DISCOVERY IN CRIMINAL CASES: DISCLOSURE BY THE PROSECUTION IN SINGAPORE AND MALAYSIA

This article attempts to describe, critically, the extent of disclosure by the prosecution authorities of evidence — whether intended to be used in summary and High Court criminal trials, or left unused - to the criminal defendant. Disclosure is studied at the pre-trial, preliminary inquiry, and trial stages. It is argued that whatever disclosures are made, by law or practice, are inadequate and unsatisfactory, that increased disclosure would be more consistent with the courts' duty to ensure a fair trial for an accused person, and that an official review of this area of the law is overdue.

"[T]he element of surprise in criminal trials should be reduced as far as possible and … the main points at issue should be clarified before any trial begins."

– The Thomson Committee (Scotland)

"[S]ince it is impossible to equip both the prosecution and the defence with the same investigative facilities the only reasonable way to attain advance equality in access to the evidence is through the "system", that is through a discovery procedure."

— Law Reform Commission of Canada

I. The Problem of Discovery

A. *Aims of the Criminal Process*

IT has been lamented that while the law and practice of pre-trial discovery in civil cases has been well-established for many years (in most jurisdictions), comparable procedures in criminal cases are a relatively neglected area of the law[1] and that it is an issue on which academic writers in England have been largely silent.[2] On the other hand, there appears to be an extensive literature on the subject in the United States, and there are several law reform studies and proposals in existence in Canada, Australia and New Zealand. Needless to say, research and writing on criminal discovery in Singapore and Malaysia is severely wanting apart from a few short or

[1] New South Wales (N.S.W.) Law Reform Commission, Discussion Paper on Criminal Procedure, Vol. I, *Procedurefrom Charge to Trial: Specific Problems and Proposals* (1987), para. 4.1.

[2] John Baldwin, *Pre-Trial Justice* (1985), p.11.

general but much-needed articles,[3] research papers[4] or a sketchy mention in a scathing critique in a public lecture.[5] There is, however, much local case-law which only tends to underscore the substantial extent of non-disclosure by the prosecution of its case and thus the unsatisfactory nature of the position of the defence.

It is rarely disputed that the primary aim of the criminal process is the determination of the guilt or innocence of alleged offenders in bringing them to justice. The pursuit of truth, however, is tempered by the "rules of the game" characteristic of the adversary process and a respect for human dignity, so that we abide by the twin principles of the presumption of innocence and the placement upon the prosecution of a heavy burden to prove its case against an accused person, beyond reasonable doubt. Thus, in convicting the guilty, we have to be prepared to pay the price of the acquittal- or the quashing of the conviction of some persons who may factually be guilty of the offences charged. The criminal process must always seek to provide a balance between the pursuit of truth and the fair treatment of the accused, and to avoid the confusion — sometimes deliberate, by strict law enforcement advocates — of the term "accused" with that of "offender", which the former becomes on being found guilty by a court of law after a fair and proper process. Until the accused is found guilty, the criminal process's only concern should be the protection of society (as by a refusal of bail) and not the erection of formidable barriers to the preparation of his defence and to his possible acquittal, by the employment of every weapon in the arsenal that the prosecution has at its disposal. The prosecution, it must be remembered, has the vast resources of the State, particularly advantageous in its investigation of crime, while the accused has few of his own. Little wonder, then, that the State, in its perceived role of protecting society, is generally unwilling to make concessions to alleged offenders whilst being perfectly willing to provide for reciprocity in discovery in civil cases where the parties are usually both private litigants and the standard of proof required is lower than that placed on the prosecution in a criminal case.

In 1923, the American judge, Judge Learned Hand said in the case of *U.S.* v. *Garsson,* on denying the defendants' motion for inspection of a grand jury's minutes, that:

> "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition

[3] See: J. Velupillai, "Right of Access to Statements Made by Witnesses to Police", Vol. XV, No. 2 (1982) INSAF, p. 35; Edgar Joseph Jr.,"Rights of Accused – Law and Practice" [1976] 2 M.L.J. ii, at ix-x; Ahmad Ibrahim, "Reform of the Criminal Law" [1979] J.M.C.L. 1, at 31-36; R. Pala Krishnan, "Preparation for Criminal Trials", [1988] 4 C.L.A.S. News 4.

[4] Lim Wee Teck, "The Phantom of Pre-Trial Discovery by the Accused: The Singapore Experience" [1982] Law Times 19; V.K. Rajah, "Discovery of Statements Made to the Police" (unpublished); and Low Kee Yang, "Discovery: A Closer Look" (unpublished). (The latter two papers are available in the Faculty of Law Library (closed stacks), National University of Singapore).

[5] David Marshall, "Facets of the Accusatorial and Inquisitorial Systems" [1979] 1 M.L.J. xxix, especially pp. xxxi-xxxii.

> he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see … Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."[6]

These words, articulated in stentorian tones, make a powerful case against disclosure by the prosecution, one that any State authority or ardent Benthamite would seize upon to end all further discussion. However, Judge Learned Hand's view is felt to be a particularly extreme one which is not tenable today[7] and the writer inclines to the view, shared by most writers on the subject of criminal discovery, that a more cogent case can be made out for disclosure by the prosecution, without a corresponding disclosure by the defence beyond what is already available to the prosecution.

B. *Disclosure by the Defence*

Certainly, under Singapore law (and to some extent under Malaysian law) and practice the accused's position is considerably less advantageous than under American law, or under English law. In both of the local jurisdictions, for instance, the police have wide powers under the Criminal Procedure Codes,[8] of search and seizure, to interview and take written statements from, a wide range of potential witnesses whom they believe to be acquainted with the circumstances of the case; and to interrogate and obtain statements from the accused, before and after he is arrested in relation to the crime, and without having to allow his lawyer or any third party to be present.

In Singapore, the C.P.C. also provides (instead of the former "cautions") for the accused to be served with a notice in writing warning him that failure to mention any facts upon which he may rely in his defence may have an adverse effect on his case; and adverse inferences may then be drawn.[9] Further, his failure to testify when called upon to make his defence, may also give rise to adverse inferences against the accused.[10] Such provisions, coupled with the requirement of notices of alibi[11] to be served by the defence on the prosecution prior to trial in both jurisdictions, serve already to give the prosecution considerable and, it is contended, adequate, discovery of the defence while still preserving the notion of a fair trial for the accused.

6 291 F. 646, 649.

7 See: J. Baldwin, *supra,* note 2, p. 12. See also, Roger J. Traynor, "Ground Lost and Found in Criminal Discovery" (1964) 39 N.Y.U.L. Rev. 228, 229.

8 Criminal Procedure Code, Cap. 68 (Singapore Statutes, 1985 edn.), ss. 25-31, 61-70, 121-122; Criminal Procedure Code (Malaysia, Reprint No. 1 of 1971 (as amended), F.M.S. Cap. 6), ss. 16-22, 54-65, 112-113.

9 Criminal Procedure Code (Singapore), *op. cit.,* ss. 122(6), 123(1).

10 *Ibid.,* s.196(2).

11 See, *e.g.,* the Criminal Procedure Code (Singapore), ss. 155, 182.

C. *Mutual disclosure?*

It may be asked why disclosure should not be a "two-way street", so that there should be mutual disclosure. The first argument against this, however, is that it is inconsistent with the principles of the criminal process to *compel* the defence to disclose any part of its case.[12] Instead, mutual disclosure becomes possible only on a voluntary basis. There are several discovery schemes that may be considered on this basis, and the writer will refer to these in his conclusions. A second argument is simply that, as will be shown, the prosecution appears already to enjoy the balance of advantage in discovery in jurisdictions like Singapore. To require further disclosures by the defence would (in the writer's view) make Singapore's criminal justice system incline towards the absurd. On the contrary, the writer will contend that there is a good case to be made out for considerably more disclosure by the prosecution, and that there is very little to be said for either increased disclosure by the defence or even the preservation of the status quo.

D. *Purposes of Disclosure by Prosecution*

What then, it may be asked, is the purpose of disclosure by the prosecution? This appears to be well summed up by the New South Wales Law Reform Commission:

> "The purpose of disclosing the prosecution case against an accused person is fourfold:
>
> (a) to ensure, unless there is a compelling reason to the contrary, that the accused has access to all the evidence relevant to his case;
>
> (b) to ensure the accused person is aware of the case that must be met, is not taken by surprise and is able to adequately prepare his or her defence;
>
> (c) to resolve non-Contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time;
>
> (d) in some cases to encourage the entering of guilty pleas at an early stage of the proceedings."[13]

It may be seen from the above stated purpose of disclosure, that it is not merely to strengthen the hand of the accused; it is also to improve the standard of the administration of justice overall.[14] Disclosure by the prosecution is likely to engender greater cooperation by the defence, especially where the accused is legally represented, resulting in a faster resolution of cases and a better relationship between the prosecution and defence coun-

[12] Law Reform Commission of Canada, *Study Report: Discovery in Criminal Cases* (1974), Working Paper, para. IV, 64-5. Cf. JUSTICE, *The Truth and the Courts* (1980), p.14; Royal Commission on Criminal Procedure (U.K.), Report (1981), H.M.S.O., Cmnd. 8092, para. 8.12; N.S.W. Law Reform Commission, Discussion Paper (Vol. I), *op. cit.,* para. 4.69.

[13] *Op. cit.,* para. 4.2.

[14] *Ibid,* para. 4.6.

sel. It is thus of benefit to the prosecution and to the State as well to have early disclosure.

It cannot at present be said that it is obvious that the accused person is getting the fairest trial possible simply because the prosecution has the burden of proof of guilt and has to establish it beyond reasonable doubt. It must not be forgotten that "traditionally, the prosecution is under an obligation to conduct its case fairly, impartially and with due regard to the interests of the accused person; it should not be motivated solely by the desire to secure a conviction. The prosecution also has a responsibility to ensure that the accused person receives a fair trial."[15]

This is sometimes manifested in some jurisdictions by the prosecution's voluntary disclosure of certain information, such as prosecution witness names, addresses, or copies of their statements in advance of the trial. Certainly, it is fundamental in our system that material witnesses not being called by the prosecution should be made available or offered to the defence. The writer will return to these and other questions. What is contended here is that discovery of the prosecution will *not,* as is often supposed by its opponents,[16] interfere with the administration of justice or disadvantage the prosecution.

II. No General Discovery

A. *"Trial by Ambush"*

Unlike civil cases, there is no obligation on parties in a criminal case to exchange "pleadings" or information as to the evidence they may intend to adduce, or the number of witnesses they may wish to call. There is no equivalent to the civil "summons for directions" governing the future prosecution of the case. The general rule seems to be that, as far as possible, each party to a criminal trial will attempt to maximise the element of surprise. Except in High Court trials, which are preceded by the preliminary inquiry — "committal proceedings" in England — what takes place in summary trials (the vast majority of cases) is basically a "trial by ambush".[17]

B. *The Charge as Discovery*

In all cases, it is the charge itself which serves as the primary form of pretrial "discovery" to an accused person. The charge must specify the nature of the offence alleged and the statutory provision against which it is said to have been committed,[18] is required to contain such particulars as the

15 *Ibid.,* para. 4.3.

16 Traynor argues: "In criminal litigation, . . . there is continuing resistance to pre-trial discovery, the more formidable because it has not only the force of law and habit but also the force of adrenal reaction against seemingly plausible menaces." He adds that the opponents fear the misuse of discovery by the accused to subvert the prosecution case by resort to perjury and witness-tampering, or the accused's continued use of the privilege against self-incrimination. But he also adds that "the most cogent arguments for change counter that resistance". (Roger J. Traynor, *op. cit.,* at pp. 228-9).

17 A term used by Samuels J.A. in *Maddison* v. *Goldrick* [1976] 1 N.S.W.L.R. 651 at 668.

18 Criminal Procedure Code (Singapore), s.158.

time and place of the alleged offence and the person against whom, or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged,[19] and according to the nature of the case, sufficient particulars of the manner in which the alleged offence was committed.[20] The charge has to be clear to the accused and "duplicity" of charges within the single charge must be avoided.[21] Errors in the statement of the charge or its particulars will be treated as material if the accused was misled by the error.[22]

In addition to the charge, the accused may learn of the specific alleged *facts* relating to the offence when the prosecutor has read to him in court a statement of facts. However, this occurs only at the stage when the plea is taken and is a practice that enables the accused to more fully understand what he may be pleading guilty to, and to decide whether to accept the facts as alleged. The charge and statement of facts are the only formal means of discovery of the prosecution in summary trials.

C. *The Preliminary Inquiry as Discovery*

It is generally accepted that the primary purpose of a preliminary inquiry is to determine whether there is sufficient evidence for the accused to be put on trial, on the premise that no one should be caused to stand trial if there is not some reasonably sound evidence against him.[23] However, it also serves other secondary purposes. It offers the accused an opportunity to avoid a trial or establish his innocence by early disclosure of evidence that he has. More important, it is said to function as a vehicle for pre-trial discovery of the prosecution evidence to be advanced at the trial and allows him an opportunity for cross-examination. It is of tactical benefit to the accused for he need not disclose his hand at this stage after looking at the prosecution's hand, and may rely instead on the prosecution establishing a case sufficient for committal of the accused. Then, the accused still retains the advantage of surprise at the trial, an advantage viewed by some as illogical.[24] The writer will examine the limited function served by the preliminary inquiry as a discovery procedure further in this paper.

III. Pre-Trial Discovery – Summary Trials and Generally

It is proposed to examine various categories of evidence that may be available to the prosecution and their corresponding availability in law and practice to the defence. Any principles stated here are applicable to all summary trials, and may be applicable to High Court trials where no provision is already made by statute for disclosure in the course of a preliminary inquiry — which provisions will be considered in Section IV below.

19 *Ibid.,* s.159.
20 *Ibid.,* s.160.
21 *Ibid.,*s.168.
22 *Ibid.,* ss. 162, 395-6. And see the Singapore Court of Criminal Appeal decision of *Lim Hong Yap* v. *P.P.* [1978] 1 M.L.J. 154.
23 Law Reform Commission of Canada, *Study Report* (*op. at.*), Research Paper, pp. 64-67.
24 See Roger J. Traynor, "Ground Lost and Found in Criminal Discovery in England", (1964) 39 N.Y.U.L. Rev. 749, 756.

