HEARSAY – A DOCTRINE IN RETREAT?
A RE-APPRAISAL OF THE HEARSAY RULE IN SINGAPORE

This article discusses the scope of the hearsay rule in the light of recent developments. Two issues raised in recent judgments – mechanically-generated evidence and statements of intention – are also analysed. Finally, the article discusses the implications of a trial system without juries on the rules of evidence, in particular, the hearsay rule.

Let us make an honourable retreat; though not with hag and baggage, yet with scrip and scrippage
(Touchstone)
Shakespeare, *As You Like It,* III, ii, 170

I. INTRODUCTION

A famous observation by Morgan, that one usually approaches the subject of presumptions "with a sense of hopelessness" and leaves "with a sense of despair"[1] may also serve to describe those who come to look at the subject of hearsay. In Singapore, the legislative approach to Hearsay can at best be described as intriguing and unusual, with substantial amendments made to the Rule in criminal cases[2] while the civil law remains virtually unaltered since 1893.[3] But neither the original provisions nor the amendments address the formidable problems of determining the scope of hearsay though the codes presuppose the existence of the exclusionary rule.[4]

The scope of the hearsay rule[5] has once again caused problems in several common law jurisdictions. The use of electronic or mechanical

1 "Presumptions" (1937) 12 Wash. L.R. 255. Another dispiriting description may be found in *Cross on Evidence:* "The rule against hearsay is one of the oldest, most complex and most confusing of the exclusionary rules of evidence." (p. 508, 7th ed., 1990.) The references to *Cross* in this article may be either to the English edition (C. Tapper, 7th ed.) or to the Australian edition (D.M. Bryne, J.D. Heydon, 3rd ed., 1986).

2 Criminal Procedure Code, ss. 377-385, Cap. 68, 1985 Rev. Ed. (hereinafter, the C.P.C.).

3 There were amendments made to the Evidence Act, Cap. 97, 1985 Rev. Ed. (reprinted 1990) hereinafter the "Evid. Act", by the addition of provisions governing admissibility of statements produced by computers (ss. 35, 36) and also, new exceptions in section 147(3) and (4).

4 C.P.C., s. 378(4) does provide for an inclusionary definition of "implied assertions."

5 There are, arguably, as many different formulations of the rule as there are common-law jurisdictions. This is because views differ as to the scope of the rule. As Singapore law is largely based on the English model, the authoritative definition provided in the latest edition of *Cross* may be used: "any assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted."

devices for recording relevant facts or reconstructing faces of suspects raises new issues. Meanwhile, some old problems – such as statements of the maker's intentions to do certain acts – continue to cause judicial concern. This article examines some of the recent cases and considers the extent to which they show judicial dissatisfaction with the obstructionist nature of hearsay. The Singapore rules are then re-evaluated in the light of the principles and policies that appear to be emerging from these cases.

II. WHAT HEARSAY RULE?

Partly as a consequence of Stephen's view that "hearsay" is an ambiguous concept and that its meaning must be collected from the exceptions to it,[6] neither the Evidence Act nor the Criminal Procedure Code contains a definition of the exclusionary rule.[7]

Evidence Act

Lack of definition notwithstanding, the Evidence Act plainly recognises the exclusion of hearsay statements unless they fall within any of the statutory exceptions. The admissibility of hearsay is achieved in a circuitous way: statements containing relevant facts or facts in issue also have to be legally relevant under the Act.[8] The legal relevancy sections concerning statements are sections 17 to 40 and are similar to, but not identical with, English common law exceptions[9] about 1872. The sections made certain statements "relevant" which also means that they are admissible. Thus, the absence of the exclusionary rule does not mean that hearsay statements may be admitted willy-nilly.

At the same time, the lack of a definition means that when statements do not fall neatly within one or more of those provisions, their admissibility or inadmissibility may be uncertain. It is precisely this problem that led to the most famous judicial *dictum* on the nature of hearsay in the leading case of *Subramaniam* v. *P.P.*[10] where the accused, who was charged with a firearms offence, pleaded duress. To prove duress, he wanted to tender in evidence the threats made by the terrorists. These of course were out-of-court statements given by persons who were not witnesses. The trial judge rejected them as being hearsay, and gave the Privy Council an opportunity to affirm the distinction between statements tendered to prove the truth of the matters contained in them and those that are tendered

6 J.F. Stephen, *An Introduction to the Indian Evidence Act 1872* (2nd Impression, 1904), p. 6.

7 J.F. Stephen in his *Digest on the Law of Evidence* (12th ed., 1912), p. 15, formulated the rule thus: "A statement oral or written made otherwise than by a witness in giving evidence, and a statement contained or recorded in any book, document, or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter asserted."

