements of the defence. The alibi defence does overlap with the prosecution’s duty to prove *actus reus* pursuant to s 103. The resolution of this difficulty is to regard the prosecution’s and accused’s roles in separate stages. The prosecution has, in the first instance, to prove, *inter alia*, that the accused was at the scene of the crime. If the prosecution adduces sufficient evidence to this effect so that the court determines that the accused has a case to answer, the accused will then have to prove his alibi on a balance of probabilities pursuant to s 105. The accused’s obligation to prove alibi does not come into effect unless and until the prosecution has discharged its own burden of establishing that the accused committed the offence. This necessarily means that the accused may be acquitted if he can raise a reasonable doubt as to whether he was at the scene of the crime (for example, through the cross-examination of the prosecution witnesses who said they saw him at the scene). However, if he is unable to do this, he must prove where he was through the adduction of his own evidence.

21 This view may be justified on the premise that the alibi defence is easily concocted. The accused may be able to arrange for a witness to falsely testify that they were together at a certain place. More often than not (depending on the credibility of the witness) this may create a reasonable doubt resulting in a wrongful acquittal. Proof on a balance of probabilities in these circumstances would be more appropriate because a true alibi would normally be eminently provable. Apart from being consistent with the Privy Council’s interpretation of s 107 in *Jayasena*, such an approach to illustration (b) of s 105 would also be true to the principle underlying s 108. This section provides that when facts are “especially within the knowledge of any person,” that person has the burden of proving those facts. Arguably, this principle would apply to an accused who says he was elsewhere.

74 The confusion stems from the word “burden” which does not necessarily connote proof. Where the accused has an evidential burden, this is a burden to adduce evidence, not to prove anything. Proof involves the adduction of facts to establish the legal elements of a case.

22 Although the suggested interpretation of illustration (b) and s 105 may be somewhat cumbersome, it does preserve the integrity of the definition of “prove” and maintains consistency between ss 105, 107 and 108 and other sections which include this word.

Conflict in operation of principle

23 Inconsistent judicial approaches are also apparent where both the Act and the common law recognise a rudimentary principle but differ in its operation. In *Re Wee Swee Hoon (Deceased); Lim Ah Moi & Anor v Ong Eng Say*,⁷⁵ Brown J decided not to apply the English rule concerning cross-examination of a witness by the party who calls him as the then s 155 of the Evidence Act (now s 156) provides a different and more flexible rule.⁷⁶ In contrast, in *Poh Kay Keong v PP*,⁷⁷ the Court of Appeal decided to ignore the restrictive words in s 24 of the Act – “having reference to the charge” – and ruled, applying a purposive approach, that a confession would be involuntary if it had been improperly induced even though the inducement did not literally refer to the charge.⁷⁸ This interpretation clearly makes sense because the potential for improper inducements (resulting in involuntary confessions) clearly extends beyond the literal wording of s 24.⁷⁹ Yet, this is another case where a common law principle was applied in a manner inconsistent with the express words of the Act and illustrates

75 [1953] 1 MLJ 123.

76 The English rule required, inter alia, a finding that the witness was “adverse”. No such requirement is imposed by the Evidence Act.

77 [1996] 1 SLR 209.

78 The Court of Appeal stated: “Turning to s 24, apart from the strict and literal construction, there is certainly another possible construction, namely, that an inducement, threat or promise has reference to the charge against the accused person, if it was made to obtain a confession relevant or relating to the charge in question. Such a construction, in our opinion, gives sense and meaning to s 24 and also achieves the purpose for which that section was enacted.” The court applied the common law by referring to *Customs and Excise Commissioners v Harz & Anor* [1967] AC 760 and related cases.