A. *First Information Reports*

An information report, sometimes referred to as a *first* information report, and made under the C.P.C. provisions,[25] is the report which usually sets into motion an investigation by the police.[26] Its maker, the informant, will commonly (but not always) be the complainant or victim of the offence and chief prosecution witness in a subsequent trial arising out of the investigation, in which case it will become imperative[27] for the report to be adduced in evidence to "corroborate"[28] the complainant's testimony, if a presumption[29] is not to be drawn that the report, if produced, would be unfavourable to the prosecution.

Does the accused have the right to inspect the first information report, and if so, also to take a copy thereof, in the preparation of his defence? The first of a line of instructive Malaysian cases on the accused's right of inspection of statements in the possession of the prosecution on the grounds of his "interest" in them, was *Anthony Gomez* v. *Ketua Polis Daerah Kuantan.* Here, the accused's solicitor had written to the local O.C.P.D. requesting a certified copy of the first information report in order to prepare his client's defence. This was refused, and on complaint to the State Legal Adviser (also the Deputy Public Prosecutor), he received the same rebuff. He then applied by motion to the High Court for an order pursuant to the Specific Relief Act, 1950[30] that the O.C.P.D. supply a certified copy of the report to the applicant. The High Court rejected the contention that the report was a public document which the applicant had a right to inspect within section 76[31] of the Evidence Act.

On appeal, the Federal Court, in an important judgment[32] ruled that the applicant had a right to inspect the first information report under the common law as it was a "public document" under section 74 of the Evidence Act and he, being a person "interested" in the report and inspection being necessary for the protection of his interest, the O.C.P.D. should have supplied him with a certified copy on request (subject to payment of the legal fee therefor) under section 77 of the same Act. Although it was conceded on behalf of the O.C.P.D. that the information report was a public document, the Federal Court was prepared to agree that it was indeed a public document. They approved of Indian authority[33] that a

25 Criminal Procedure Code (Singapore), s.115; Criminal Procedure Code (Malaysia), s.112.

26 The police may, of course, start an investigation of their own volition where they have reason to suspect the commission of a seizable offence (s.119, Criminal Procedure Code, Singapore) or begin investigation on referral from a Magistrate who has himself taken cognizance of an offence (Part VI, Criminal Procedure Code, Singapore), as, by receiving a complaint.

27 *Tan Cheng Kooi* v. *P.P.* [1972] 2 M.L.J. 115.

28 Evidence Act, Cap. 97 (Singapore Statutes, 1985 edn.), s.159 (Evidence Act 1950 (Act 56, Revised - 1971) Malaysia, s.157).

29 A presumption of fact may be drawn under s.116, illustration (g), Evidence Act (Singapore); s.114, illustration (g), Evidence Act (Malaysia).

30 Act 137, Laws of Malaysia (Revised - 1974), s. 44 (1). Under s. 44 (1), a Judge may make "any order requiring any specific act to be done or forborne", by any person holding a public office or by any corporation or any court subordinate to the High Court.

31 Section 78 in the Evidence Act, Singapore.

32 [1977] 2 M.L.J. 24.

33 *Queen Empress* v. *Arumugam* I.L.R. 20 Mad. 189.

person charged with an offence is legitimately interested in knowing beforehand the particulars of the charge made against him and the names of the witnesses who are going to support it. On the other hand, "a mere curiosity or even an interest in some other matter which could perhaps be better served by the inspection, would not be sufficient".[34]

The source of the common law right is said to be *Mutter* v. *Eastern and Midlands Railway Co.* Here, the English Court of Appeal had to consider the question whether a right of inspection at common law included a right to take *copies* of public documents. In ruling that the right to take copies was always incidental to the right to inspect, Lindley L.J. said:

> "When the right to inspect and take a copy is expressly conferred by statute the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle . . . "[35]

This passage was cited with apparent approval in *Anthony Gomez.* However, the reasoning in *Anthony Gomez* is unclear. The Federal Court said the applicant had a right to inspect the report, a public document, under the common law because of his interest in it. However, *why* was the report a "public" document within section 74 of the Evidence Act? The Court did not say. Presumably the Court thought it fitted within section 74(a)(iii) of the Evidence Act, thus forming the acts or records of the acts of a public officer. The Court did say, however, that the applicant had a right to inspect under the common law because of his interest in it. But surely the common law defines not the scope of the right to inspect but rather the scope of the right to *inspect and take a copy* of, a public document. In *Mutter's* case,[36] the Court of Appeal conceded that the right to copy did not necessarily coincide with that of inspection and that there might be cases where inspection was all that could reasonably be required or where a person's right to inspect may extend to much more than he had a right to take a copy of.[37] The "interest" referred to seems to be that in what one wants to *copy,* rather than that in inspection alone.

Yet another approach seems to have been taken in the Malaysian case of *Husdi* v. *P.P.,* a petition for (criminal) revision before Syed Othman F.J. The accused requested copies of all statements recorded by the police from witnesses in the course of investigation, which included the first information report. His Lordship ruled that the right of the accused to the first information report was no more than a consequence of his right to be informed as soon as may be of the grounds of his arrest under Article

[34] [1977] 2 M.L.J. 24, at 26, quoting the Madras High Court in *State of Madras* v. G. *Krishnan* A.I.R. 1961 Mad. 92.
[35] (1888) L.R. 38 Ch.D. 92, 106.
[36] *Ibid.*
[37] *Ibid.,* pp. 106-7.

5(3)[38] of the Malaysian Constitution; and that this Article itself was derived from the common law.[39] Supplying the accused with the report gave the accused the first opportunity to explain his (alleged) conduct. His Lordship also pointed out that it was a notorious fact that the police in accident cases did supply a copy of the first information report on payment of a prescribed fee and that if they could make it a practice in accident cases, he could see no reason why they should be justified in withholding the supply of first information reports in the more serious cases which affected the liberty of the accused.[40]

The approach in *Husdi* is a novel and possibly more convincing approach than that taken in *Anthony Gomez.* However, it is strange that in *Husdi,* although mention was made of the Federal Court decision in *Anthony Gomez,* the judge, Syed Othman F.J., had no need to have recourse to it and instead provided his own reasons for allowing inspection of the first information report.

However, *Husdi* is not the most recent and thus the last word on this subject. In 1981, *Loo Fang Siang* v. *Ketua Polis Daerah, Butterworth*[41] was decided by Arulanandom J. Here, civil proceedings were begun by the applicant against the rider of a motorcycle for damages in respect of an accident he had suffered in a collision with the motorcycle. The applicant had applied through his solicitors to the respondent for police reports, plans and photographs taken in connection with the accident. The respondent provided the relevant documents except the police report made by the rider on the ground that its maker was not the client of the applicant's solicitor. An application was then made to compel the respondent to supply the said report for the purposes of processing his civil claim. The respondent, although conceding that the police report was a "public" document, argued that *Anthony Gomez's* case had no relevance as the applicant here was seeking a police report made by another person for the purpose in *civil* proceedings and not for the purpose of defending himself in criminal proceedings.

However, Arulanandom J. allowed the application and applied *Anthony Gomez's* case, holding that the applicant indeed had an interest in the police report. He said:

> ""His interest" is not qualified or limited to matters where he is involved in criminal prosecution. He has just as much interest in police reports made by third parties which may be defamatory, false or imputing negligence on the highway, lack of due care and consideration, breach of statutory duty, etc., etc. And a person who seeks to establish negligence on the part of someone who collided with him has a legitimate interest in knowing what the other person's version of the accident as given in his police report is."[42]

38 Article 9(3) of the Constitution of the Republic of Singapore (Reprint No. 1 of 1980, Singapore Statutes, 1985 edn.).
39 [1979] 2 M.L.J. 304, at 305-6.
40 *Ibid.,* p.306.
41 [1981] 2 M.L.J. 272.
42 *Ibid.,* p.273.

He also approved of a definition of "public document" in *Earl Jowitt 's Dictionary of English Law,* as "a document made for the purpose of the public making use of it".[43] Thus (he said) the public should have the right of access to a public document in the absence of express statutory limitation of it or unless it was established that public access was contrary to public interest.

Arulanandom J.'s proposition as to the interest in reports to the police made by third parties, it may be noted, is broad enough to encompass reports which are not only first informations, but also any other report to the police that makes some kind of allegation about the applicant's character or conduct. It is thus a considerable extension of the principle stated in *Anthony Gomez.*

In Singapore the question of the accused's legal entitlement to the first information report has not yet arisen. However, it would seem that it may not in fact arise as the police apparently do supply a copy of the first information report to the accused or his counsel on payment of a fee.[44]

B. *Statements of Prosecution Witnesses*

The writer here refers to all statements to the police other than first information reports made by persons supposedly acquainted with the facts and circumstances of a case and who may be called by the prosecution to testify at a criminal trial as well as any statements which may be recorded by prosecution counsel from potential witnesses. The former are statements made "in the course of a police investigation"[45] and both these and the latter may be referred to as prosecution "witness statements" generally.

1. *Statements Made in the Course of Investigation*

A Federation of Malaya case, *Martin Rhienus* v. *Sher Singh,*[46] decided that a statement made to the police under section 112 of the Malayan C.P.C., and thus in the course of investigation, was "absolutely privileged", applying the reasoning in an Indian decision, *Methuram Dass* v. *Jagganath Dass,*[47] that the maker was required to attend before the police, could be interrogated, and was bound to answer truthfully; and as such, was in no materially different position from an ordinary witness, who was not liable in legal proceedings to another for what he had said. Thus it would seem that the court was ruling that a statement to the police could not be the basis for legal action against the maker for defamation, by analogy with the immunity of an ordinary witness who had been compelled to testify in court.

[43] In *Pg. Mahli bin Png. Noordin* v. *Dato Haji Abd. Rahman* [1988] 2 M.L.J. 581, 582-3, Roberts C.J. (of the High Court of Brunei Darussalam) disapproved of this definition, preferring the test of Suffian L.P. in *Khoo Siew Bee's* case, namely, that a document was 'public' if it formed the act or record of the act of a judicial officer who was under a duty to record [the statement]. See: *Khoo Siew Bee* v. *P.P.* [1979] 2 M.L.J. 49, 50.

[44] V.K. Rajah, *supra,* note 4, makes this observation at p.8.

[45] See Criminal Procedure Code (Singapore), ss. 121-2; Criminal Procedure Code (Malaysia), ss. 112-3.

[46] [1949] M.L.J. 201.

[47] I.L.R. 28 Cal. 794.

However, in *Husdi* v. *P.P.,* where the court had to consider the right of the accused to inspect statements of witnesses to the police, the court applied *Martin Rhienus* v. *Sher Singh,* although it involved an action for defamation. Syed Othman F.J. said:

> "... I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses."[48]

He also said that the defence was not entitled to the police statements as they themselves might record a statement from a prosecution witness if they wished, there being no property in a witness.

Is the court's rationale for denial of inspection correct? The writer is convinced that the reasoning of Syed Othman F.J. cannot be supported. First, the holding that a document is "privileged" for the purposes of actions in defamation is quite irrelevant to a holding that it is inadmissible or incapable of inspection. To do this is to confuse "privilege" in defamation with "privilege" in the law of evidence, such as legal professional privilege, the privilege of police informers or some other public interest privilege. Certainly any suggestion that *Martin Rhienus* was laying down a principle of inadmissibility of police statements would be unwarranted. Even if it did, it is well-established now at common law that public policy must lean instead towards disclosure to the accused if it is necessary to aid in establishing the accused's innocence.[49]

Second, if there is a real risk of tampering with prosecution witnesses by disclosure of their statements, surely there is an equal if not greater risk of tampering, in His Lordship's suggestion of the interview of prosecution witnesses by the defence, which follows from the absence of "property" in a witness.[50]

As for the allegedly "public" nature of the police statement, Syed Othman F.J. said that "simply because a document is the act of a public officer does not give a person, interested or otherwise, a right to inspect". The Evidence Act did not confer any right; it presupposed the existence of a right to inspect derived elsewhere. The right to inspect a police statement, "which is a statutory, not a common law creature, would depend on the construction of the relevant provisions, particularly those under the Criminal Procedure Code".[51] In his examination of the Evidence Act and

[48] [1979] 2 M.L.J. 304, 307.

[49] See: *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494,498; *D* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 218; *Neilson* v. *Laugharne* [1981] 1 All E.R. 829, 837; *R* v. *Barton* [1972] 2 All E.R. 1192; *Cain* v. *Glass (No. 2)* (1985) 3 N.S.W.L.R. 230.

[50] *Husdi* v. *P.P.* went on appeal to the Federal Court of Malaysia ([1980] 2 M.L.J. 80), but the rulings as to pre-trial discovery made by Syed Othman F.J. were not challenged there. The Federal Court was urged to consider discovery at the trial, which issues will be dealt with by the writer elsewhere in this paper.

[51] [1979] 2 M.L.J. 304, at 306.

the C.P.C., he found "no provision which is construable as giving a right to inspect a police statement".