8 For "logically relevant" facts, see ss. 6-16, Evid. Act.

9 For example, the law on dying declarations in s. 32(a) Evid. Act does not require the maker to be in "settled, hopeless expectation of death" – a common law requirement.

10 [1956] 1 W.L.R. 965.

simply to show that they were made. The terrorists' threats fell into the latter category and hence were not hearsay.

Applying the Evidence Act to the case, however, causes difficulty because no provision concerning statements seemed to apply.[11] The case illustrates the inadequacy of the law in not having a positive definition of the exclusionary rule of hearsay. Statements that are "original evidence" do not fit nicely into the scheme of the Evidence Act. Stephen probably intended such "statements" to be treated as "facts", and hence "relevant" under sections 6 to 16.[12] There is, however, hardly any judicial support for the view.

Criminal Procedure Code

Section 377[13] of the C.P.C. contains a statutory definition of the hearsay rule in an *inclusionary* form. It states:

> "In any criminal proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent which it is so admissible by virtue of any provision of this Code or any other written law, but not otherwise."

This definition is supported by two other sub-sections to form a reasonably complete account of the doctrine. Section 378(3) states that a "statement" includes "any representation of fact whether made in words or otherwise" and subsection 378(4) provides that "a protest, greeting or other verbal utterance may be treated as stating any fact which the utterance implies." Seen in this way, two observations as to its scope may be made: first, with respect to express assertions, the formula covers both statements by words and conduct. Second, where the assertion is implied, that is, not intended by the maker to be assertive, only verbal utterances are within the rule.

III. IMPLIED ASSERTIONS AND THE C.P.C.

Under the C.P.C., the approach is taken that implied assertions by conduct do not fall within the hearsay rule, and thus will be admissible if relevant. For example, the well-known illustration of Baron Parke in *Wright* v. *Doe d. Tatham*[14] of a sea-captain inspecting his ship before setting sail with

[11] This is not surprising as the "threats" were not "hearsay" and the provisions on "statements" were all "hearsay exceptions". The threats could conceivably have been treated as "facts showing the existence of any state of mind ... towards any particular person" – see the next note (12).

[12] It is submitted that this is clearly supported by the many illustrations in ss. 6-16 dealing with statements, both written and oral. For example, see illus. c (s. 6), illus. (f)-(k) (s. 8), illus. (j)and(k)(s. 14). However, it is unfortunate that the issue was ignored in *Subramaniam* itself.

[13] This section and sections 378-385 were introduced in 1976 to facilitate the admissibility of hearsay in criminal cases. These provisions are based on the draft bill found in the UK Criminal Law Revision Committee's *Eleventh Report on Evidence* (1971, HMSO Cmd. 4991.)

[14] (1837) 7 Ad. & El. 313.

his whole family on-board being tendered as evidence of his belief that the ship was shipworthy would not be within the hearsay rule. If an issue had arisen as to whether the ship was seaworthy, the sea-captain's conduct would be treated as circumstantial evidence that the captain believed that his ship was seaworthy, a fact asserted through his conduct, *albeit* unintentionally.

The view that implied assertions by conduct should not be within the hearsay rule has drawn some criticism,[15] if only from theoreticians. Views range from one extreme to the other: that "all implied assertions, whether by statements or by conduct, should be excluded as hearsay" to the view that "implied assertions are not within the rule at all". The differing views turn not so much on whether implied assertions are by nature "hearsay" but on a practical assessment of the reliability of such unintended assertions. Many believe that since the makers of "implied assertions", by definition, do not intend to assert the relevant facts, the dangers inherent in hearsay – insincerity and inaccuracy – are markedly reduced. Certain legislation such as the US Federal Rules of Evidence[16] therefore exclude "implied assertions" entirely from the exclusionary rule. The in-between position as contained in the C.P.C., that is, distinguishing between "statements" and "conduct", has been described as unconvincing.[17] As the editors of *Cross*,[18] *inter alia,* remarked, the distinction is irrational because "it would make a soldier's salute admissible evidence of the presence of an officer, but not a soldier's statement 'Good afternoon, sir'." There is much to be said for the view adopted in the US Federal Rules; indeed, there is now growing judicial support[19] for treating "implied assertions" as a form of circumstantial evidence and excluding them altogether from the hearsay rule.