79 As the Court of Appeal stated: “If the words ‘having reference to the charge against the accused’ are construed strictly and literally then even a threat of assault made directly to the appellant would not fall within s 24. Suppose instead of the threat (as alleged by the appellant), the investigating officer threatened the appellant to beat him up or have him beaten up by other officers unless he gave a ‘good’ statement. Such a threat on a strict and literal construction has no reference to the charge also. Suppose further the appellant’s brother and sister-in-law had also been arrested and the investigating officer threatened the appellant that he would have them beaten up unless the appellant gave the required statement. In both these examples, the threats were made; in both, the threats have no reference to the charge, and in both, the threats were made to induce the appellant to give the required statement.” ([1996] 1 SLR 209 at 219–220.)

a contrary route to that taken by Brown J in *Wee Swee Hoon*.⁸⁰ Indeed, the approach in *Poh Kay Keong* may be distinguished from the situation in which the Act can embrace a common law rule even in the absence of a direct reference to it. Hence, the courts have ruled that a confession is inadmissible if it is involuntary through oppression.⁸¹ Although the Act does not expressly refer to oppression as a vitiating factor, the words ‘inducement’ and ‘threat’ clearly encompass oppressive behaviour as they do any other conduct which impinges on voluntariness.⁸²

24 The approach in *Poh Kay Keong* resembles that of the Court of Criminal Appeal in *Chin Tin Hui v PP* in respect of s 6 of the Act.⁸³ This provision formulates the common law doctrine of *res gestae* as it stood at the time of the introduction of the Act in 1893:

“Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.”

25 Stephen said of the “transaction” that “it is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong ...”.⁸⁴ The narrowness of this principle characterised English law until the early 1970s with the result that any fact occurring outside the transaction, no matter how close in time to it, would be excluded. For example, in *R v Bedingfield*,⁸⁵ the victim’s reference to her assailant immediately after her throat had been cut were regarded as inadmissible.⁸⁶ The English authorities were applied in the Singapore case of *Mohamed Allapitchay v R*,⁸⁷ in which the cries of a stab victim identifying his attacker immediately after the incident were not considered to be part of the *res gestae*.

⁸⁰ Although the different methodologies in the two cases had the same objective in mind: a more flexible legal doctrine.

⁸¹ See, for example, *Ong Seng Hwee v PP* [1999] 4 SLR 181; *Fung Yuk Shing v PP* [1993] 3 SLR 421; *PP v Tan Boon Tat* [1990] SLR 375 (HC); [1992] 2 SLR 1 (CA).

⁸² See s 24 of the Act.

⁸³ [1994] 1 SLR 778.

⁸⁴ See the notes to Art 3 of the *Digest*.

⁸⁵ (1879) 14 Cox CC 341.

⁸⁶ In the words of Cockburn CJ in *R v Bedingfield* 14 Cox CC 341 cited with approval by Lord Reading in *R v Christie* [1914] AC 545, “It was not part of anything done, or something said while something was being done, but something said after something done.” Also see *Teper v R* [1952] AC 480; *R v Gibson* (1887) 18 QBD 537.

⁸⁷ [1958] 1 MLJ 197.

26 The common law “transaction” principle was superseded by the more flexible test of ascertaining whether the possibility of concoction could be disregarded.⁸⁸ Lord Wilberforce explained in *Ratten v R*⁸⁹ that in the case of statements made after the crime or civil wrong, the question to be asked is whether “the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded”.⁹⁰ The effect of the “spontaneity” principle is that facts which do not form part of the actual transaction may be admissible if they are obviously reliable. Hence, the old cases such as *Bedingfield* and *Mohamed Allapitchay* would be decided differently in the context of this common law development.

27 In Singapore, however, s 6 remains the same after 109 years. However, in *Chin Tin Hui*,⁹¹ the Court of Criminal Appeal appeared to endorse the more flexible common law test by determining that the oral statements of the accused to a CNB officer in response to the latter’s questions immediately after the accused’s arrest (in relation to the transportation of drugs) could form part of the *res gestae*.⁹² Without expressly saying so, the Court of Criminal Appeal applied Lord Wilberforce’s formulation in *Ratten v R* to the effect that the trial judge “rightly discarded any possibility of concoction by ANO Chua”. The court added that the accused’s oral statements ‘formed part of the transaction of transporting the drugs’.⁹³ This decision may be controversial if viewed in the strict context of s 6 of the Act. The transportation of the drugs ended as soon as the accused was arrested and handcuffed.⁹⁴ It follows that the transaction (in Stephen’s words, the group of facts associated with the crime)⁹⁵ had ended before the accused uttered his statements.