Another commentator[52] correctly points out that this reasoning is inconsistent with that in *Anthony Gomez,* a decision of the Federal Court. He also suggests that it is not logical for the Malaysian courts to allow discovery of first information reports and the accused's own cautioned or uncautioned statements, and to disallow discovery of prosecution witness statements, as they are all statements made to the police and the accused has an equal interest in all of them in the preparation of his defence. He feels that the only possible (although ill-founded) justification for the ruling in *Husdi* is the fear of witness tampering. However, he submits that sections 76 and 78 of the Evidence Act of Singapore[53] do not extend to statements by witnesses to the police because of the existence of section 122 (2) of Singapore's C.P.C.. This provides for a definite time when such a statement will become available to the defence: at the trial on the request of the defence and on the direction of the court for the purpose of cross-examination when the witness is testifying. The commentator adds:

> "If [section 76 and section 78] of the Evidence Act were construed as conferring on the accused person a right to the statements of witnesses, then [section 122 (2)] would be otiose. The power of the court to direct the prosecutor to supply the accused with a copy of the statement or statements would be without effect — the accused having already obtained the statements under the Evidence Act".[54]

This writer finds this reasoning convincing, and is probably a more plausible reason for saying prosecution witness statements are not discoverable. However, Syed Othman F.J.'s argument that there is no statutory basis for a right to inspect may have some substance and is not without support.[55]

2. *Common Law Duties of the Prosecution*

There is a well-established procedure in English law which may be dubbed "the Rule in *R.* v. *Bryant and Dickson"*[56] and which is summarised by *Archbold* as follows:

> "Where the prosecution have taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence and should supply the defence with the witness's name and address. The prosecution are not under the further duty of supplying the defence with a copy of the statement which they have taken".[57]

[52] V.K. Rajah, *supra,* note 4, pp. 9-12.
[53] *I.e,* Evidence Act (Malaysia), ss. 74 and 76 respectively.
[54] V.K. Rajah, *supra,* note 4, p.14.
[55] See *Kulwant* v. *P.P.* [1986] 2 M.L.J. 11, 12.
[56] (1946) 31 Cr. App. R. 146.
[57] Archbold, *Criminal Pleading, Evidence and Practice* (42nd edn., 1985), p.331.

Thus it seems the prosecution themselves are never under any duty to supply copies of witness statements to the defence before the trial, even if they decide not to call the witnesses themselves. This "rule" has been applied in Malaysia[58] as well. However, in Australia, the High Court has ruled[59] that there is no legal obligation on the prosecution to disclose either the identity or a copy of the statement of a witness it does not intend to call. The duty of the prosecution is thus narrower than that in England.

Some confusion appears to have been caused by Lord Denning M.R.'s dictum in *Dallison* v. *Caffery.* He said there of the duty of a prosecuting counsel or solicitor: "if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence."[60] Archbold[61] suggests that, as *Bryant and Dickson* cannot be reconciled with Lord Denning's statement, it is preferable practice to allow the defence to see such statements unless there is good reason for not doing so.

3. *Interviewing Prosecution Witnesses*

It is necessary to examine the duty, if any, of the prosecution to allow the defence access to potential prosecution witnesses with a view to taking a statement from them; and the right of the defence to contact and to interview them.

It has been well-established at common law that there is no "property" in any witness of fact.[62] Thus, in theory, counsel for either party may interview any witness, whether he is going to be called by the other party or has already given evidence at a preliminary inquiry. Sir Theobald Mathew stated the position in England as he understood it in 1952:

> "It is the undoubted right of a solicitor to see any witness who, he thinks, may assist his client's case. The ruling of the Law Society on this matter is that there is no property in a witness and that, as long as there is no question of tampering with the witness or seeking to persuade him to alter his story, it is open to the solicitor for either party, in civil or criminal proceedings, to interview and take a statement from any witness, or prospective witness, at any stage of the proceedings, whether or not that witness has been interviewed or indeed called as a witness by the other party."[63]

58 *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49, 50.
59 *Lawless* v. *The Queen* (1979) 53 A.L.J.R. 733.
60 [1965] 1 Q.B. 348, 369.
61 *Op. cit.,* p.331.
62 See: *Harmony Shipping Co. SA* v. *Davis and Others* [1979] 3 All E.R. 177.
63 Sir Theobald Mathew, *The Department of the Director of Public Prosecutions* (1952), p.15 (cited by Roger J. Traynor *supra,* note 24, at 763). Sir Theobald then thought that there was an exception to this right, where a witness had already given evidence before the examining justices or magistrate (in committal proceedings), but a Lord Chief Justice of England ruled that there was no exception, although it might not be necessary for anyone to interview a witness after he had given evidence at a preliminary hearing. In fact today, as most committals are "paper committals", whether in England, Singapore or Malaysia, the defence will know the content of the witness's written statements.

In spite of this right and the practice in England, the Bar Committee in Singapore had, until 1966, followed its old practice and refrained for a time from advising its members to exercise their rights on the understanding that the prosecution would always call witnesses included in the prosecution's list. However, it reversed this practice and advised its members to exercise their rights to interview any witness listed by the prosecution including the complainant, owing to the growing practice by the prosecution of refraining from calling listed witnesses, thus depriving the defence of the opportunity of taking a statement from them and of deciding whether to call them as witnesses.[64]

The practice in Singapore[65] tends now to follow that in England but solicitors tend to be cautious in interviewing prosecution witnesses in order to avoid prosecution allegations of tampering with witnesses or the Court's suspicion of it.[66] Thus, any interview is likely to take place with advance notice to the prosecution authorities, or at least, with an independent witness to the interview being present.

Perhaps the words of David Marshall, once Singapore's premier criminal case advocate, merit consideration:

> "6.2 . . . [W]hat is the logic in refusing full disclosure in all criminal proceedings, including those in the Subordinate Courts?
>
> 6.3 Criminal Trials are not poker games. . . Their purpose is not to enrich the egos of prosecutors or defence counsel.
>
> 6.4 I recommend that all statements obtained in the course of investigation and all exhibits collected should be made available to the Defence, whether or not the makers of the statements are called to the witness box or the exhibits admitted in evidence".[67]

4. *New Developments in England*

It may be pertinent to note certain new developments in England which allow a substantial measure of disclosure of information to the defence. The first was the issue by the Attorney General in 1982 of "Guidelines" for the disclosure of "unused material" to the defence in trials on indictment.[68]

64 See Law Society of Singapore Ruling on "Communication by Counsel with Witnesses Subpoenaed by the Prosecution" (Bar Committee Circular of 3rd March 1966), in *Practice Directions and Rulings Issued by the Law Society of Singapore* (1984), p.16

65 *Ibid.*

66 In the celebrated trial of 'Sunny Ang' in 1965, defence counsel had taken the liberty of interviewing the prosecution's principal witness on his understanding of the position in England, namely that there was no property in a witness. He had also taken the precaution of asking an independent lawyer to be present. However, prosecution counsel alleged that it amounted to an attempt to suborn the witness, and the trial judge initially thought the incident was 'scandalous' and 'appalling', and said 'I have never heard of this being done before', although he finally accepted counsel's explanation and that he had acted 'with the best of intentions'. See: Alex Josey, *The Trial of Sunny Ang* (1973) pp. 37-42.

67 D. Marshall, "Facets of the Accusatorial and Inquisitorial Systems", [1979] 1 M.L.J. xxix, p. xxxi.

68 [1982] 1 All E.R. 734; (1982) 74 Cr. App. R. 302.

The prosecution were enjoined to make available to the defence solicitor all "unused material" if it had some bearing on the offences charged and the surrounding circumstances of the case, subject to some exceptions. By guideline (1):

> "... the term "unused material" is used to include the following: (i) all witness statements and documents which are not included in the committal bundles served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at committal and (if not in the bundle) any documents referred to therein; (iii) the unedited version(s) of any edited statements or composite statement included in the committal bundles."

"Unused material" could thus include prosecution witness statements.

The second, after the experience[69] of several police jurisdictions of voluntary disclosure prior to Magistrates' Court summary trials, was the long-awaited implementation of the powers conferred on the Lord Chancellor by section 48 of the Criminal Law Act 1977, to make Rules for requiring the prosecutor to furnish advance information of the prosecution case.[70] By the Rules,[71] the prosecutor is required, on the request of the defence, to provide it with either (a) a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings, or (b) a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings.

Here again, relevant parts of witness statements could be disclosed, although a summary of their salient points may suffice.

C. *Names and Addresses of Prospective Witnesses*

The names and addresses of witnesses the prosecution intend to call are not as a matter of law required to be provided to the defence, whether in Malaysia or in Singapore.

In England, the names and addresses have in practice often been provided, and this could aid the defence in arranging its own interviews of the witnesses,[72] if it required this. In trials on indictment, there was never a problem, as the names are commonly placed, in practice, "on the back of the indictment"[73] or will be available in the committal papers with the depositions or written statements. Where the prosecution do not intend to call a witness, they are apparently under a legal (common law) duty[74] to provide the particulars to the defence so that the defence may interview them and perhaps even call them.

69 See J. Baldwin, *Pre-Trial Justice* (*op. cit.*) which was "A Study of Case Settlement in Magistrates' Courts".
70 The Magistrates' Courts (Advance Information) Rules 1985: S.I. 1985, Pt. I, p.1612.
71 *Ibid.,* rule 4 (1).
72 Marshall, *supra,* note 67, at p. xxxi, feels that a list of names of potential prosecution witnesses would aid the defence in *avoiding* communicating with the persons named.
73 Archbold, *supra,* note 57, pp. 334-5.
74 *R.* v. *Bryant and Dickson, supra.*

In trials on indictment, in the Attorney General's Guidelines on disclosure, "unused material", and in summary trials under the Magistrates' Courts Rules, "written statements" or summaries, could respectively include information of the names and addresses of witnesses; however, in both situations, there is a saving[75] from disclosure of facts or matters which in the prosecutor's opinion, would lead to any proposed witness being intimidated or the course of justice being interfered with. Thus, clearly, the prosecutor retains a discretion to withhold "sensitive" information such as the statement containing it as well as the name (or identity) and address of the maker.

It is not the practice, as far as can be ascertained, in Singapore or Malaysia, for the prosecution to supply names and addresses of witnesses it intends to call. The reason for this is presumably to avoid witness tampering. However, the disadvantage of non-disclosure is that defence counsel may unwittingly interview a witness he believes to be material without realising that the prosecution intend to call him as a witness.[76]

D. *The Accused's Own Previous Statements to the Police*

In 1979, a Malaysian High Court decided that an accused person was entitled to inspect and be supplied with a certified copy of, any cautioned statements made earlier by him to the police. In *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur,*[77] Suffian L.P. (sitting in the High Court), made this ruling, on an application by notice of motion by the accused for an order under section 44 (1) of the Specific Relief Act, 1950. He stated that cautioned statements (as were confessions) were public documents as they formed the act or record of the act of a public officer who was under a duty to record the statement within section 74 of the Evidence Act of Malaysia. Further, as with first information reports, the accused had an "interest" in his own previous statement. The court approved of the principle in *Anthony Gomez's* case[78] and extended it to cautioned statements made by the accused himself. Suffian L.P. also thought that his ruling was not unfair as there was no fear here of witness tampering and as the statement would have been signed by the accused himself, thus making any radical departure from it by him, difficult.

In *Husdi* v. *PP.,* Syed Othman F.J. said[79] in a *dictum* that Suffian L.P.'s ruling in *Khoo Siew Bee* "appears to apply to a statement by an accused whether or not he is under caution", as the accused's statement was part of his case, whether or not the prosecution accepted it or intended to use it.

Finally, in *Haji Abdul Ghani bin Ishak* v. *PP.,* Wan Yahya J. in the Malaysian High Court held that the judgment in *Khoo Siew Bee's* case "was intended to include all statements, whether cautioned or uncau-

[75] The Attorney-General's "Guidelines" for the disclosure of "unused material to the defence in cases to be tried on indictment", *supra,* note 68, nos. 6(v), 8, 13; Magistrates' Courts (Advance Information) Rules,(*supra*, note 70), rule 5.
[76] See Marshall, *supra,* note 67.
[77] [1979] 2 M.L.J. 49.
[78] *Anthony Gomez* v. *Ketua Polis Daerah Kuantan* [1977] 2 M.L.J. 24.
[79] [1979] 2 M.L.J. 304, 306.

tioned, made by the accused".[80] In *Haji Abdul Ghani,* the ruling was clearly *ratio,* as the applicant specifically applied for copies of all statements made by him, whether cautioned or uncautioned. However, the court declined to allow disclosure to the applicant of a statement made by his co-accused, as the co-accused was a competent witness against the applicant whose statement should thus be placed in the same category of statements made by witnesses. Here, the court thought *R.* v. *Bryant and Dickson*[81] was applicable, and the prosecution was under no duty to supply statements of potential witnesses to the defence.

In England, copies are made available to the accused of any statement written and signed by him as well as his co-accused's statements (written or oral), as a procedural courtesy,[82] but as that only. This unfortunately means that the police may choose not to disclose these to less cooperative defence counsel or to unrepresented defendants. Of course, where the prosecution intend to adduce the confession of the accused in evidence, the new procedure[83] in England would apparently require a copy to be given to the accused.

In Singapore, the High Court has, in a recent decision, *Kulwant* v. *P.P.,*[84] ruled that the accused has no right to inspect his own previous statement to the police in the absence of statutory authority for it. The applicant, awaiting committal proceedings for the offence of rape, applied to the High Court by way of "criminal motion", for an order that the respondent furnish him with certain documents, namely, the first information report, extracts from the station diary and the charge book, respectively, and two statements made by him to the police, one before he was charged, under section 121, and the second after the charge, under section 122(6) of the C.P.C.. There first information report and later statement were supplied to him. Counsel then abandoned applications for the extracts from the diary and charge book, leaving only the question of the discovery of the accused's earlier statement to be considered by Punch Coomaraswamy J.

In examining sections 76 to 78 of the Evidence Act of Singapore, Coomaraswamy J. ruled that none of these sections conferred a right to *inspect* a public document. He said, "The right to inspect must be found in a statute (even where there is a "real and tangible interest"), not in section 78". Statutes like the Companies Act and the Bankruptcy Act gave specific rights to inspect, after which a certified copy could be provided under section 78. The police and other administrative bodies often provided certified copies of public documents, in the exercise of administrative discretion and not in response to a statutory right. He added:

> "To say that section 78 gives a right of inspection is a totally unwarranted stretching of the language of that provision and will destroy the

[80] [1980] 2 M.L.J. 196, 197.
[81] (1946) 31 Cr. App. R. 146.
[82] Law Reform Commission of Canada, *Study Report (op. cit.),* p.138.
[83] *I.e.,* under the Attorney General's "Guidelines", 1982, supra, note 68, and the Magistrates' Courts Rules, 1985 *supra,* note 70.
[84] [1986J 2 M.L.J. 10.
[85] *Ibid,* at p.12.

necessary and justified confidentiality of the administration *and* of private persons involved in the bulk of public documents."