From the preceding discussion, it is obvious that the Singapore rules can be improved. The Evidence Act lacks guidance as to what constitutes hearsay. The C.P.C. does provide some guidance, but at the same time, adopts a position on implied assertions that is difficult to defend, in theory and in practice.

IV. "EXCEPTIONS" TO THE RULE

Quite apart from the lack of guidance as to what constitutes hearsay, the Singapore legislation can also be faulted in having two different sets of rules for the admission of hearsay in criminal cases in 1976, while retaining the 1893 rules for civil cases.[20] The enactment of the 1976 amendments reveals a lack of understanding about the provisions contained

15 For an excellent discussion on the whole subject of implied assertions, see *Cross* (3rd Aust. ed., 1986), pp. 737-742 (s. 16.8).
16 Rule 801, esp. (a) and (b).
17 See *Cross* (3rd Aust. ed., 1986), pp. 740-1.
18 *Loc. cit.*
19 See esp., Mason C.J.'s views in *Walton* v. *The Queen* (1989) 63 A.L.J.R. 226, discussed below.
20 The "computerised records" provisions were enacted in the Evid. Act rather than the C.P.C.. The reason for enacting them in the Evid. Act presumably was that they could apply to civil cases as well.

in the UK Criminal Law Revision Committee's draft bill that was an attempt to bring the criminal law of hearsay as close to its civil counterpart – the Civil Evidence Act 1968 – as possible. The UK Committee stressed the fact that under the Civil Evidence Act 1968, hearsay evidence "is now widely admissible in civil proceedings." In its view, it is a "fresh argument in favour of allowing such evidence in criminal proceedings." It continued:

> "This is not only because it seems desirable in general that the law of evidence in civil and criminal proceedings should be as nearly alike as possible ... but because it would be particularly unfortunate if differences in the law were to lead to different results in proceedings relating to the same facts."[21]

There is under the present scheme, no coincidence of approach in the two codes; the Evidence Act (for both civil and criminal cases) contains codified versions of common law exceptions, and the C.P.C. contains what is essentially an approach based on simpler distinctions – between first-hand and multiple hearsay and between documentary and non-documentary hearsay. However, lawyers, not surprisingly, prefer to use provisions they know (the Evidence Act) rather than the ones they do not.

The C.P.C. provisions are, similarly, not helped by the complexity of the provisions. The Criminal Law Revision Committee was aware of the problem but thought that "the procedure ... will be much less complicated than the provisions themselves look...."[22] This appears to be unduly optimistic and does not seem to be borne out in practice in Singapore.

The notice procedure envisaged in section 378 is also novel and unfamiliar to lawyers in criminal practice.[23] It has been noted that a similar scheme in the UK Civil Evidence Act 1968 has also proved to be cumbersome and its usefulness doubted.[24] In the Working Paper on Evidence (Business Records)[25] the view was expressed that "[a] notice procedure seems to be particularly inappropriate to the many cases, for example, equity and commercial cases, which are heard quickly and without the set-piece formality the procedure seems to envisage." The comment, it may be added, is specially apt when applied to subordinate court trials.[26]

21 Para. 235, Cmd. 4991, HMSO 1971. See also, para. 243.

22 *Op. cit.*, para. 247.

23 It is also a confusing section because in its original form, it was limited to first-hand hearsay. As the operative sub-clause (cl. 31(5)) was omitted, an irrational position is created in that the conditions for admitting documentary hearsay (based on "duty") may be seen to be more onerous than those applicable to oral hearsay (under s. 378). This is surely absurd insofar as it is predicated on the supposition that oral hearsay is more reliable than documentary hearsay.

24 See esp. N.S.W. Law Reform Commission, *Report on The Rule Against Hearsay,* LRC 29 (1978), para. 6.12.8-6.12.10.

25 Para. 199, cited in the Report, *op. cit.* at 6.12.8.

26 It is noteworthy that the English legislation now governing criminal hearsay – Criminal Justice Act 1988, ss. 23-8 – does not incorporate any "notice procedure", perhaps because it deals only with documentary hearsay.

So far as the Evidence Act's exceptions[27] are concerned, they are based largely on the established common law exceptions in 1872. Parties proffering hearsay statements have to show that such statements are within one or more of these exceptions. On occasions, such statements have had to be excluded even though their reliability may not be in doubt.[28] The C.P.C. amendments were supposed to ameliorate the rigidity of the common law exceptions. Retaining the application of the Evidence Act exceptions to criminal cases has served to confuse the aim of the C.P.C. provisions[29] and divert attention away from the issue of reliability of hearsay.

