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SING A SONG OF *SANG*, A POCKETFUL OF WOES?

This article argues that there is provision in the Singapore Evidence Act for the exercise of judicial discretion to exclude prejudicial evidence. It then considers the English case of *Sang* with a view to showing that there is a need for development of the privilege against self-incrimination and for a broader conception of prejudice in a trial which takes into account inadequacies in the preparation for trial occasioned by the manner evidence is procured. The inter-relations of *Sang* and evidentiary legislative provisions (especially in the Road Traffic Act) are also examined.

I. INTRODUCTION

THE existence of a judicial discretion to exclude relevant evidence, which at common law is now well established[1] (although its scope may be controversial), cannot be taken for granted in Singapore.[2] At first blush, there is no provision for the discretion in the Evidence Act.[3] Section 138(1) of the Evidence Act declares (mandatorily it would appear) that the judge shall admit relevant evidence. By implication he shall reject irrelevant evidence. There is an embodiment of the cardinal common law principle that all relevant evidence is admissible[4] but it seems without the countervailing principle that prejudicial relevant evidence may be excluded.

The supposed absence of the exclusionary discretion has been attributed to the great difference between the common law, which is said to concentrate on what evidence to exclude, and the Evidence Act, which lays down a positive system of what evidence to include.[5] The criticism seems to be that in concentrating on what to include, one has forgotten that it may be necessary to exclude what might normally be relevant. These pronounce-

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1 Lord Diplock in *Sang* [1980] A.C. 402 traces its origin to the 1940s.

2 The inclusionary discretion to include evidence of dubious relevancy is left out of account. For arguments that no exclusionary discretion exists in civil trials, see J.R. Forbes, "Extent of the Judicial Discretion to Exclude Relevant Prejudicial Evidence in Civil Cases" (1988) 62 A.L.J. 211. *Cf. Pearce* v. *Button* (1985) 60 A.L.R. 537, *Mazinski* v. *Bakka* (1978) 20 S.A.S.R. 350, *I.T.C. Film Distribution* v. *Video Exchange Ltd.* [1982] 1 Ch. 321, *Berger* v. *Raymond Sun Ltd.* [1984] 1 W.L.R. 625.

3 Cap. 97, 1985 Rev. Ed.

4 See *e.g. Inhabitants of Eriswell* (1790) 3 T.R. 707, 714, *Whiley* (1804) 2 Lea. 983, 985-986.

5 R. Margolis, "The Concept of Relevance: In the Evidence Act and the Modern View" (1990) 11 Sing. L.R. 24.

ments must not pass without closer scrutiny. If they are right, the Evidence Act is deficient. The decision in *Cheng Swee Tiang*[6] adopting the common law exclusionary discretion will lack statutory foundation. The pronouncements have an important impact on the question of illegally obtained evidence. This question is moot if in the first place the judicial discretion to exclude is non-existent.

II. Arguments that Discretion Exists

The Evidence Act which Sir James Stephen drafted certainly concentrates on spelling out what evidence is included as relevant and, therefore, admissible.[7] All facts are stated expressly to be relevant or else rejected implicitly as irrelevant and relevancy is accordingly defined as follows:

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.[8]

If then a fact is not stated in the Evidence Act as relevant, it is not relevant so that hearsay and similar fact evidence generally speaking are irrelevant by virtue of simply being left out. But to say that the need to exclude relevant evidence is forgotten is to approach the Act somewhat superficially and may overlook the possibility of an exclusionary discretion built into certain categories of relevancy.

We know that Stephen was alive to the need to balance probative force against prejudicial effect. In many places he shows that he is apprised of the dangers of allowing hearsay and alert to the prejudicial effect of that on the accused. He notices that the accused might be put at the mercy of a liar, for how does one defend oneself against a lie when one has no clue who has put it out? An incalculable amount of time would be lost trying to trace unauthorized and irresponsible gossip.[9] But certain categories of hearsay evidence are, nevertheless, declared to be relevant. The admission is declared to be relevant in sections 17 to 21 of the Evidence Act. Dying declarations and entries made in the course of business are also relevant. It is not difficult to surmise that these categories of hearsay are made relevant because their probative force exceeds their prejudicial effect. Statements of feelings, intention, knowledge and so on are dealt with by section 14. Stephen tells us that "statements [as these] are regarded as relevant facts

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[6] [1964] M.L.J. 292. See also Saw *Kim Hai* [1956] M.L.J. 21.