Coomaraswamy J. also rejected the argument that a right to inspect could arise merely from a "real and tangible interest" in the statement to be inspected. Presumably, His Lordship was considering the "interest" argument used successfully by defendant applicants in *Khoo Siew Bee's* case[86] and in *Haji Abdul Ghani's* case,[87] as these cases were not cited or considered in his judgment. Presumably also, these were not cited as His Lordship may have considered the later Malaysian case of *P.P.* v *Raymond Chia & Anor.,*[88] a decision of the Malaysian Supreme Court (which he did consider) as the last and most authoritative view of the Malaysian Courts on the subject of criminal discovery. As the writer will later show, this may not have been justified.

Has there ever been a *practice* of making available the accused's own statements to him, in Singapore? The answer must be equivocal. One writer[89] claims, from his enquiries (including interviews) that "informal discovery" has existed, but with requests for information helpful to the defence rarely being acceded to, except that discovery which was conceded by the prosecution was usually confined to the accused's own statements to the police. Another writer,[90] however, claims that his enquiries at the time revealed that the accused person was as a matter of practice, not supplied on his request with his own statements, whether cautioned or not. From a reading of *Kulwant,* there now appears to be a practice of providing the accused with a copy of his statement made under s. 122(6), after the notice in writing (warning) is served on and explained to him on his being charged or officially informed he may be prosecuted. However, certainly after *Kulwant,* the prosecution would be bolder in refusing inspection of all inculpatory statements made by the accused before the notice of warning is served.

This writer regrets the ruling made in *Kulwant,* although the reasoning that a right to inspect must have a statutory basis may have substance.[91] There are a number of unfortunate implications.

First, it is very necessary for any person who has made a statement to be allowed to inspect his own statement to appreciate what he actually did say some time before and which may have been damaging to himself or which he may have forgotten.

It is, further, anomalous that prosecution witnesses may be permitted to look over their own statements[92] to refresh their memories whilst accused persons are not permitted to look at their own statements, even when

[86] *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49.
[87] *Haji Abdul Ghani bin Ishak* v. *P.P.* [1980] 2 M.L.J. 196.
[88] [1985] 2 M.L.J. 436.
[89] Lim Wee Teck, *supra,* note 4, p.21.
[90] V.K. Rajah, *op. cit.,* p.9.
[91] Note that this argument is reminiscent of the view of Syed Othman F.J. in *Husdi* v. *P.P.* [1979] 2 M.L.J. 304 at 306, although the case was not cited in *Kulwant* v. *P.P.*
[92] See: *Lim Hong Yap* v. *P.P.* [1978] 1 M.L.J. 154, 157; *R.* v. *Richardson* [1971] 2 All E.R. 774, 776-7.

these are likely to be more damaging to them than prosecution witness statements would be to themselves. These would only be damaging to the extent of showing the witness's inconsistency.

Third, defence counsel have often received an unpleasant surprise at the trial on learning that their clients have made a confession to the police when they have hitherto gone on the assumption that the accused has made no incriminating statement to the police earlier, often based on the accused's own somewhat imperfect recollections and perceptions of what had transpired earlier, including the import of what he had said to the police earlier under conditions of stress. This element of doubt and possible surprise over what the accused is supposed to have said to the police may undermine counsel's preparation of the defence and does no credit to the administration of justice in the State. The sooner accused persons are allowed sight of their own statements, as is the law in Malaysia, the better it will be for the administration of justice. Defence counsel often need to test the veracity of their own client's story,[93] and the statements he made to the police are a way of testing it.

Finally, there simply appears to be no good reason why the prosecution should wish to withhold such statements from inspection, if it is not to hold an unfair "trump card" over the accused and his counsel. Certainly the fear of witness tampering does not apply in this situation, as Suffian L.P. pointed out in *Khoo Siew Bee's* case.[94] There is no clearer case of a person having an "interest" in a statement than the accused in his own statement.[95] However, the Court did not pursue this line of argument and the line of Malaysian cases on this point.

E. *The Co-accused's Previous Statements to the Police*

As was noted earlier, Wan Yahya J. in *Haji Abdul Ghani's* case[96] ruled that an accused person was not entitled to copies of any statement made by his co-accused as the co-accused was a competent witness against the accused; thus such a statement was one made by a witness and the same rule applied as for prosecution witness statements. Wan Yahya J. applied the reasoning of Suffian L.P. in *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur,* where Suffian L.P. had said, after allowing discovery of the accused's own cautioned statements:

> "Be it noted that my ruling only applies to statements recorded from the accused, not from others who are potential witnesses against or for them — as to which the prosecution are under no duty to supply to the defence, *Bryant and Dickson.*[97][98]

93 See: V.K. Rajah, *supra,* note 4, p.9.
94 [1979] 2 M.L.J. 49, 50.
95 The Law Reform Commission of Canada stated: "The importance of the accused's own statements is self-evident and need not be developed. It is difficult to imagine a class of evidence that is of greater significance to the case for the defence". (Report No. 22: *Disclosure by the Prosecution* (1984), p.23.)
96 *Haji Abdul Ghani bin Ishak* v. *P.P.* [1980] 2 M.L.J. 196. And see text above note 80, *supra.*
97 *R.* v. *Bryant and Dickson* (1946) 31 Cr. App. R. 146.
98 [1979] 2 M.L.J. 49, 50.

However, Wan Yahya J. rather cryptically remarked, after allowing the accused an order under section 51 of the C.P.C., to inspect documents seized from him in order to enable him to prepare his defence, that he might, by a similar application, obtain the co-accused's statements "for his own defence".[99]

In *P.P.* v. *Neoh Bean Chye & Anor.,*[1] Choor Singh J., in considering the effect of the rules in the former "Schedule E" of the C.P.C., ruled that there was no requirement in the rules that if two persons were arrested and one had made a statement, then before any statement was taken from the second person, a copy of the other's statement must be supplied to him.

F. *Previous Convictions*

If the accused or a prosecution witness have criminal 'records', such information would be valuable to the defence. The accused's own record will be pertinent to defence counsel who, in preparing the defence, will know not only damaging 'traits' the accused may have which the prosecution may wish to exploit if they amount to 'similar fact evidence', but will be forewarned of the dangers of putting his client's character in issue under the Evidence Act and so causing him to lose his 'shield' in the course of the trial. Prosecution witness's records will, of course, be crucial to their credibility — if the defence knows about them.

The problem is, how will the defence learn of them? In Singapore, provision[2] has been made for a register of criminals, and for a Registrar of Criminals and Assistant Registrars to keep a register of 'registrable particulars.' Similar provision is made in Malaysia.[3] Both countries have kept records since 1947, the Governor having directed[4] that a register of criminals be kept in the Central Criminal Registry in Kuala Lumpur and a subsidiary register be kept at the Criminal Record Office of the Criminal Investigation Department in Singapore.

The Criminal Record Office has continued to carry out the provisions of the Registration of Criminals Act in Singapore. However, its records are not open for public inspection and good reasons must be given to that Office for any inquiry into any person's record. Prosecution witness's records will not normally be provided to the defence by the Office, and neither does the prosecution make this a practice, even if they are aware of a witness's record. This makes any cross-examination by defence counsel of prosecution witnesses as to their character fraught with peril as the

[99] [1980] 2 M.L.J. 196, 198.

[1] [1975] 1 M.L.J. 3. The Court of Criminal Appeal (Singapore), whose judgment is also reported herein, dismissed the appeal from Choor Singh J.'s decision.

[2] Registration of Criminals Act, Cap. 268, 1985 edn. (Singapore).

[3] Registration of Criminals and Undesirable Persons Act, 1969 (Laws of Malaysia 1969, Act 7).

[4] Colony of Singapore Government Gazette, Vol. IV, No. 79 (July 22, 1949), Notifn. No. 2046, in exercise of powers conferred by s.4(2) of the Registration of Criminals Ordinance, 1949. A previous Registration of Criminals Ordinance had been in existence in 1947 until replaced by the 1949 Ordinance, the parent of the present one in Singapore. Mr. H.F. Ridley became the first Registrar of Criminals w.e.f. 23 June 1947: Notifn. No. 2045, Government Gazette *(supra).*

defence may have to resort to shooting in the dark or 'fishing', to discredit a witness, which may then bring into play the Evidence Act's reproofs[5] as to the asking of questions without reasonable grounds.

The cross-examination of a witness as to his character will not be meaningful unless counsel are allowed access to criminal records of all witnesses freely on stating their reasons. For this to depend entirely on the discretion of the Registry of Criminals is unsatisfactory. Also, if prosecution counsel are able to have easier access to records, they should be willing to disclose these to the defence.

G. *Copies of Specified Categories of Reports*

The Criminal Procedure Codes of both Singapore and Malaysia provide for the delivery by the Public Prosecutor of copies of certain reports to the accused before the commencement of a criminal proceeding, where he intends to give such reports in evidence at the proceeding. Under section 369[6] of the Singapore C.P.C., documents purporting to be reports under the hand of persons enumerated in sub-section (2), "upon any matter or thing duly submitted to him for examination or analysis or report", may be used in evidence in any inquiry, trial or other proceeding under the C.P.C. unless the court or the accused requires that person to be called as a witness — with the proviso that a copy thereof is given to the accused at least ten clear days before the commencement of the proceeding. All such reports are made admissible as prima facie evidence of the facts stated therein.[7]

The 'reports' include those of any Government chemist, Government pathologist, Government Bacteriologist, a gazetted document examiner, and duly appointed inspector of weights and measures. In addition, it may include 'any person, or class of persons to whom the Minister by notification in the *Gazette* declares that the provisions of this section shall apply'.[8]

The law reports contain several Malayan cases, all concerning Government Chemists' reports. It has been held that a trial 'commences' when the contentious phase has begun, namely, when the accused 'has claimed to be tried and his claim has commenced to be met', and not when he is charged and makes his plea or when his case comes up for mention.[9] It has also been held[10] that the proviso to the section is a condition precedent to the admissibility of a report and that failure to comply with the requirement of delivery of a copy to the accused ten days before the commencement of the proceeding will make the report inadmissible. It is

5 Evidence Act (Singapore), ss. 151-2; Evidence Act (Malaysia), ss. 149-50.
6 The Malaysian equivalent is s.399.
7 Criminal procedure Code, s.369(4).
8 *Ibid,* s.369(2)(g).
9 *P.P.* v. *Tay Tuan* [1953] M.L.J. 20; *Goh Tong* v. *P.P.* [1953] M.L.J. 251; *Chong Peng* v. *P.P.* [1954] M.L.J. 39, 40.
10 See *Chong Yik* v. *P.P.* [1953] M.L.J. 72; *P.P.* v. *Ng Fah* [1954] M.L.J. 150; *Chong Peng* v. *P.P.* [1954] M.L.J. 39.

not settled,[11] however, whether the failure of compliance will make any wrongful admission of a report an illegality or an irregularity (not occasioning a failure of justice) which is curable under section 396.[12]

H. *Copies of "Written Statements" Proved*

Section 371 (inserted in 1972)[13] of the C.P.C. of Singapore provides for the admissibility of a written statement by any person in any criminal proceedings (other than committal proceedings) "as evidence to the like extent as oral evidence to the like effect by that person", provided that certain specified conditions[14] are satisfied.

The conditions are: the inclusion of the purported signature of the maker and of a declaration by the maker that it is true to the best of his knowledge and belief and that he knew he would be liable to prosecution for wilfully false statements in it; that a copy of the statement is served by or on behalf of the party proposing to tender it, on each of the other parties, before the hearing; that none of the other parties or their legal representatives serves a notice of objection within seven days of the service of the copy; and that the accused has been legally represented prior to the hearing or the court is satisfied that the accused is aware of the provisions of section 371. However, the parties may agree before or during the hearing that the statement (under signature and declaration) should be tendered in evidence.

Under this provision, the prosecution may adduce statements of witnesses who are not to be called to testify in person, if it serves a copy of each of the statements in question on the accused (or, where there is a joint trial, on each of the accused) before the hearing and the accused or his counsel has made no objection. It has been ruled in England that such statements, before being tendered, must be edited to contain no inadmissible irrelevant or prejudicial material.[15] So much of a statement as is admitted in evidence must be read aloud at the hearing and, where the court directs, an account shall be given orally of so much of it as is not read aloud.[16] The contents of statements read become admissible as if the maker had gone into the witness box and given evidence, but are not conclusive of the matters stated therein.[17]

It appears that Section 371 is used often by the prosecution in criminal trials, particularly for the proof of formal evidence. As the party propos-

[11] See *Chong Yik* v. *P.P.* [1953] M.L.J. 72 (wrongful admission of certificate of Government Chemist was an illegality); and *Ng Yee* v. *P.P.* [1953] M.L.J. 250 (wrongful admission of Chemist's report was an irregularity curable under s.422 of the Code, as condition in proviso to s.399(i) could be waived).

[12] Section 422 in the Malaysian Criminal Procedure Code.

[13] Criminal Procedure Code (Amendment) Act 1972 (Act 12 of 1972). The Amendment Act was based on provisions of the U.K. Criminal Justice Act, 1967. Section 371 is based on section 9 of the 1967 Act.

[14] Section 371(2).

[15] *Practice Direction,* [1986] 2 All E.R. 511, by Lord Lane C.J..

[16] Section 371(6).

[17] *Lister* v. *Quaife* (1982) 75 Cr. App. R. 313.

ing to tender the statement, other parties or the court itself, may choose to call the maker to give evidence in court, the service of a copy before the criminal proceedings becomes a valuable discovery procedure.

I. *Copies of Notes of Proceedings*

In Singapore, the C.P.C. provides[18] that "any person affected by a judgment or order made by a criminal court" who desires to have a copy of any order or deposition or any other part of the record, shall be furnished with a copy by the court on application, and on payment of a fee unless the court for some special reason thinks fit to furnish it free of cost.