The present law, it is submitted, is Byzantine and generally ineffective. Its utility may be further examined by considering two problems that have been encountered in other jurisdictions recently, namely, mechanically-generated information and statements concerning mental or physical conditions.

V. MECHANICALLY-GENERATED INFORMATION

As a result of Stephen's view not to regard objects or things as a separate form of evidence, the Evidence Act recognises only two types of evidence: oral and documentary. This has meant that the Act is virtually silent on the issue whether objects or things are admissible in evidence. Section 62(3) is the only provision that expressly refers to "any material thing other than a document" and it provides that there is a judicial discretion to require the production of such a thing for the inspection of the court where "oral evidence refers to the existence or condition" of it. However, there are no rules about the proof of such things as compared with the elaborate rules concerning the authentication of documents and the use of secondary evidence to prove the contents of documents.

The question recently raised by mechanically-generated information that constitutes relevant facts is whether such evidence falls within the hearsay rule and hence, *prima facie,* inadmissible. The classic examples of such evidence are photographs, tape recordings and video-recordings. The view taken by the common law is aptly summarised by the editors of *Cross:*

> "When the court permits a tape-recording to be played over, it is acting on real evidence, if it treats the intonation of the words as relevant. If the court's attention is directed solely to the terms of the recording, it may be acting under an exception to the rule against hearsay.... Or the court may receive the recording as original evidence, as when a recording of slanderous words is admitted in order to show that the words were in fact spoken."[30]

27 For a discussion, see Chin T.Y., *Evidence* (1988), Ch. 2, pp. 31-47.
28 For the most well-known common law example, see *Myers* v. *DPP* [1965] A.C. 1001. For a Singapore case, see *Vaynar Suppiah* v. *KMA Abdul Rahim* [1974] 2 M.L.J. 183.
29 An additional problem created by the C.P.C. provisions is the prescription that hearsay is only admissible by virtue of written law. *Quaere:* does that mean that the common law doctrine of *res gestae* has no application under Singapore law?
30 3rd Aust. ed., p. 51 (s. 1.59).

A different analysis may have to be taken under the Evidence Act, as it is likely that the tape-recording will be treated as a document.[31] Where its contents are in issue, the statements contained in the document may have to be deemed "relevant" by virtue of one or more of the provisions dealing with statements. Where the intonation of the words or the fact that the words are spoken are relevant, they may have to be treated as "facts" that have to be legally relevant before they are admitted.

A photograph or, by extension, a video recording of a relevant fact then may be admissible under the Evidence Act as a document. In *Taylor* v. *Chief Constable of Cheshire*,[32] a witness who saw a video-recording of a theft committed in a shop was allowed to give testimony of it without infringing the hearsay rule. On similar facts, the position at local law is likely to be that secondary evidence of the document is admissible because the original had been destroyed.[33]

More difficult problems arise when photofit pictures are tendered in evidence. Are they real evidence? Or should they be treated as within the hearsay rule? A "photofit" picture is compiled from the eye-witness's recollection of the suspect. The English Court of Appeal had two recent opportunities to consider whether a photofit picture can be admitted without infringing the hearsay rule. In *Cook,* the photofit picture was introduced as part of the witness's testimony and objection was made that it infringed the rule against previous consistent statements as well as the rule against hearsay. In *Constantinou*,[34] the photofit picture was used as the only means of identifying an assailant. The Court of Appeal in *Cook*[35] held that the photofit picture did not infringe the hearsay rule because:

> "We regard the production of the sketch or photofit by a police officer making a graphic representation of a witness's memory as another form of the camera at work, albeit imperfectly.... As we perceive it the photofit is not a statement in writing made in the absence of the defendant ... which this very old rule against hearsay has ever been expressed to embrace. It is we think *sui generis....* It is a thing apart, the admissibility of which would not be in breach of the hearsay rule."

Reactions to this decision have been mixed: welcomed by one writer as "a triumph of good sense"[36] but criticised by two others as "crucially fallacious"[37] and as "extremely optimistic"[38] because the decision assumes "equivalent objectivity in the combination of human beings composing 'photofit' or drawing, and camera." Both critics point out that the traditional

31 A document is defined in the Evid. Act as "any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter" (s. 3(1)).

32 (1986] 1 W.L.R. 1479.