28 It is not even entirely clear that the common law test was satisfied in the circumstances. Although the High Court and Court of Appeal were of the view that the statements were made spontaneously, there must be a question as to whether the *res gestae* principle can apply to facts occurring after the intervention of the authorities particularly where the

88 See *Ratten v R* [1972] AC 378; *R v Andrews* [1987] AC 281.

89 [1972] AC 378.

90 *Ibid.*, at 389 to 390.

91 See main text at note 83.

92 [1994] 1 SLR 778, at 780. The accused was asked about contents of the plastic bag he was carrying. The accused responded: “gift, heroin, 59 sachets”.

93 *Ibid.*

94 The judgment states (*ibid.*): “Immediately after the appellant had been arrested and handcuffed, ANO Chua asked him what was contained in the light brown polythene bag he was carrying.”

95 The relevant extract is set out in the main text below note 83.

evidence would favour the latter. Notwithstanding the reputation that a police force or investigative agency might have for its integrity and uprightness, there can be no guarantee against falsehood or embellishment of evidence in rare and isolated circumstances in the interest of securing a conviction. In the words of Lord Reid in *Ratten*, “the possibility of concoction or fabrication ... is... an entirely valid reason for exclusion, and is probably the real test which judges in fact apply”.⁹⁶ The statements of the accused would more appropriately have been admitted as a confession to knowledge and possession of drugs pursuant to ss 17 and 21 of the Act.⁹⁷

Different conceptual bases

29 The difference between the “transaction” and “spontaneity” approaches to *res gestae* is not the only instance of divergence between s 6 of the Evidence Act and the common law. The Act treats *res gestae* as original evidence which is admitted without the need to consider exclusionary rules such as hearsay. Stephen stated in his *Digest of the Law of Evidence*:

“Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue ... although if it were not part of the same transaction it might be excluded as hearsay.”⁹⁸

30 Therefore, the Act pre-empts the hearsay rule by admitting statements on the basis that they form part of the transaction. In contradistinction, the common law admits *res gestae*, not as original evidence, but as an exception to the rule against hearsay.⁹⁹ The Singapore courts have yet to analyse and acknowledge the different conceptual bases for *res gestae* in the Act and at common law. Indeed, there are judicial statements by the High Court which indicate that *res gestae* doctrine constitutes an exception to the hearsay rule as in the case of the common law.¹⁰⁰ More emphatically, the

⁹⁶ [1972] AC 378, at 389. *Chin Tin Hui* is a weaker case for the application of the common law “spontaneity” test than *Bedingfield*, *Teper* and *Allapitchay*, which did not involve the intervention of the authorities and in which the evidence was not admitted.

⁹⁷ They appear to have been made voluntarily pursuant to s 24. The statements would not have been admissible pursuant to s 122(5) of the CPC because they were made to Narcotics Officers rather than the police. Statements of facts showing knowledge are also admissible pursuant to s 14.

⁹⁸ Stephen’s *Digest*, at p 4.

⁹⁹ See, for example, *Ratten v R* (at note 89).

¹⁰⁰ See *Public Prosecutor v Wong Wai Hung & Anor* [1993] 1 SLR 927; *Saga Foodstuffs Manufacturing (Pte) Ltd v Best Food Pte Ltd* [1995] 1 SLR 739. In Malaysia, the Federal Court in *Leong Hong Khie & Tan Gong Wai v PP* [1986] 2 MLJ 206 considered the doctrine of *res gestae* as an exception to the hearsay rule.