However, an accused person committed for trial has a right to receive free of charge a copy of the depositions of the witnesses recorded by the Magistrate.[19] Depositions form part of the "record" of the preliminary inquiry proceedings prior to committal to which the accused is entitled to a copy.[20] Section 150(1), which was amended in 1972, appears to conflict with section 400(2), as the latter entitles the accused to a copy of the depositions recorded by the magistrate; while the former states that the Magistrate's Court "shall send a copy of the record of the proceedings to the Public Prosecutor and the accused". Clearly, if it is mandatory by statute to supply a copy of the record (not stated to be only on request) to the accused, he cannot also be charged for the performance of that public duty by the Court. Presumably section 400(2) is redundant, as the depositions are only a small part of the entire "record". Copies of "written statements", on which an accused person may be committed for trial without the personal attendance of witnesses at the inquiry, are required[21] already to be served on all other parties at least seven days before the date of the hearing, by the party proposing to tender it; so the accused will have adequate discovery of such written statements in any case.

In Malaysia, the accused is similarly entitled to a copy of the notes of proceedings of the preliminary inquiry, but, apparently, only on termination of proceedings and generally, on payment of a "reasonable sum" as a fee unless it appeals, whereas the Public Prosecutor is entitled to a copy free of charge.[22]

J. *Unused Material*

Unlike the United Kingdom, where the accused has had, since 1982 in trials on indictment, and since 1985 in summary trials, extensive access to prosecution material which the prosecution does not propose to use, the position in Singapore and Malaysia is governed by the common law rules and professional courtesy, which place less obligation on the prosecution.

18 Cap. 68 (1985 Rev. Edn.), s.400(l).
19 *Ibid.,* s.400(2).
20 *Ibid.,* s.150.
21 *Ibid.,* s.l41(2).
22 Criminal Procedure Code, Malaysia, s.433. And see the comment by Edgar Joseph Jr., "Rights of the Accused — Law and Practice" [1976] 2 M.L.J. ii, at x.

As earlier noted, where the prosecution decide not to call as a witness a person who can give material evidence and from whom they have taken a statement, they must make that person available as a witness for the defence and should supply the defence with the witness's name and address.[23] There is no further duty. However, Lord Denning M.R. suggested[24] that there is a further duty, where the prosecution knows that the witness can assist the defence in showing his innocence, to call that witness itself or make his statement available to the defence.

In *Teh Lee Tong* v. *Rex,* Spencer Wilkinson J. laid out guidelines in summary trials. He ruled:[25]

> (1) that all material witnesses (*i.e.* witnesses whose evidence would clearly and obviously throw light on the case) from whom statements had been taken should be brought to the court by the prosecution. Any witness not so brought must be made available to the accused.
>
> (2) Of the witnesses brought to court, the prosecuting officer was not bound to call or to offer for cross-examination a witness whose evidence was in his opinion unnecessary or obviously hostile.
>
> (3) The existence of witnesses brought to court but not called or offered for cross-examination must be brought to the attention of the court so that they were available to be called by the defence, or by the court should the court consider that necessary.[26]

In a further *dictum,* however, Spenser Wilkinson J. added that, in order to avoid placing the accused in an awkward position if suddenly faced with the offer of a witness he had never seen, it was desirable in most cases for the accused to be supplied with a copy of the statements of the witnesses not called by the prosecution; otherwise, "the court would no doubt in an appropriate case grant an adjournment to enable the accused to take statements from such witnesses".[27]

K. *Summonses to Produce Evidence: Section 58[28] of the Criminal Procedure Code, Singapore (Section 51, Malaysia)*

Section 58 of the C.P.C. confers a wide power on a court to order the production of "any document or other thing" which a court or police

23 *R* v. *Bryant and Dickson* (1946) 31 Cr. App. R. 146.
24 *Dallison* v. *Caffery* [1965] 1 Q.B. 348, 369.
25 [1956] M.L.J. 194.
26 It must of course, be borne in mind that the prosecution, in not calling a material witness or offering him to the defence, risks a presumption being drawn that the witness's evidence would, if produced, be unfavourable to the prosecution case. See: s.116, illustration (g), Evidence Act (Singapore); s.114, illustration (g) (Evidence Act, Malaysia); *Khoon Chye Hin* v. *P.P.* [1961] M.L.J. 105.
27 [1956] M.L.J. 194, 196.
28 The material part, s.58(l), reads:
"Whenever any court or police officer considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such court or officer, such court may issue a summons or such officer a written order to the person in whose possession or power such document or thing is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order. . . "

officer considers desirable for the purposes of any investigation, inquiry, trial or other proceeding, by the person in whose possession or power such evidence is believed to be. The courts have had ample opportunity to examine the scope of this provision and its Malaysian equivalent, which is identically worded.

In *P.P.* v. *Teoh Choon Teck,* Hepworth J. in a Penang High Court, in dealing with the equivalent provision, section 59, in the former Straits Settlements C.P.C., laid down the following test for ascertaining what was necessary or relevant for the purpose of the proceeding:

> "The thing called for must have some relation to, or connection with, the subject-matter of the investigation or inquiry or throw some light on the proceeding, or supply some link in the chain of evidence. Anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced, and that is the primary object of these provisions. *(Mallal's* Criminal Procedure, 3rd edition, page 69)… It may be that the thing called for may turn out to be wholly irrelevant to the inquiry; but so long as it is considered necessary or desirable for the purpose of the inquiry, the power is there."[29]

In *Teoh Choon Teck,* the accused, charged with forgery, was successful in obtaining an order to inspect documents earlier seized from him by the police and to take copies of them. Hepworth J. ruled that the accused was entitled to this as the documents were specifically referred to in the charges and as it was essential for the accused to have the originals or photostat copies of the documents in order for him properly to prepare his defence.

In *Haji Abdul Ghani bin Ishak* v. *P.P.,* Wan Yahya J. applied the test in *Teoh Choon Teck* to allow the accused an order under section 51 of the Malaysian C.P.C., for inspection of documents seized from him in the course of investigation. He added that although there was no further obligation on the police to supply certified copies of the documents, the accused was not prohibited from making copies of them himself.[30]

However, in *Teoh Choon Teck,* it was stressed that the provision was not a discovery device, as such: it did not entitle the accused to discover by what means the prosecution proposed to prove the facts which they alleged made up the offence charged. Instead, "[s]ection 59 is merely a vehicle whereby secondary evidence may, if it comes to the point, be given of the contents of a document".[31] In other words, it was analogous to the "notice to produce" procedure of civil trials, to enable the accused to produce the documents as evidence in his defence.

In *Syed Abu Bakar bin Ahmad* v. *PP.,* Seah J. (as he then was) thought that section 51 of the Malaysian C.P.C. should be construed strictly, and the section did not allow an accused to ask for discovery or inspection of documents seized by the police in the course of their investigation or in their possession before the criminal trial; for "to do so would be tanta-

[29] [1963] M.L.J. 34, 36.
[30] [1980] 2 M.L.J. 196, 198.
[31] [1963] M.L.J. 34, 37.

mount to inspection of the evidence of the prosecution by the defence prior to the trial".[32]

In the later case of *PP.* v. *Raymond Chia Kim Chwee & Anor.,* Hashim Yeop Sani S.C.J. (as he then was), delivering the judment of the Supreme Court, also reiterated this. He said:

> "The entitlement of the accused under section 51 of the Criminal Procedure Code to any document or copies of document *[sic]* or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied."[33]

Raymond Chia's case concerned more than the accused's own documents that had been seized from him. The respondents, charged with forgery, had each applied for inspection of various documents in the possession of the prosecution including those stated in the charge; and, in the second respondent's case, for specified and unspecified documents. Several questions were posed in notices of motion before the Supreme Court, which included the scope of an accused person's entitlement to inspect documents under section 51 of the Malaysian C.P.C..

The court drew a distinction between entitlement before the commencement of the trial and that in the course of a trial. *Before the commencement* of the trial, the issue of the summons was at the discretion of the court before which the trial was heard or pending. The accused should have sufficient notice of what was alleged against him so as to enable him to prepare his defence. As a general rule, the documents or materials must be documents or materials specified or referred to in the charge. The accused was not entitled to all documents taken from him; nor should a general demand for unspecified documents be entertained. Where the application was made in the course of the trial or inquiry, the court had to consider strictly the question of relevancy of the documents or materials to the issues for adjudication.[34]

In *Kulwant* v. *PP.,* the Singapore High Court had occasion to consider the scope of the Singapore provision in the question whether the High Court had original jurisdiction to compel production of any document to any person under a charge in a subordinate court if that person considered it necessary or desirable for the purposes of a proceeding.

Coomaraswamy J. considered it plain that the High Court only had jurisdiction to entertain an application under section 58 if it was itself "seised of the inquiry, trial or other criminal proceeding".[35] He went fur-

[32] [1982] 2 M.L.J. 186, 187.
[33] [1985] 2 M.L.J. 436, 439.
[34] *Ibid.,* at pp. 439-440.
[35] [1986] 2 M.L.J. 10, 14.

ther and added that on the facts, no court (not even a Magistrate's Court) had jurisdiction as no proceeding had as yet commenced in any court as the accused was "still waiting for a preliminary inquiry to commence".[36]

His Lordship's interpretation of section 58 (1) led him to the firm view that an application under it could be made to a trial court *"only after* the recording of prosecution evidence has commenced", and, in many cases, "at an appropriate time, later than commencement, when the trial is well under way before the court has before it the necessary material to decide relevancy to enable it to consider the necessity or desirability of production of the document".[37]

Coomaraswamy J. read *Raymond Chia's* case as qualifying applications before the commencement of the trial "only for the purpose of giving adequate particularity to the charge where the charge itself specifies documents",[38] thus finally ruling that:

> "[E]xcept in the case of documents referred to in the charge, an application under section 57(1)[39] should be made only after the commencement of the recording of prosecution evidence".[40]

This passage probably contains part of His Lordship's *ratio decidendi* in the case. However, it would appear that His Lordship has read *Raymond Chia's* case too narrowly, and it is humbly submitted that such a reading is not justified.

First, His Lordship sought to find support in *Raymond Chia* for his view by quoting a passage where the Supreme Court there said, in relation to an application before the commencement of the proceeding, that the Court which must consider the application is the "Court before which the trial was pending or in which the trial was proceeding".[41] However, the Supreme Court concluded more accurately that the issue of the summons was at the discretion of the "Court before which the enquiry or trial is heard or pending".[42] In any case, the plain words of the section read, "Whenever any Court . . . considers . . . the production … is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding … by or before such court . . . , such court may issue a summons. . .". This surely is wide enough to allow a magistrate to issue a summons for the purpose of a preliminary inquiry which has been set down for hearing or is "pending"? Yet, Coomaraswamy J. thought not as the magistrate would have "no jurisdiction as yet to hear an application" under the section. The writer humbly disagrees with such a narrow construction. On the facts, the applicant could well have been granted a summons whilst he was "awaiting appearance before an examining magistrate" had he applied to that magistrate, instead of applying to the High Court. However, although His Lordship's views on a magistrate's power to

36 *Ibid.*
37 *Ibid.*
38 *Ibid.,* p.16.
39 *I.e*, s.58(l), as it has since been re-numbered in the 1985 edition of the Code.
40 [1986] 2 M.L.J. 10, 16.
41 *Ibid.,* p.14, quoting from [1985] 2 M.L.J. 436, at 438.
42 [1985] 2 M.L.J. 436, 440.

grant a summons are only *obiter,* and not binding as such on lower courts, it will be highly persuasive to magistrates and may inhibit them from issuing summonses under section 58. This would be unfortunate.

Second, it is submitted that the Malaysian Supreme Court, even after *Raymond Chia's* case, has left intact, perhaps even preserved, the principles of *Anthony Gomez*[43] and *Khoo Siew Bee*[44] :namely that the accused person is entitled under the common law to inspect the first information reports and his own statements to the police, respectively, owing to his "interest"[45] in them. Although counsel for the accused had addressed Coomaraswamy J. on the "real and tangible interest" that the accused had in documents so as to compel production of it, on the basis of "a number of Malaysian cases in support of his argument", it is unfortunate that His Lordship did not consider the application of these cases presumably because in each of them "the application was made under section 44 (1) of the (West Malaysia) Specific Relief Act, 1950 (Act 137), which has no Singapore counterpart".[46] He also apparently considered *Raymond Chia* to be the last word on the subject as "This decision may well bring an end to Specific Relief applications to the High Court in West Malaysia for issue of a summons under section 51(i) when an inquiry, trial or other proceeding is by or before a court other than the High Court. This is particularly so when regard is had to proviso (d) to section 44 (1) which makes an application possible only if 'the applicant has no other specific or adequate remedy'."[47]

However that may be, it is clear that *Raymond Chia* itself preserved the common law principle as the Supreme Court there referred to *Anthony Gomez* and *Khoo Siew Bee* as "another basis for the inspection and supply of the first information report and cautioned statement."[48] The Court, it is submitted, left open the possibility that even first information reports and cautioned statements may be obtained under section 51 of the C.P.C. if they are relevant to the issues for adjudication; and surely they must be! Although pre-trial discovery is more difficult, the defence may be able to anticipate the prosecution and obtain copies of these after commencement of the trial even if the prosecution were planning not to adduce them at all or to adduce them at a later stage.

No doubt, it was unnecessary for the Supreme Court to consider the "principle" as it was only concerned with resolving questions on the scope of section 51 of the C.P.C.. Also, *Raymond Chia,* as it did not deal with sections 74 to 76 of the Malaysian Evidence Act, clearly left the interpretation of these sections open, and is no authority for a rejection of a right to inspect and to be supplied copies of documents the accused has an "interest" in, consistent with these sections. It is also no authority for denying the existence of a common law right of inspection and of taking copies of documents.

43 *Anthony Gomez* v. *Ketua Polis Daerah Kelantan* [1977] 2 M.L.J. 24.
44 *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49.
45 Note the extension of the principle in *Haji Abdul Ghani bin Ishak* v. *P.P.* [1980] 2 M.L.J. 196, and Wan Yahya's interpolation (at p.197) that the "interest" was a "tangible" one.
46 [1986] 2 M.L.J. 10, 14.
47 *Ibid.*
48 [1985] 2 M.L.J. 436, 439.