33 The relevant provisions are: s. 65(e) – oral accounts of contents of document and s. 67(c) – original destroyed or lost.

34 [1989] Crim. L.R. 571.

35 [1987] 1 All E. R. 1049, at p. 1054h.

36 A. Zuckerman, *All ER Annual Review* 1987, p 113.

37 P.B. Carter, *Cases & Statutes on Evidence* (2nd ed., 1990), p. 306.

38 C. Tapper, *Cross on Evidence* (7th ed., 1990), p. 530.

dangers which the hearsay rule are supposed to guard against – error or misdescription – are present. Therefore the photofit picture ought to have been treated as "hearsay". The *Cook* decision may be defended on the ground, perhaps, that such dangers are considerably lessened by the fact that the witness may be cross-examined with respect to it. There was no such "safeguard" in *Constantinou.* The decision may be seen as an extension of *Cook* in that the picture was treated as the only means to identify the accused. The eye-witness's other testimony regarding his identification of the accused was excluded.[39]

In Singapore, the issue may be resolved at a technical level. If the photofit picture were introduced as a document used to refresh the memory of the witness or used as a basis for cross-examination, section 147(3) and (4) might be referred to in order to justify such pictures as evidence of any fact stated therein. Thus, these pictures may be treated as hearsay but nonetheless admissible because of the exceptions.[40] Considered in this way, the way is open for a challenge to be made regarding the quality of the picture as provided for in section 147(5). It would therefore be possible for a Singapore court not to follow the English position.

If, however, the English position is accepted, and if the person supplying the description for the photofit picture is not called as a witness, there is doubt as to how the picture is to be received in evidence. The section referred to above – section 62(3) – assumes that there will be a witness giving oral evidence about the condition or existence of a material thing (as distinct from a document). But in the case of the photofit picture, who is the right person to give such evidence? The supplier of the information? Or the police officer who constructed the picture? Can the officer who was responsible for storing the picture give evidence as to how it originated although he might have no first-hand knowledge? It is submitted that the rules are woefully inadequate in this regard.

A further issue which is raised by the *Cook* decision that photofit pictures are *sui generis* is whether it is correct to classify the pictures as documents. It is one thing to say that Stephen had the drafting skill to ensure that the definition of a document can include photographs[41] but it is quite another matter to apply the rules on documentary evidence to tape-recordings, video-tapes and photofit pictures, none of which were in existence at the time the Evidence Act was originally drafted.

[39] The note in the Crim. L R. did not indicate why the evidence was rejected.

[40] *Quaere:* is the picture a "statement" within these sub-sections? The view of the Court of Appeal in *Cook* is that "a photofit is not a statement" and should be treated as being outside the hearsay rule.

[41] The illustration to the definition of "document" in s. 3(1) is inconclusive: "Words printed, lithographed or *photographed* are documents." (Italics added.)

VI. STATEMENTS OF INTENTION[42]

One problem that has received considerable judicial and academic attention recently is the nature and use of statements of intention made by persons who are not called as witnesses. The treatment of such statements under local law would probably surprise and dismay jurists.[43] It also exposes the weakness of an essentially mechanical approach of "fitting" statements to appropriate provisions.

Yeo Hock Cheng v. *Rex*[44]

In *Yeo's* case, the accused was charged with the murder of his fiancee.[45] The crucial statement[46] in issue was made by the deceased to her sister just before she left for the ill-fated appointment. She told her sister that she was going out with the accused and that he had told her to put on menswear. The majority of the Court of Appeal took the view that this statement was admissible as a dying declaration because it formed part of the "circumstances of the transaction" that resulted in her death.[47] The admissibility of the statement was therefore settled by reference to an exception to the hearsay rule, namely, dying declarations, a course not otherwise open to common law jurisdictions that require a declarant to be in "settled, hopeless expectation of death" before such a statement is admissible.

An important question (that the majority did not address) was: what are the dangers in using the statement of the deceased to prove that the accused met her as arranged? The declarant could be insincere and could have lied about the meeting arrangements. Or there could be inaccuracy in perceiving what the other party wanted her to do. It is for those reasons that in *People* v. *Alcade*[48] Traynor J. remarked:

> "A declaration as to what one person intended to do, however, cannot *safely* be accepted as evidence of what another probably did."