High Court stated in *Soon Peck Wah v Woon Chye Chye*:¹⁰¹ “By virtue of s 2(2) of the Evidence Act, the common law exceptions to the rule have also been incorporated into our law of evidence.”¹⁰² This is problematic at a number of levels. There is no question that there are a number of exceptions in English law which are not recognised or only acknowledged in modified form by the Act.¹⁰³ Their application would be inconsistent with the Act. In any event, the hearsay rule no longer applies in civil cases in England.¹⁰⁴ Another difficulty arises from s 377 of Criminal Procedure Code, which provides that hearsay evidence may only be admitted by virtue of statute. It follows that the common law exceptions concerning the hearsay rule cannot apply in criminal cases. A further concern arises from Stephen’s intention to comprehensively formulate the traditional exceptions to the hearsay rule in ss 17–41 of the Evidence Act. The application of all common law exceptions without discrimination would dislocate this scheme. Finally, the difference between the conceptual bases of s 6 of the Act and the common law doctrine is underlined by the placement of the provision in the early sections governing original evidence¹⁰⁵ rather than in the grouping of the hearsay exceptions.¹⁰⁶

Common law’s effect on the Act’s framework

31 Particular difficulties arise where the adoption of a common law principle threatens to undermine the structure of the scheme of the Act. In *Tan Meng Jee v PP*,¹⁰⁷ the High Court determined that the common law test for determining the admissibility of similar fact evidence – whether its probative value is outweighed by its prejudicial effect – was implicitly recognised by ss 14 and 15 of the Evidence Act. However, it is quite clear that this balancing approach was not established at common law until the decision of the House of Lords in *Boardman* in 1972 (eighty years after the enactment of the Evidence Act). Prior to *Boardman*, the English courts applied what was then termed as the “categorisation” approach by which similar fact evidence would be admitted for specific purposes. Such evidence would not be admissible unless it came within a recognised category. In the Act, the categories are set out in ss 14 and 15, which characterise the state of the law governing similar fact evidence at the end

101 [1998] 1 SLR 234.

102 *Ibid.*, at para 34.

103 For example, s 32(a) of the Act, which is broader than the common law exception regarding dying declarations.

104 By the Civil Evidence Act, 1995 (c38).

105 *Ie*, ss 6–11.

106 *Ie*, ss 17–41.

107 [1996] 2 SLR 422.

of the 19th century.¹⁰⁸ The decision of the court in *Tan Meng Jee* to superimpose the common law balancing principle on ss 14 and 15 assumes (wrongly, in the writer's view)¹⁰⁹ that the principles in the two jurisdictions are consistent with each other.

32 The development of the balancing principle in *Tan Meng Jee* was taken further in *Lee Kwang Peng v PP*.¹¹⁰ The Court determined that as ss 14 and 15 only govern the admissibility of evidence to establish *mens rea* or a mental element, similar fact evidence which establish *actus reus* should be admitted pursuant to s 11 (b). The court justified this approach on its view that the words "highly probable or improbable" are representative of the balancing mechanism of probative force against prejudicial effect in *Boardman*. Although the court acknowledged that the use of s 11 (b) would be contrary to the scheme of the Act as conceived by the draftsman,¹¹¹ it declared its willingness to ignore this concern in the interest of giving effect to the common law principle. Yong Pung How CJ stated:

"I am of the view that to affirm this interpretation of s 11(b) would also pave the way for future treatment of the Evidence Act as a facilitative statute as opposed to a mere codification of Stephen's statement of the law of evidence."

33 In one stroke of the pen, the court converted the code into a source of law capable of judicial development unrestricted by concerns as to inconsistency (and, therefore, contrary to s 2(2)) and regardless of the statutory framework. According to the scheme of the Act, similar fact evidence is only admissible pursuant to ss 14 and 15 (and only then) to establish *mens rea* or a mental element, not *actus reus*. Stephen himself pointed this out when criticising a case in which hearsay evidence was admitted pursuant to s 11(b).¹¹² Stephen never intended s 11(b) to be used as a supplementary provision to admit evidence not encompassed by the

108 Prior to the case of *Makin v Attorney-General for NSW* (1894) AC 57 which began the process of extending the categories.

109 And in the view of Michael Hor, "Similar Fact Evidence in Singapore: Probative value, Prejudice and Politics" [1999] SJLS 48–81.

110 [1997] 3 SLR 278.