His Lordship had stated that section 44 (1) of the Malaysian Specific Relief Act had "no Singapore counterpart". Section 18 of the Supreme Court of Judicature Act ("S.C.J.A.") must be considered. His Lordship dismissed the S.C.J.A. as conferring jurisdiction on the High Court to make an order in favour of the kind of application made in the case. He did this apparently for two reasons: first, there had to be a written law vesting a power in the High Court or the power invoked had to come within subsection (2)[49] of section 18 the S.C.J.A., *i.e*, the powers referred to in the First Schedule[50] "shall be exercised in accordance with any written law or Rules of Court relating to them"; and second, the remedies to be granted by the High Court were remedies in the nature of a prerogative writ, but that was not the nature of the application. However, a closer examination of the S.C.J.A. may be instructive.

The power in the First Schedule at the time (now section 18 (2)) was "the power to issue to any person or authority *directions, orders or writs, including writs* of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, *or any others, for the enforcement of any of the rights conferred by any written law or for any purpose. . . "*. Thus, it is not entirely accurate to say that the First Schedule remedies "are remedies in the nature of a prerogative writ". Also, the remedies are not only for the purpose of enforcement of rights conferred by written law, but may be alternatively "for any purpose". Read in this light, the provision is not as narrow as one might imagine and may indeed be comparable to section 44 of the Specific Relief Act. After all, section 44(1) of the Specific Relief Act is merely a substitute for the remedy of mandamus, as section 49 of the Act bars hereafter the issue of any writ of mandamus. If the Malaysian courts can grant an order under section 44, why cannot the Singapore courts grant mandamus or a similar order for the purpose of doing justice? Is this not a remedy within the scope of "any purpose" in the S.C.J.A.? Indeed, the courts seem well-disposed to assuming inherent powers[51] as the English courts do, and can do so under section 5 of the C.P.C., which allows "the law relating to criminal procedure for the time being in force in England" to apply where no special provision has been made in the Code and where it does not conflict with the Code.

His Lordship did not attempt to examine and refute the line of reasoning in the Malaysian "interest" cases that the Evidence Act[52] conferred a right to inspect documents and so, there was arguably a right conferred by "written law". There was no attempt to distinguish that line of cases apart from stating that the Specific Relief Act had no counterpart in Singapore. Finally, in respect of the argument that the power had to be exercised in accordance with any written law or Rules of Court, it may be said that this may be a purely procedural provision; or that the Evidence Act,[53] in requiring the supply of certified copies on demand to any person having the right to inspect public documents, provides for such exercise.

[49] Now sub-section (3) in the 1985 edition of the Supreme Court of Judicature Act.
[50] Now section 18(2) of the Supreme Court of Judicature Act.
[51] See: *Hari Ram Seghal* v. *P.P.* [1981] 1 M.L.J. 165.
[52] Section 78 (Singapore); section 76 (Malaysia).
[53] *Ibid.*

Although the Malaysian "interest" cases are not binding in Singapore, the common law right of inspecting and copying documents one has an "interest" in, is alive and well in Malaysia after *Kulwant's* case, and will remain persuasive in Singapore until directly distinguished, perhaps along the lines of the writer's tentative views earlier stated.[54]

IV. Preliminary Inquiries as a Vehicle of Discovery

A. *'The Record'*

The C.P.C. in Singapore provides, (as noted earlier[55] in this paper) that on the accused person's committal for trial, the Magistrate's Court shall send a copy of the record of the committal proceeding to the accused. The contents of the "record" are fully enumerated in section 150(4), and include, *inter alia,* the name and residence of the complainant, if any; the offence complained of and the offence proved, if any; the "depositions"; the statement or evidence of the accused under section 145, if any; the charge; and the list of witnesses given by the accused.

No mention is made of "written statements" received in evidence from persons under sections 140 to 141 in lieu of their giving oral evidence in person. However, section 141(1) states that "in preliminary inquiries conducted under this Chapter, a written statement by any person shall, if the conditions mentioned in subsection (2) are satisfied, be *admissible as evidence to the like extent as oral evidence to the like effect* by that person".[56] Section 140 also provides that an examining Magistrate may commit an accused person where *all* the evidence before the court consists of written statements, if he is satisfied also that the statements disclose sufficient evidence to put the accused upon his trial. Thus it is submitted that written statements do form part of the record, and as "depositions", because they are deemed admissible "to the like extent" as depositions recorded in court, and because without them, there may be hardly any "record" in some cases. If the writer is incorrect in this view of the scope of "depositions", it makes little difference to the accused, as he would already have been served a copy of each written statement before it was tendered in evidence.[57] In either case, discovery would have been adequately provided to the accused. However, if the record does not include "written statements", the Registrar[58] would receive an incomplete "record", and any appeal against the Magistrate's decision to commit or to discharge the accused would be impossible as the appeal court will not have the written statements. Thus the writer feels that "depositions" must include "written statements" and if there is any doubt as to this, section 150(4) should be

54 See text following first footnote reference mark no. 35, above.
55 See Part III, section I above, entitled "Copies of Notes of Proceedings".
56 Italics are inserted by the writer.
57 This is required under section 141(2)(c), as a condition of admissibility.
58 *I.e.,* of the Supreme Court. Section 150 (1) requires the original record and "any document, weapon or other thing which is to be produced in evidence" to be sent to the Registrar by the Magistrate's Court when it receives an order from the Public Prosecutor to do so. "Document" clearly cannot include a "written statement" because statements are not evidence per se, since their makers, as with deponents, must be called at the trial, and statements are admissible as "evidence" only under clear exceptions to the rule against hearsay.

amended to provide specifically for "written statements" to be included in the "record" or in a definition of "depositions".

Section 150 is silent on how soon after committal the accused should receive his copy of the record. Section 400 is also silent on this. If the accused remains in custody pending the trial, it becomes imperative that the record is prepared early so he may prepare his defence and so that an early trial is possible.

In *P.P.* v. *Mat Zain,* where there was a long wait before the preliminary inquiry, and another three weeks' wait for the proceedings to be received in the Registry on 11 April, 1949, Callow J. ruled :

> "An accused person is entitled to a certified copy of the depositions on demand. Mr. Lee Thean Chu for the accused did not himself apply for a copy; the accused made application on the 24th of April, 1949. In my view the committing Magistrate should enquire from the accused person on committal as to whether he requires a copy of the depositions so that he may have early opportunity to prepare his defence."[59]

This is a useful ruling to rely on in case the preparation of the "record" takes considerable time; for the accused can obtain copies of depositions (and probably of the court's order) under section 400 first, in advance of the full record.

B. Identity of Informers

May an accused person obtain, during the preliminary inquiry, the disclosure of the identity of any informer? Section 137 of the Evidence Act, Singapore, protects magistrates, police and revenue officers from being compelled to disclose from whence they obtained their information. At common law, disclosure of the identity of an informer was apparently possible in a criminal *trial* in limited circumstances, where the public interest leaned in favour of disclosure. Lord Diplock pointed out, in *D.* v. *National Society for the Prevention of Cruelty to Children,* that:

> "... By the uniform practice of the judges which by the time of *Marks* v. *Beyfus* 25 QBD 494 had already hardened into a rule of law, the balance had already fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure."[60]

Recently, however, the Supreme Court of New South Wales[61] has extended this principle, stating that "the exception to the non-disclosure principle applies at all stages of criminal proceedings" and that it was "not

[59] [1948-49] M.L.J. Supp. 142.
[60] [1978] A.C. 171, 218.
[61] *Cain* v. *Class (No. 2)* [1985] 3 N.S.W.L.R. 230, 249, 251 (McHugh J.A.).

easy to see why the principle should not apply at the *committal* stage of criminal proceedings". McHugh J.A. said:

> "Committal proceedings are an important element in our system of criminal justice. They constitute an important element in the protection of the accused … It would be a serious anomaly if, at the committal stage, an accused person could not obtain information which would result in the dismissal of the charge and often enough, secure his freedom from custody. Why should he have to wait until the trial to secure his liberty? There is no ground for thinking that a magistrate cannot decide the issue as well as a judge."[62]

McHugh J.A. went on to say that it was open to a magistrate in committal proceedings to require the disclosure of the identity of an informer if he formed the opinion that the production of the evidence would assist the accused person either to destroy the making of a prima facie case or to make out his case, leading to a discharge.

It may be that the clear words of the Evidence Act would exclude the development by the courts in Singapore or Malaysia of an exception along the lines of the common law; unless the importation of the common law public interest approach can be made without doing violence to the words of the Act, and are seen as not being inconsistent with it.

C. *Witnesses not Called at the Inquiry*

Another question to be considered is whether the prosecution may call further evidence at the trial which was not called at the preliminary inquiry and no notice of which was therefore given to the accused.

In England, this course is possible. In *R.* v. *Epping and Harlow Justices, Exp. Massaro,* the prosecution, in order not to subject a young girl, the complainant in a sexual assault charge, to the experience of giving evidence and to being cross-examined twice, called other supporting evidence at the committal proceedings on which the accused was committed. The accused applied for an order of certiorari to quash the committal order on the ground that he had been deprived of the right of cross-examination. The application was refused, Lord Widgery C.J. saying:

> "[W]hat is the function of the committal proceedings for this purpose? Is it, as the prosecution contend, simply a safeguard for the citizen to ensure that he cannot be made to stand trial without a prima facie case being shown; or is it … a rehearsal proceeding so that the defence may try out their cross-examination on the prosecution witnesses with a view to using the results to advantage in the Crown Court at a later stage? … For my part I think that it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out. The prosecution have the duty of making out a prima facie case, and if they wish for reasons

[62] *Ibid.,* p.249.

> such as the present not to call one particular witness, even though a very important witness, at the committal proceedings, that is a matter within their discretion, and the failure to do so cannot on any basis be said to be a breach of the rule of natural justice."[63]

Thus, the prosecution in England is under no duty at the committal proceedings to call, or to tender statements of, all the witnesses intended to be called at the trial. It may "reserve" some witnesses for the trial itself.

However, in Singapore, section 188(3) of the C.P.C. provides that a person who has not given evidence at a preliminary inquiry shall not be called as a witness by the prosecution at any trial before the verdict is given, unless the accused person or his advocate and the Registrar have been previously served with a notice in writing of the intention to call such person stating his name, address and the substance of the evidence intended to be given. Alternatively[64] if the prosecution omitted to call a witness at the preliminary inquiry whom it intends to call at the trial, a Magistrate's Court may summon and examine supplementary witnesses after the commitment and before the commencement of the trial and bind them over to appear and give evidence; such witnesses shall be examined in the presence of the accused who shall have the right to cross-examine them.

In the circumstances, it would seem that in Singapore, preliminary inquiries tend also to serve the other purpose considered by Widgery C.J. in the case of *Ex p. Massaro* and rejected by him there. In Singapore, preliminary inquiries do seem to serve to give the accused due notice of all evidence to be tendered against him at the trial and to allow him the right of cross-examination of all witnesses intended to be called, and thus serve a genuine "discovery" function. Certain provisions fortify this view. Section 141(2)(d) permits the parties, including the accused, who are served with a copy of a written statement, to object to it being tendered in evidence at the inquiry. Further, by section 141(4), the court may of its own motion or on the application of any party, require the maker of the statement to attend before the court and give evidence. The right to cross-examination of all witnesses intended to be called by the prosecution at the trial being exercised does appear to be a function or purpose of the inquiry.

In Singapore, the jurisdiction of the District Courts has recently been expanded[65] to allow District Courts to try more serious offences such as rape, which would ordinarily have been tried in the High Court. Although this relieves greatly the backlog of criminal cases and the heavy work-load of the High Court, it does however mean that far fewer criminal cases will in future be tried in the High Court, with the consequent dispensability of preliminary inquiries and far fewer discovery opportunities for accused persons, as they will most commonly face a summary trial without the advantages of discovery of the prosecution evidence. Thus, while Singapore has progressive and useful preliminary inquiry provisions, much less use will ever be made of them; instead there will be increasing use of the

[63] [1973] 1 Q.B. 433, 435.
[64] See section 151, Criminal Procedure Code (Singapore).
[65] See ss. 7, 11 of the Criminal Procedure Code, as amended by Act 5 of 1986.

summary trial with its attendant difficulties of discovery of the prosecution. Some may look upon the increase in subordinate court jurisdiction as an advance in the administration of justice from the viewpoint of efficiency and expediency; this writer considers it a largely retrogressive step, from the viewpoint of an accused person's fair trial. In return for the increased likelihood of a lighter sentence and a speedier trial and disposal of his case in a District Court, he must accept the 'trade-off of his opportunities for discovery of the prosecution, of some of his avenues for appeal,[66] and possibly of the manner in which his defence will be conducted.

V. The Course of the Trial

In both summary trials and High Court trials, there are further problems of discovery. These are no longer problems of pre-trial discovery, but those which occur in the course of the trial itself.

A. *Summonses to Produce Documents: Criminal Procedure Code (Section 58, Singapore; section 51, Malaysia)*

It will be remembered that the purpose of applications under the C.P.C. is not to enable pre-trial discovery intended primarily to enable the accused to have materials or documents relevant to the trial. An application may be made before the commencement of the trial, or, more commonly, in the course of the trial. In the latter situation, the material must be relevant to the issues for adjudication.[67] The early case of *PP.* v. *Teoh Choon Teck*[68] laid down a simple test that anything which might reasonably be regarded as forming part of the evidence in the case might be ordered to be produced. This has been complicated by the narrow interpretation given in *Kulwant* v. *P.P.,*[69] alluded to earlier.

In the writer's view, the accused, once the trial has commenced, should be entitled to apply under this provision not only for the statements of material prosecution witnesses (which would certainly include the first information report), but also for previous statements made by the accused himself, and possibly, statements made by his co-accused. All of them are very likely to satisfy the test of relevance to the proceedings. What can be more relevant or of greater interest to the accused than his own statement? Previous cases, including *Raymond Chia,* have not explored the possibility of the use of section 58 for these purposes. Even in *Kulwant,* the issue did not actually arise, because a court other than the court before which the proceedings were pending was being asked to rule on the supply of the

[66] Appeal generally lies from a subordinate court trial to the High Court only. Any further appeal by an accused person is dependent upon the willingness of the High Court judge hearing the appeal to reserve for the decision of the Court of Criminal Appeal any question of law of public interest which has arisen in the course of the appeal: s.60(l), Supreme Court of Judicature Act, Cap. 322 (1985 Rev. Edn., Singapore).