The key word is "safely", and to classify the statement as a dying declaration and hence admissible does not guarantee that the trier of fact will be aware of such dangers. If the evidence was used to infer that the accused did meet the deceased as arranged, it would be crucially damaging to his case. Such apparently was the approach taken by the majority.[49] McElwaine C.J., dissenting, may be closer to the mark when he said:

[42] See esp. C. Tapper, "Hillmon Rediscovered and Lord St. Leonards Resurrected" (1990) 106 L.Q. R. 441.
[43] It is no comfort to know that these were Privy Council decisions.
[44] (1938) 7 M.L.J. 104 (C.C.A.); (1939) 8 M.L.J. 91 (P.C.).
[45] It appeared to have been a forced engagement after the accused seduced the girl: p. 109 C.C.A.).
[46] There were in fact two statements tendered, but only one is relevant to this discussion.
[47] See s. 32(a) Evid. Act.
[48] (1944) 148 P.2d. 627 (Cal.) cited by C. Tapper, (1990) 106 L.Q.R. 463.
[49] Roger Hall C.J. (FMS), Terrell J.

> "I do not see how a statement by the girl in this case of what the accused is alleged to have said on a former occasion, or of the clothing the accused is alleged to have told her to wear on the night of her murder is admissible in evidence, the accused not having been present at the making of either statement....
>
> *It may be evidence of her state of mind, of her intention, but neither her state of mind nor her intention is relevant to the issue - who killed her?"*[50]

McElwaine CJ.'s cautious attitude regrettably went unheeded and when the Privy Council considered a similar case on appeal from Patna, India,[51] the position was taken that statements of intention by deceased persons can be admitted under the "dying declarations" exception. Lord Atkin said:[52]

> "However, statements made by the deceased that he was proceeding to the spot where he was in fact killed or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction...."

This line of cases thus reveals that there is no guarantee of reliability even where the evidence is admitted under a hearsay exception, particularly one where the traditional safeguard (that a man is not likely to lie because he is near death) is not applicable. It is submitted that unless some attempt is made to inform the trier of fact as to the dangers of relying on statements in each case, there is really no point in going through the exercise of showing that a statement is within an hearsay exception. The point may equally be made that if the court was aware of the dangers, calling it hearsay adds little to the objective of ensuring that the evidence is properly evaluated.

Further judicial analysis on the status of such statements may be found in the recent decision of the High Court of Australia in *Walton* v. *The Queen*.[53] A statement in issue was the declaration by the deceased that she intended to meet her husband, the accused, at a certain time and place. The prosecution's case depended, *inter alia,* on proof that she met the accused as arranged and that he later murdered her.[54] The case is notable not just for the novelty of the approach taken by Mason C.J. but also for the willingness of the judges to recognise that the hearsay rule should not be stringently applied, at least, where other independent evidence is present to support the facts that the hearsay was tendered to prove.

50 *Ibid*., p. 107. (Italics added.)

51 *Pakala Narayana Swami* v. *King-Emperor* (1939) 8 M.L.J. 59.

52 *Ibid*., p. 61.

53 (1989) 63 A.L.J.R. 226. Besides C. Tapper's excellent analysis in 106 L.Q.R., *supra,* note 42, the reader may also find Stephen J Odgers, *"Walton v. The Queen* - Hearsay Revolution" (1989) 13 Crim. L.J. 201 illuminating. The whole judgment repays careful study.

54 Again, such a statement in Singapore would probably be admitted as a dying declaration.

On the issue whether the statement of intention was hearsay or not, Mason C.J. thought that the better view is that such statements are original evidence as they are seen to have independent evidentiary value. Such a value may vary: "The admissibility of evidence of statements of intention to do an act as proof that the act was subsequently undertaken rests on probability."[55] As, on the facts, there is other evidence to support the fact that the deceased did meet the accused, Mason C.J. did not see the sense in rejecting the statements even though they relate to the future actions of another as well.

The majority (Wilson, Dawson and Toohey JJ.) were perhaps more circumspect, recognising that statements about state of mind may or may not involve hearsay. Where reliance on such a statement requires some assessment on the truthfulness or accuracy of the maker, an element of hearsay is involved.[56] But even such a statement can be treated as conduct from which an inference can be drawn, without involving any hearsay element. The statements uttered by the wife in the instant case were therefore treated as "conduct" and not as assertions by her that she would be meeting the accused at a certain time and place.[57] The trier of fact in other words can infer from the deceased's statements that she acted according to them.