111 *Ibid*, at paras 44–46.

112 Therefore, in *R v Parbhudas Ambaram & Ors* [1874] 11 Bombay HCR 90, West J considered that s 11 had to be limited so as not to let in every conceivable fact merely because it was probative in some way. This view was endorsed by Stephen in his *Digest*, at p 155 and in his *Introduction to the Evidence Act*, at p 123. Also see *Karam Singh v R* [1967] 2 MLJ 75, in which the court ruled that although motive was a relevant fact and admissible pursuant to s 8, the provision had to be read subject to the subsequent provisions in the Act governing the exceptions to the hearsay rule (s 32 in this case).

positively formulated exceptions to the exclusionary rules in ss 14–57. The danger of using s 11 (b) in this manner is that it undermines the scope of admissibility set by those later provisions, even to the extent of rendering them redundant. Section 11(b) is intended to be a residuary provision for the purpose of admitting a non-relevant fact (*ie*, a fact not declared relevant by ss 6–10) which may be relevant when considered in conjunction with other relevant or non-relevant facts.¹¹³

The problem of statutory correlation

34 The problem of symbiosis between the Act and the common law is not merely a challenge for the judges. Legislators have also introduced modern principles of evidence in a form sharply contrasting with the Act. In 1976, a number of significant amendments were introduced to both the Act and the CPC.¹¹⁴ These provisions were based on the reported recommendations of the UK Law Revision Committee.¹¹⁵ To take just the series of provisions in the CPC admitting hearsay,¹¹⁶ it is apparent that an exclusionary rule is formulated¹¹⁷ in contrast to the inclusionary approach of the Act.¹¹⁸ Whereas the exceptions in the Act cater to specific situations, the CPC exceptions are not so limited.¹¹⁹ The common law concept of notice is adopted by the CPC¹²⁰ but not by the Act. There are a variety of supplementary provisions¹²¹ in the CPC concerning such matters as credibility, reliability and weight which are not present in the Act. While the CPC admits verbally uttered implied assertions,¹²² the Act makes no mention of such evidence. The distinction between ordinary statements and documentary records only features in the CPC,¹²³ not the Act. Out of court statements of opinion are dealt with by the CPC, not by the Act. The rationale for these differences between the Evidence Act and the CPC eludes most scholars. Presumably, the intention is that separate rules should govern criminal and civil suits. Yet, this means that hearsay evidence is more readily available to the prosecution against the accused (because of broader CPC exceptions which are not limited to specific situations) than it is to parties in a civil suit. Such a conclusion is hardly

¹¹³ See the illustrations to s 11.

¹¹⁴ See Acts 10/76 and 11/76.

¹¹⁵ Their 11th Report on Evidence. (HMSO Cmnd No 4991, 1972.)

¹¹⁶ See ss 377–385 of the CPC.

¹¹⁷ *Ibid*, s 377.

¹¹⁸ Sections 17–41 of the Act.

¹¹⁹ Compare ss 17–41 of the Act with ss 378 and 380 of the CPC.

¹²⁰ See s 379(2)–(4) of the CPC.

¹²¹ *Ibid*, ss 381 and 383.

¹²² *Ibid*, s 378(4).

¹²³ *Ibid*, ss 378 and 380.

satisfactory when one considers the almost universal acceptance of the need for safeguards in the law of criminal evidence.¹²⁴

Conclusion

35 The application of the common law or ideas of a foreign system of law in the face of inconsistency with the Evidence Act is understandable given the need to tap more than a century of accumulated judicial wisdom. Viewed in this context, one can understand the judicial desire to extend the common law to Singapore despite confrontation with the statute. In *Lee Kwang Peng*, Yong Pung How CJ declared that in the future the Act should be treated as a facilitative statute rather than a code.¹²⁵ Notable though this objective may be, the judiciary is faced with a statutory codification the parameters of which are essentially fixed and systemised according to the law as it stood in 1893. A facilitative statute has an entirely different aim of guiding, but not limiting, the judicial development of the law. As the aims of a code and facilitative statute are in stark contrast to each other, the re-classification of the Act as a facilitative mechanism (without more) may lead to confusion and uncertainty.¹²⁶