[67] *P.P.* v. *Raymond Chia Kim Chwee & Anor.* [1985] 2 M.L.J. 436.

[68] [1963] M.L.J. 34, 36.

[69] [1986] 2 M.L.J. 10.

accused's own statement, and it was also before the commencement of the proceedings. It is submitted that the issue of section 58 being used for these purposes is still an open one.

B. *Prosecution Witness Statements*

In Singapore, the accused person is not entitled to be supplied by the prosecution at any time with copies of witness statements — with the exception of "written statements" under section 141 or under section 371 of the C.P.C. The position is similar in Malaysia. Witness statements are not supplied to the accused out of professional courtesy either.

In England, it has been held that the prosecution ought to inform the defence that they have in their possession a statement of a prosecution witness which is materially inconsistent with the evidence the witness has given on the stand.[70] However, there has been a practice largely followed at the Central Criminal Court, of revealing to the defence the previous statements of prosecution witnesses which are relevant to their evidence.[71] In trials on indictment now, most witness statements will be made available under the Attorney-General's Guidelines.

In Singapore and Malaysia, the defence still labours under the disadvantage of not knowing if the prosecution witness has been giving evidence inconsistent with his previous statements. It has been held, in fact, that the accused is not entitled to any such statements without the trial court's intervention.

In *Muthusamy* v. *P.P.*,[72] the *locus classicus* on the subject, Taylor J. set set out guidelines on the proper way to deal with previous statements being sought for the purpose of impeaching the witness's credit, utilising the statutory provisions of section 145[73] of the Evidence Act and section 124[74] of the C.P.C. regarding statements made in the course of investigations. His Lordship stressed that only when a request had been made by either side, would the court ask for and read the former statement. If there was no serious discrepancy, the trial judge would so rule and hand the statement back. If, however, the difference was "so material as probably to amount to a discrepancy affecting the credit of the witness," the Court might ask the witness if he did make the statement; if he admitted this or denied it but was proved to have made it, the two conflicting versions had to be explained to him, and he was to explain the difference; and if he could, his credit was saved.

The decision and guidelines of Taylor J. have been approved and applied consistently in Singapore and Malaysia.[75] It has also been held[76] in

[70] *R.* v. *Howes,* March 27, 1950, C.C.A. (unreported).
[71] Archbold, *op. cit.,* p.332.
[72] [1948] M.L.J. 57.
[73] Section 147 in Singapore.
[74] Section 122 in Singapore; section 113 in the present Malaysian Criminal Procedure Code.
[75] See, *e.g.,* the recent Federal Court of Malaysia judgments in *Krishnan & Anor.* v. *P.P.* [1981] 2 M.L.J. 121; and in *Husdi* v. *P.P.* [1980] 2 M.L.J. 80.
[76] *Yohannan* v. *R.* [1963] M.L.J. 57.

Singapore that the C.P.C. provision[77] obliges the court, on the accused's request, to refer to the witness's previous statement, but confers on the court a discretion, if it considers it expedient, to direct that the accused be furnished a copy of it to enable him to impeach the witness's credit. If the court thinks it expedient in the interests of justice that the defence should see any part of a statement, the defence is entitled to be furnished with a copy of the whole statement, and the furnishing of copies of extracts only from statements to the police of witnesses is wrong.[78]

The Privy Council has also held that a request by an appellant accused who was one of three defendants, of production of statements made by himself and his co-accused to the police was not improper and was wrongly refused by the court as counsel for the appellant was entitled to the benefit of whatever points he could make out of a comparison of the documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their import.[79] This would appear to be the position at common law, and apart from statute dealing with the extent of the right to the production of witness statements, as in the Malaysian and Singapore legislation.

A former statement may not be admitted in evidence without being put to the witness or without a copy being furnished to the accused.[80] However, if the former statement is put to the witness in cross-examination, with a copy being supplied to the accused, the statement will in Singapore (but not Malaysia) become admissible as evidence of any fact stated therein of which direct oral evidence by the witness would be admissible.[81]

In *Husdi* v. *PP.,* the Federal Court of Malaysia, after approving of *Muthusamy's* case, went on to justify the accused's right to the supply of a prosecution witness's statement under section 113 of the C.P.C. being operative only through the intervention of the court. Suffian L.P. said:

> "We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court — because of the *peculiar circumstances prevailing in this country.* Malaysia is a small country, with a small population, and Malaysians are easily scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify — let alone — arrest the offender, and yet complain that the police do not catch criminals and that the courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, *the defence may be tempted to askfor,* and *theprosecution will be obliged to supply, copies ofevery statement in the police investigation file, and Malaysians will*

77 Section 121(2) of the Criminal Procedure Code, Singapore (now renumbered section 122 (2)).
78 *Samsudin* v. *P.P.* [1962] M.L.J. 405, 407 (per Good J.A.).
79 *Mahadeo* v. *R.* [1936] 2 All E.R. 813, 816 (Privy Council Appeal from Fiji).
80 *Idris bin Taib* v. *P.P.* [1940] M.L.J. Rep. 36.
81 Section 147(3), Evidence Act, Singapore. The Singapore Evidence Act was amended by Act 11 of 1976 to allow this. In Malaysia, the original position stated in *Muthusamy* v. *P.P.* [1948] M.L.J. 57 at p. 58 would continue to govern, *i.e.:* "In no case can the former statement become his evidence." (Taylor J.).

> *be more reluctant to come forward with evidence to incriminate their fellows."*[82]

Very peculiar indeed! This view has met with much criticism.[83] In the first place, it may merely be an unsubstantiated opinion; for it is not so notorious that judicial notice was taken. More important, the statement suggests that witnesses would fear their identity being disclosed in the statement and consequent intimidation. One commentator[84] argues that this could easily be set right by making copies of the statements available just before the actual trial to enable the defence to be prepared to raise the issue of impeachment of credit. Another considers the fears of witness tampering difficult to support. He argues:

> "[A]re not the defence supplied with statements of prosecution witnesses in the preliminary inquiries for High Court trials? Are not the witnesses just as likely to be tampered with in such circumstances? Clearly then, drawing an arbitrary distinction between the tampering of *[sic]* witnesses in summary trials and High Court trials ... is without justification. In both instances, the witnesses are committed by their signed statements not to change their evidence during the trial itself. Undue weight should not therefore be given to this fear of witness tampering."[85]

Need for Reform?

This writer considers that the time has come for reform of this troublesome approach to discovery of witness statements.

In the first place, there is some disparity between the Singapore and Malaysian C.P.C. provisions. In Singapore, it is mandatory for the court, on the request of either the prosecutor or the accused, to refer to any previous statement the witness has made to the police in the course of police investigation, but it may at its discretion direct that the accused be furnished with a copy of it to enable him to impeach the witness's credit in the manner provided by the Evidence Act.[86] The position was identical in Malaysia, until the C.P.C. was amended[87] in 1976. Section 113(1) of the C.P.C. now no longer explicitly makes the court's intervention dependent upon a request to refer to the witness's previous statements, and merely permits the use of any such statement in cross-examination and for the purpose of impeaching credit. Despite this, however, it would appear that the courts will continue to apply the principles enunciated in *Muthusamy's* case so that reference to statements will still require a request by either party that reference be made.[88] Thus, it seems that the court will not refer to previous statements at its own initiative; nor will either party

82 [1980] 2 M.L.J. 80, 82. Italics are inserted by the writer.
83 See J. Velupillai, *op. cit.,* pp. 36-37; and V.K. Rajah, *op. cit.,* p.12.
84 J. Velupillai, *op. cit.,* p.37.
85 V.K. Rajah, *op. cit.,* p.12.
86 *Yohannan* v. R. [1963] M.L.J. 57.
87 Act A324, Schedule, w.e.f. 10 January 1976.
88 See, *e.g., Husdi* v. *P.P.* [1980] 2 M.L.J. 80. Also, Edgar Joseph Jr. states *(supra,* p.2, note 3, p. ix) that in practice, the prosecution or the defence will apply to the court to refer to the witness's statement, and that the court may not refuse such a request.

be entitled to copies of the witness's statement without the court's intervention. This conservative approach by the courts, and unwillingness to formulate new principles to succeed those in *Muthusamy* after the amendments of the C.P.C., is most unsatisfactory.

Second, the accused is totally dependent upon the good offices of the prosecution if he wishes to obtain copies of witness statements without making a request to the court. As Traynor says, "the prosecution remains the judge of when to open the door", and that:

> "Even when the prosecution opens the door to prior statements, the defense has no way of knowing how much, if anything, still remains behind the door, and no way of putting a surmise to the test. It is still more serious at the trial than at the pretrial stage for the defense to be at this distance from discovery. With the soundness of final decision on the facts at stake, should not the defense as a matter of right be able to cross-examine a witness on the basis of all the available evidence, inclusive of his prior statements? Can anything short of such a right afford adequate insurance against the risks that attend any determination of where the truth lies or does not lie?"[89]

A closer look is needed at the reasons for the lack of disclosure to the accused of witness statements without the court's intervention.

The argument that the statements are 'privileged' cannot be pertinent except where the statements are those made by police informers. Besides, even where informers are concerned, only pretrial withholding of the information is pertinent; at the trial, the protection of informers' identities and particulars is hardly relevant where the informer has been persuaded to give evidence. Only complainants in rape cases should be so protected at the trial in the interests of avoiding publicity in the media.[90] However, the accused should never be denied such information as will be helpful to the preparation of his defence, and an undertaking by him or counsel of non-publication is adequate protection before disclosure.

The argument that there is no *entitlement* to witness statements is a *non sequitur.* On the contrary, is there a reason for *non-disclosure?* There are certainly good reasons for disclosure. One is to give the accused all opportunities for exercising his rights under the Evidence Act of impeaching the credit of the witness on the ground of inconsistency. Another is the possibility that the witness may have forgotten certain details or omitted in evidence a part of his statement which may prove to be material to the defence case. If so, the accused may have no opportunity to test his veracity or accuracy against his memory, for even the *Muthusamy* principles do not allow the court to direct the furnishing of a copy of a previous witness statement unless there is a "discrepancy" affecting the witness's credit. A mere omission or minor difference from the statement is not such a discrepancy as will cause the court to affect credit and to empower the court

89 Roger J. Traynor, *supra,* p.6, note 24, p.766.

90 Section 9(3) of the Supreme Court of Judicature Act (Cap. 322, 1985 edn.) empowers a Court to order that no person shall publish the name, address or photograph of any witness or any evidence that is likely to lead to the identification of any witness.

to direct the furnishing of a copy to the accused. This is a serious flaw even in the *Muthusamy* case itself, and the writer agrees with the view[91] that the practice of the courts allowing access to a statement only on their affirming that there is a discrepancy, is unjustifiable.

Edgar Joseph, Jr. said in 1976 that "[i]f the prosecution is founded in truth, as in theory all prosecutions are expected to be, then, there appears to be no valid ground for blindfolding the defence, as it were".[92] The editors of *Archbold* submit that "the practice of revealing to the defence the previous statements of prosecution witnesses which are relevant to their defence is not only wholly unobjectionable but is very much in the interests of justice".[93] This writer cannot agree more with these views. The practice recommended in *Archbold* was largely followed in the English Central Criminal Court even in the absence of the Attorney-General's guidelines of 1982. There is no reason why the prosecution services in Singapore and Malaysia cannot voluntarily disclose witness statements to the accused before trial in the same way, without taking advantage of a restrictive view in *Muthusamy's* case. Merely because a practice has been followed for forty years does not make it the best practice in the interests of justice. Age is actually a particularly good reason for the re-examination of a practice.

C. *Witnesses Not Called by the Prosecution*

When the prosecution has taken statements from potential witnesses, the question arises as to whether it is incumbent upon the prosecution to call as witnesses *all* such persons from whom statements have been taken. The duties of the prosecution in High Court trials are very much dependent on the statutory provisions relating to preliminary inquiries.[94] The considerations in summary trials have been considered in Part III (J) above.[95] The basic duty here of the prosecution is to bring to court all material witnesses from whom statements have been taken, and to make available to the accused any person not so brought.

VI. CONCLUSIONS

A. *The Present Position*

The present position in law and practice can be summarized as follows:

1. In Malaysia, the accused is allowed copies of First Information Reports as of right, by virtue of *Anthony Gomez's* case.[96] In Singapore, the prosecution follows the Malaysian practice.

[91] J. Velupillai, *supra,* p.3, note 3, p.37.
[92] *Supra,* p.3, note 3, p. ix.
[93] *Supra,* p.12, note 57, at p.332.
[94] See Part IV above and Chapter XVII of the Criminal Procedure Code, Singapore.
[95] See, in particular, the case of *Teh Lee Tong* v. *Rex* [1956] M.L.J. 194, at 195 (also discussed above in Part III (J) above, headed "Unused Material").
[96] *Anthony Gomez* v. *Ketua Polis Daerah Kuantan* [1977] 2 M.L.J. 24.

2. In Malaysia, the accused is allowed, as of right, copies of cautioned statements (*Khoo Siew Bee's* case)[97] as well as of uncautioned statements (*Haji Abdul Ghani's* case).[98] In Singapore, however, statements recorded under section 122(6) of the C.P.C. are treated as analogous to 'cautioned' statements (as a 'notice in writing' to be read and explained to the accused is mandatory) and are thus disclosed to the accused; whereas the prosecution cannot be compelled to disclose statements by an accused to the police made before this stage, in the course of investigation, in view of *Kulwant's* case.[99]

3. In both Malaysia and Singapore, the accused is not entitled to disclosure of prosecution witness statements (on the reasoning of *Husdi's* case).[1] The prosecution services in both jurisdictions do not engage in the practice of making disclosure in the exercise of their discretion.