The difference of opinion in this decision may be said to characterise the agonising lack of clear answers in determining the scope of hearsay, let alone providing clear rules that can be applied daily by Bench and Bar. These recent decisions reveal the needless complexities of the hearsay rule. The diversity of views and sophistication of analysis generated may both bemuse and confuse lawyers and laymen alike. *Walton's* case may, however, signal the willingness of judges to be flexible to a degree not evident hitherto.[58] It is to this issue that we must now turn.

VII. SOLUTIONS?

In *Walton,* Mason C.J. also had to consider the admissibility of a statement made by a child who answered the phone by saying "Hello Daddy". This was tendered to prove that the accused whom the boy called "Daddy" was on the line. The statement was of course an implied assertion[59] and under the well-established definitions of the rule, clearly hearsay. Mason C.J. drew on the line of authority relating to *res gestae* to the effect that statements that are made in circumstances where fabrication is unlikely may be admitted as part of the *res gestae.*[60] He argued for a broader application of the principle:

55 (1989) 63 A.L.J.R. 226, p. 230.
56 *Ibid., p.* 234.
57 *Ibid., p.* 235.
58 The lack of judicial activism may be due in part to Lord Reid's remark in *Myers* v. *D.P.P.* [1965] A.C. 1001 that it is up to the Legislature to provide new exceptions to the hearsay rule.
59 Defined by Mason C.J. as an assertion "which can be inferred or implied from a statement or from conduct, and will generally not be deliberately intended by the author" *(ibid., p.* 229).
60 The leading authority is *Ratten* v. *The Queen* [1972] A.C. 378. See also *R. v. Andrews* [1987] 1 A.C. 281.

"The hearsay rule should not be applied inflexibly. When the dangers that the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay."[61]

The "flexible" view is backed up by the observation that it is especially in the case of implied assertions that the risk of concoction may be small. Here, the judge should undertake "to balance the competing considerations in order to determine admissibility, since the dangers associated with hearsay evidence will not all necessarily be present."[62] By contrast, "an express assertion will often lend itself more readily to a suspicion of concoction." In the case of express assertions, therefore, there should be a strict application of the rule though even here, exceptional circumstances may arise where it may be unnecessary.

His approach, however, did not find favour with his brethren who did not accept that the boy's greeting could be treated as evidence of the identity of the caller. Nonetheless, Mason C.J.'s *dictum* may be regarded as a general principle that may appeal to judicial activists though it may make the life of litigation lawyers more difficult, as will any principle that requires a balancing of factors.

The broader issue raised by the case is whether a reform of the hearsay rule should not take the form of conferring a judicial discretion to *include* reliable evidence. Conversely, evidence that is not reliable, or evidence that would operate unfairly against the accused should still be excluded although it may be technically admissible.[63] The use of discretion was regarded as essential by the NSW Law Reform Commission in its proposals on the reform of the hearsay rule.[64] Reliability has been identified by the Commission to involve two aspects - reliability of the statement and reliability of the transmission to the court. The reliability of the statement may be secured by requiring the maker to be known, to have personal knowledge of the facts contained in the statement and to allow the party against whom the statement is adduced to challenge the credibility of the maker as well as the circumstances in which it was made. Where a statement is "relayed" from the maker to other intermediaries, reliability in transmission requires the intermediaries to be ascertainable and credible. The burden should be on the party adducing "multiple hearsay" statements to show that the process of transmission is reliable. Again the right to challenge the credibility of the maker should also be available against any intermediary.

[61] (1989) 63 A.L.J.R. 226, pp. 229-30.

[62] *Ibid*., p. 230.

[63] This is not the place to discuss discretion in any detail and readers are referred to the valuable work by Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* (2nd ed., 1990), esp. Ch. 7.

[64] The draft Evidence (Amendment) Bill contains a provision (s. 74) which expressly confers on a judge a discretion to *include* reliable evidence.

It has been argued that a relaxation of the hearsay rule will lead to a flood of unreliable evidence and that the principle of orality (that is, primary reliance on oral testimony) will be jeopardised. This objection does not take account of the fact that at the end of the day, the trier of fact will be looking for credible evidence and that is hardly likely to be achieved by a mass of multiple hearsay statements. Lawyers are, in other words, likely to rely on the best evidence possible and that may mean that hearsay evidence will usually play a secondary role, whether the exclusionary rule exists or not.