36 There is a related difficulty here pertaining to consistency in the interpretation of the Act. While the characterisation of the statute as a facilitative mechanism does not bar a strict and literal interpretation of a provision, the courts must rationalise the interpretative route they desire to take to avoid the perception of arbitrariness or idiosyncrasy. In *Sim Bok Huat Royston v PP*,¹²⁷ Yong Pung How CJ reiterated the Court of Appeal's literal interpretation of s 24 of Act in *Thiruselvam s/o Nagaratnam v Public Prosecutor*¹²⁸ to the effect that the section does not apply the

¹²⁴ This can be seen in other rules of evidence such as the rule excluding evidence of bad character (which is very much less strict in civil cases) and the burden of proving the elements of a crime beyond a reasonable doubt (in contrast to the burden of proof on a balance of probabilities in civil cases). In England, the recommendations of the Law Revision Committee were not adopted because of these concerns. (In fact, the Law Revision Committee sought to apply the provisions of the Civil Evidence Act 1968 to criminal cases.) Accordingly, the exceptions in criminal cases were very much more narrow than civil cases until the hearsay rule in civil cases was abolished in England in 1995.

¹²⁵ The relevant extract is set out in the main text below note 112.

¹²⁶ As explained in the course of this article, this is already evident in some cases where the court has either ignored s 2(2) of the Act or rationalised the application of the common law on the basis of a non-literal application of its provisions irrespective of the Act's underlying scheme.

¹²⁷ [2001] 2 SLR 348 at para 20.

¹²⁸ [2001] 2 SLR 125.

requirement of voluntariness to a confession made by a witness in the capacity of an accused in previous proceedings against him. His Honour declared, in apparent antithesis to his endorsement of the facilitative approach in *Lee Kwang Peng*, that “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”.¹²⁹ Irrespective of the merits of this conclusion,¹³⁰ the omission of the court to explain the basis of its literal construction of s 24 raises questions as to when different interpretive approaches are to be applied. Another instance of the problem is illustrated by *Juma’at bin Saad v PP*,¹³¹ in which the court did not seize the opportunity to resolve, through a purposive interpretation, the long outstanding and crucial issue of the incidence of the burden of proof in respect of defences which overlap with the prosecution’s duty to establish the elements of a crime. The accused, who was charged with housebreaking, argued on appeal that he was intoxicated at the time of his commission of the offence. The High Court concluded that as intoxication is a defence in s 86(2) of the Penal Code, s 107 of the Evidence Act required the accused to prove it on a balance of probabilities. The court preferred to adhere to the terminology of the Act despite its acknowledgment of “hypothetical and artificial questions in the process”¹³² – in particular, the duty of the prosecution to prove that the accused had the necessary intention to commit the crime. The court ruled that the prosecution was entitled to assume that the accused was sober at the time of the offence and that it was for the accused to prove that he was not. The defence of accident pursuant to s 80 of the Penal Code raises similar issues which could have been resolved in *Juma’at bin Saad*¹³³ if the Act had been approached as a facilitative statute, as advocated in *Lee Kwang Peng*.

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¹²⁹ *Ibid*, at paras 42–43.

¹³⁰ The merits are considered by Michael Hor in his article: “Prior inconsistent statements: Fairness, statutory interpretation and the future of adversarial justice,” which also appears in this journal.

¹³¹ [1993] 3 SLR 338.

¹³² *Ibid*, at 345.

¹³³ The point was made in the Sri Lankan case of *R v Chandrasekera* (1942) 44 NLR 97 at 125 that defences ought to be differentiated according to whether they raise separate issues (which the accused would be required to prove) or merely challenge the prosecution’s case. This view was also supported by the Privy Council in *Jayasena v R* [1970] AC 618. However, as both cases concerned the plea of private defence, the incidence of the burden of proof in relation to the defence of accident and related defences affecting *mens rea* (such as intoxication) require a definitive statement by the Court of Appeal.

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