4. All disclosure of any other material, such as sketch plans, photographs, medical reports, and reports from the Department of Scientific Services, and statements recorded under section 122(5) of the C.P.C. from the accused, is generally at the discretion of the prosecution, and is released only as a matter of courtesy. An application is made directly to the prosecuting counsel or Officer-in-Charge of the district or police station concerned.[2] All other material, such as previous convictions, or seized documents, are not generally disclosed, and an application under section 58 of the C.P.C. may have to be made to test the relevance of the material to the case.

B. *The Implications of Kulwant's case*

It is submitted that the case of *Kulwant* v. *P.P.*[3] has a number of important implications for the future — at least in Singapore.

First, part of the *ratio decidendi* of *Kulwant* may well be contained in one passage where, after considering an Indian Supreme Court case[4] and a Malaysian Supreme Court case,[5] Coomaraswamy J. said:

> "The views of these two Supreme Courts are my reasons and basis for saying that except in the case of documents referred to in the charge, an application under section 57 (1) should be made only after the commencement of the recording of prosecution evidence."[6]

97 *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49.
98 *Haji Abdul Ghani bin Ishak* v. *P.P.* [1980] 2 M.L.J. 196.
99 *Kulwant* v. *P.P.* [1986] 2 M.L.J. 10.
1 *Husdi* v. *P.P.* [1979] 2 M.L.J. 304 (High Court).
2 See the helpful practical advice given by R. Pala Krishnan, "Preparation For Criminal Trials", [1988] 4 C.L.A.S. News 4, 5.
3 [1986] 2 M.L.J. 10.
4 *Assistant Collector of Customs* v. *Melwani,* A.I.R. 1970 S.C. *962.*
5 *Raymond Chia Kim Chwee* v. *P.P.* [1985] 2 M.L.J. 436.
6 [1986] 2 M.L.J. 10, 16.

In *Kulwant,* the High Court was concerned with whether it had jurisdiction to entertain an application for disclosure of certain documents. Thus, the non-applicability of section 57(1) (now re-numbered section 58(1)) of the C.P.C. was the main reason for the Court's decision to refuse the request for disclosure. The Court also found that jurisdiction could not be based on any other sections of the Supreme Court of Judicature Act.[7] It dealt only briefly with sections 76 to 78 of the Evidence Act, considering that the application of section 78 to allow the supply of certified copies of public documents on demand presupposed the existence of a *statutory right of inspection.*

Thus, since the question of jurisdiction of the Court was the fundamental issue, it is submitted that the statements of the Court on sections 76 to 78 were only made *obiter* and thus the questions whether an accused's own statement to the police is a "public" document, whether there is a right to inspect it or any statement on the basis of section 78, must remain open questions. There is therefore no final word in Singapore on the principle enunciated in the Malaysian cases on any "real and tangible interest" as founding (or not founding) a right to inspect. Any future High Court in Singapore is free to examine these questions again, or even to differ from *Kulwant* on the jurisdiction of the High Court under section 58(1) of the C.P.C.

Third, the implications of the practice in England on *Kulwant* must be examined. In *Kulwant,* the Court declined to resort to an application of the Attorney-General's "Guidelines" of 1982 on "unused material" under section 5 of the C.P.C., as they were not part of the English "law relating to Criminal Procedure", being neither of legislative nor judicial origin, and furthermore, there was no lacuna in the Code necessitating such resort.[8]

The writer agrees thus far with the reasoning in *Kulwant.* However, it has been also held in the Malaysian Courts, applying the equivalent provision, section 5 of the Malaysian C.P.C., that the courts, like the English courts,[9] had "inherent" power to intervene and make rules not provided for in the Code, in order to prevent or correct any injustice.[10] In the light of this approach, it is submitted that it is open to the courts to *make rules to redress any imbalance between the prosecution and the defence* — as in the case of disclosures to be made by either party in a criminal case. Certainly, it is beyond dispute that the courts have jurisdiction to ensure that the accused has a fair trial. On this basis, the writer feels that there is every reason for the courts to hold that an accused person has a right to inspect, at the very least, his own previous statements to the police and,

7 Cap. 322, 1985 edn., sections 7(a), 15, 18, 23, 27.

8 [1986] 2 M.L.J. 10, 16.

9 See, *e.g.*, *Connelly* v. *D.P.P.*, [1964] 2 All E.R. 401. At p.408, Lord Devlin said that judges of the High Court "have in their inherent jurisdiction, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court process is used fairly and conveniently by both sides." This included "a general power … to prevent unfairness to the accused", by which nearly the whole of the English criminal law of procedure and evidence had been made by judges in exercise of their powers to see that what was fair and just was done between prosecutors and accused.

10 *Hari Ram Seghal* v. *P.P.* [1981] 1 M.L.J. 165, 167.

arguably, any documents seized by the police or other investigating authority which are relevant to the investigation; and that a statutory right to inspect is not the only one. A right based on one's "tangible interest" in a statement (especially one's own) may thus, perfectly conceivably, take on a life of its own. It is hoped that the courts will not be overly restrictive[11] and will allow the evolution and crystallization of such a development.

The words of Wan Yahya J. in *Haji Abdul Ghani* v. *P.P.* sound a salutary warning against inflexibility by the parties to a liberal approach towards applications for documents such as the accused's own previous statements and documents seized by the police:

> "Documents produced unexpectedly in court can only result in adjournment and delay in the disposal of a case. An attitude of undue caution in the production of documents necessary for the defence of an accused person may unfairly give rise to the insinuation that the prosecution is resorting to a hide and seek method of reducing the defence into a game of blind man's buff."[12]

C. *Need for Wider Reform of Witness Statements*

The writer reiterates his agreement with other writers, such as the editors of *Archbold,* who feel that "the practice of revealing to the defence the previous statements of prosecution witnesses which are relevant to their evidence is not only wholly unobjectionable but is very much in the interests of justice".[13] It allows more easily for the impeachment of witnesses on the basis of their inconsistency, and their cross-examination for lack of veracity or accuracy, and the discovery of unintentional "omissions" from the evidence which may be material to the case. Further, the principles enunciated in *Muthusamy's* case[14] require re-examination.

D. *Alternative Approaches to Pre-trial Disclosure*: *Formal and Informal Schemes of Discovery.*

Accepting that the present state of pre-trial discovery in Singapore and in Malaysia is unsatisfactory, several models for pre-trial disclosure by the prosecution are available for consideration. The New South Wales Law Reform Commission succinctly summed up five models. They are:

1. informal negotiations between the prosecution and the defence (found in all jurisdictions);
2. rules of professional ethics for prosecutors;
3. prosecutorial guidelines;
4. rules of court; and
5. a legislative scheme.

11 See: Chin Tet Yung, *Evidence,* (1988) p.220, where the author strongly argues in favour of disclosure to the accused of copies of his own statement.
12 [1980] 2 M.L.J. 196, 198.
13 *Supra,* p.12, note 57, p.332.
14 *Muthusamy* v. *P.P.* [1948] M.L.J. 57.

Informal negotiations are informal discussions between prosecution and defence and their success depends on the relationship between them and a willingness to be reasonable. All disclosure is purely voluntary, subject only to ethical considerations. In some jurisdictions, this develops into a semi-formal system of pre-trial review or the pre-trial conference which is adopted in the courts, and where a certain amount of mutual disclosure takes place in an atmosphere of co-operation or congeniality. In England, this development was widespread in magistrates' courts in many areas[15] before rules[16] made provision for disclosure of advance information to the accused of the prosecutor's case.

Ethical rules included in codes of conduct for legal professions have no legal force, but indicate desirable practices, and may often be considered inadequate and even the least effective option. This is probably the position in Singapore and Malaysia.

The first two approaches are the least satisfactory because all disclosure is voluntary and based on professional courtesy, a very flimsy foundation for any coherent system of discovery. Writers seem to have little faith in them.[17]

Prosecutorial guidelines do not have the force of law, but are guidelines issued to prosecutors by the controlling authority over criminal prosecutions. Such "Guidelines" have been issued by the Attorney-General in England, but, if not comprehensive, may only produce uniformity of practice among prosecutors.

Rules of Court are made by the courts under powers granted to them by law. They usually exist, and are comprehensive, in relation to civil cases, but often need substantial development in criminal cases. Some rules may be made under "inherent" powers (where they exist) to make them to fill lacunae or to do justice, others are made under specific statutory provisions for specific purposes. Unless the courts are given a wide discretion to make rules for the purpose of fair trials, the powers are usually inadequate in criminal cases. In New South Wales, Australia, rules have been made[18] in respect of summary trials in the Supreme Court of New South Wales, allowing a judge to make directions in a criminal trial on his own motion for the efficient and just disposal of a case. Thus, he may direct the prosecution to give better particulars; to furnish a list of prosecution witnesses to the defence; to supply the statements of prosecution witnesses or, if there is no statement, a summary of the evidence the witness might give; to produce a list of witnesses whom the prosecution does not intend to call; to produce a list of, and copies of, documents to be submitted at the hearing; and to permit the inspection of documents and property.[19]

15 See John Baldwin, *Pre-Trial Justice* (1985), *supra,* p.l, note 2.

16 The Magistrates' Courts (Advance Information) Rules 1985, S.I. 1985 No. 601.

17 See, *e.g.*, Roger J. Traynor, *supra,* p,6, note 24, at 767; Law Reform Commission of Canada, Report No. 22: *Disclosure by the Prosecution* (1984), Chapter II, p.5.

18 The rules were made under powers given by the Supreme Court (Summary Jurisdiction) Act 1967 (NSW).

19 New South Wales Law Reform Commission Discussion Paper on Criminal Procedure, Vol. I *supra,* p.l, note 1, para. 4.77.

The New South Wales model of rules has the advantage of providing, in summary trials, some machinery for discovery to make up for the lack of discovery in summary trials in Malaysia and Singapore. It also solves the problem of dealing with intractable prosecuting officers or authorities who refuse to entertain even reasonable requests by the defence for disclosure of material.

The last model — of a statutory scheme providing for compulsory disclosure — appears to find the most favour among law reform bodies in other jurisdictions. Such a scheme already exists in the U.S.A.[20] Draft proposals have been made for it in Canada.[21] Tentative proposals have also been made in New South Wales, Australia, for a combination of the statutory and 'rules of court' models.[22]

A formal (statutory) scheme has the advantage of conferring on the accused enforceable rights to disclosure, subject to certain specified necessary exemptions, such as matters requiring confidentiality. It may give the prosecution a discretion (subject to judicial review) to except certain matters from disclosure, or it may give the courts the discretion to order that disclosure is not in the public interst. Where a statutory scheme has been proposed, it has been recommended primarily because it has been considered unsatisfactory to allow for disclosure by the prosecution on a solely voluntary basis;[23] for this would mean leaving all disclosure at the whim of the prosecution, and would be unlikely to result in adequate disclosure. Traynor criticised the informal discovery made by prosecutors to defence counsel on the basis of professional courtesy or the tradition of the 'Old Boys Act' (or 'Old Boys' Network') "acted out frequently enough to give it the force of a realistic practice, if not of law or custom".[24] What Traynor said then, somewhat cynically, is perhaps truer of Asian societies like Singapore and Malaysia: "There can hardly be discovery by the grace of the prosecution to those who never even reach the state of grace. The defendant who has no solicitor to represent him does not even have a gambling chance to enter the pale of discovery."[25]

A formal scheme in Singapore has its adherents,[26] and there are many models to choose from. It is beyond the scope of this paper to compare the relative merits of the various models available. Suffice it to say that the Indian Criminal Procedure Code allows for a basic scheme of discovery that should not bristle with difficulties, and would provide the minimum adequate disclosures to an accused person, and so may commend itself for consideration as a modest scheme which is acceptable in the local context.

20 The Federal Rules of Criminal Procedure (1975), Rules 16, 26.
21 Law Reform Commission of Canada, Report No. 22, *supra,* Chapter II.
22 New South Wales Law Reform Commission Discussion Paper on Criminal Procedure *supra,* p.l note 1, para. 4.81-4.88.
23 See, *e.g.*, Report of the Canadian Law Reform Commission *supra,* p.44, note 21, p.5.
24 Roger J. Traynor, *supra,* p.6, note 24, p.767.
25 *Ibid.*
26 See: Lim Wee Teck, *supra,* p.2, note 4, at pp. 23-4. Lim argues for a uniform formal discovery procedure in all criminal cases, in order to make the accused's right to defend himself a "realistic" one, and supports a model combining the California "Omnibus hearing" model, the Canadian Law Reform Commission's recommended model in its Working Paper of 1974, and the procedures of the U.S. Federal Rules of Criminal Procedure.

The Indian scheme provides for the supply to the accused before the commencement of the inquiry or trial, of (a) a copy of the first information report recorded, free of cost;[27] and (b) copies of (i) all documents or relevant extracts on which the prosecution proposes to rely, and of (ii) all statements to the police of witnesses whom the prosecution proposes to examine as its witnesses, which are also forwarded to the magistrate empowered to take cognizance of an offence, on the completion of an investigation.[28] Magistrates are enjoined to furnish to the accused free copies of all prosecution witness statements recorded in the course of an investigation.[29]

In India, all statements made in the course of investigation are inadmissible[30] as substantive evidence and confessions to the police by the accused are inadmissible as well,[31] so the need for the accused's being given copies of his own statements to the police assumes less importance. However, in Singapore and Malaysia, statements made to the police by the accused may be used as substantive evidence against him, and it is surely imperative that he be granted copies of such statements if his right to a fair trial is to be meaningful.

An official review of the adequacy of disclosure to the accused is long overdue and the writer hopes that the problems and issues he has tried to identify will provide food for thought.

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27 Criminal Procedure Code (India), s.207(ii).

28 *Ibid*., section 173(5), (7), as amended by Act 26 of 1955. See also: *C. Gangi Reddi* v. *State of Andhra* 1955 Mad. 303, 304; and Sohoni's *The Code of Criminal Procedure* (18th edn., 1985), Vol. 2, pp. 1509, 1704-7, 1725.

29 Criminal Procedure Code (India), s.207.

30 *Ibid*., s.162. Statements are recorded by the police under the powers of s.161, which is the equivalent of s.121, and s.112, respectively, of the Criminal Procedure Codes of Singapore and Malaysia.

31 Indian Evidence Act 1872, ss. 25-6.

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