It is further submitted that any proposal for changes to the hearsay rule must also take account of the nature of the Singapore trial process, the most significant feature being that all trials are by professional judges. There are no juries, neither are there lay magistrates. When dealing with the admissibility of evidence in bench trials, it is difficult to gainsay the opinion of the Privy Council in *A-G (Hong Kong) v. Siu Y.S.* regarding the judicial role:

> "In a trial by a judge alone the exercise of excluding the evidence on grounds of prejudice becomes somewhat unreal when it is remembered that the judge must be informed of the nature of the evidence in order to rule upon whether or not it is admissible. *If the judge having ruled it inadmissible is to be trusted to put the evidence out of his mind he can surely be trusted to give it only its probative, rather than its prejudicial, weight if he rules that it is admissible*.[65]

Although their Lordships were concerned with similar fact evidence, the comments apply equally to hearsay, indeed any evidence that is tendered to the judge for the purpose of determining its admissibility.

Where the judge needs to know the nature of the evidence in order for him to rule on its admissibility, the Privy Council must surely be right to observe that the distinction between admissibility and weight is more apparent than real. The italicised words in the *dictum* above contain the key consideration: confidence is already placed in judges on a matter of admissibility and to trust judges on admissibility but not on weight is spurious. The present rules are based on a distinction between law and fact, judge and jury, admissibility and weight. In bench trials, such a distinction appears specious especially in situations where the judge has to see the evidence to rule on its admissibility.

In the case of hearsay evidence, "the judge must be informed of the nature of the evidence" in order to rule on it.[66] The judge may have to see the statement in order to discharge his duties properly. He has to

[65] [1989] 1 W.L.R. 236, p. 241. (Italics added.)

[66] An emphatic proviso is necessary here with respect to statements made by accused persons: the judge can decide the preliminary issue of "voluntariness" without actually reading the statement. The judge may know of the existence of a statement but he does not need to know whether it is a "full confession" or not nor, more significantly, does he need to know the contents of it in ruling on its voluntariness. It is understood that the present practice is that statements by the accused are not read by the judge in determining its "voluntariness".

consider whether the statement being adduced is being used to prove the truth of the facts or opinions expressed or implied in it. *Ex hypothesi,* he must be informed of its contents. It has never been suggested, nor is it reasonable to suggest, that a judge should not read the statement unless he has already ruled it admissible.

The conclusion that one may draw from the above discussion is that there ought not to be grave objection to shifting the role of the judge from one of determining the admissibility of hearsay evidence to one of assessing its probative value, if any. Those not in favour of investing judges with too much discretion object to the unpredictability inherent in any exercise of discretion. Appellate courts may be less likely to overturn a decision based on discretion and where that discretion is *inclusionary* the dangers are that much more obvious.[67] There is no doubt that an appellate court can review the improper exercise of discretion.[68] The general ground for reviewing the exercise of a trial judge's discretion is based on "injustice", admittedly, a vague standard. However, a considerable body of case-law now exists to guide appellate and trial judges on the matter.[69]

It is hoped that the above analysis will convince the reader that the hearsay rule in Singapore is far too complicated and involved to work smoothly. Short of abolition - perhaps too radical to contemplate at this time - serious thought should be given to reduce the scope of the rule. For a start, the distinction between express and implied assertions should be observed and implied assertions should not be brought within the exclusionary doctrine. This approach is reflected in the US Federal Rules of Evidence[70] and in the recommendations of the NSW Law Reform Commission. Mason C.J. in *Walton's* case also expressed a similar view.

Second, there must, as far as possible, be a coincidence of rules in civil and criminal proceedings. There may of course be special considerations in criminal cases, for instance, there must be special rules relating to statements by the accused where other policies besides reliability play important roles.[71]

Third, new conditions of *admissibility* may be worth introducing. For example, hearsay statements of victims of rape or child abuse should be considered admissible where such statements are taken in conditions that do not prejudice the accused but where the witnesses may give their statements without the tension of an adversarial public trial.

Fourth, there must be an appreciation of the fact that the trial judge in Singapore is both a trier of law and a trier of fact. In criminal trials, this fact should lead to the rules of evidence moving away from the strict

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67 See, Rosemary Pattenden, *op. cit.*, Ch. 10.

68 N.B., *R* v. *Hambury* [1977] Q.B. 924.

69 See Rosemary Pattenden, *op.cit.*

70 See Rule 801.

71 For example, the disciplinary principle and the protective principle may result in statements not being admitted even though reliable.

dichotomy of admissibility and weight towards the concepts originally used by Stephen, namely, relevancy and weight. An alternative may be to have a law of criminal pre-trial discovery. The pursuit of both approaches would make for a more rational system of procedural rules in Singapore.

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