[7] Stephen actually drafted the Indian Evidence Act on which the Singapore Evidence Act was substantially based.

[8] Section 3(2) of the Evidence Act. This is perhaps a better definition than that in his *Digest of the Law of Evidence* (1936, 12th ed.), Art. 1 of which states that facts are relevant when they are so related to the fact to be proved that by themselves or in conjunction with other facts they prove or render probable the existence or non-existence of the matter in issue.

[9] J. Stephen, *Introduction to the Indian Evidence Act 1872* at pp. 168-169.

either because the circumstances under which they are made invest them with importance, or because no better evidence can be got."[10]

The same thinking informs his treatment of similar fact evidence. He considers that it clouds the precise issue to be determined. The reception of similar fact evidence would turn every trial into a trial of the whole life and character of the accused.[11] So he conceives that similar fact evidence must pertain to the very issue of state of mind, of system, or of deliberation. Otherwise such evidence is irrelevant.

In effect then, in formulating the relevancy provisions of the Evidence Act, a balance has been struck between probative force and prejudicial effect. The relevancy provisions represent categories of facts which are acceptable or legally relevant and as to which evidence may be received in proof.

But – and this is important – the balance between probative force and prejudicial effect need not always be struck inflexibly, and, so we must ask whether some of these categories in fact contain a built-in exclusionary discretion. Some categories clearly do not contain the discretion. These are the directly relevant facts or facts in issue. They are defined in uncompromising terms.[12] But certain categories of indirectly relevant facts are more ambiguously defined. In these the discretion may be discerned.

Obvious categories are sections 14 and 15, the provisions which are apt to bring in admissible similar fact evidence. On one view, which is actually unfounded, sections 14 and 15 require that the defence must raise an issue rendering the similar fact evidence relevant in rebuttal.[13] This means, as *Noor Mohamed*[14] and *Thomson*[15] well illustrate, that the prosecution cannot put in similar fact evidence as part of its case. Unless it is a defence which may reasonably be anticipated, the prosecution must abide the defence putting in issue some state of mind or intention either by the line of cross-examination undertaken or by examination-in-chief of defence witnesses. But clear-sighted judicial minds in *Boardman*[16] have stripped the admissibility of similar fact evidence at common law of this technicality. Admissibility, they now say, is not conditioned by the defence putting a matter in issue but depends upon strong, striking probative force which outweighs any prejudicial effect. So if indeed sections 14 and 15 require the defence to have engaged an issue rendering the similar fact evidence relevant, any

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[10] *Ibid.,* at p. 166.

[11] *Ibid.,* at p. 169.

[12] For instance, section 7 which states: "Facts which are the occasion, cause or effect ... of facts in issue ... are relevant."

[13] See *Raju* [1953] M.L.J. 21. Whether section 11(b) embodies the degrees of relevancy approach is controversial.

[14] [1949] A.C. 182

[15] [1918] A.C. 221.

[16] [1975] A.C. 421.

exercise of an exclusionary discretion will be impossible under these provisions *per se.*

In fact, sections 14 and 15 do not say that an issue must have been engaged by the defence rendering the similar fact evidence relevant in rebuttal. But sections 14 and 15 are worded so as to admit similar fact evidence that is particularly relevant to *mens rea* because they require there must be an issue or a question of it.[17] We know that similar fact evidence is generally relevant to show propensity to commit crimes and bad character. Since it would be prejudicial to the accused to allow for general relevancy, only particular relevancy can avoid prejudice to the accused. One instance of particular relevancy no doubt arises when the defence makes alive an issue of state of mind or raises a question of accident. The defence need not engage the issue at all, but if it does, it is safe to let in similar fact evidence in rebuttal. The avoiding of prejudice is assured in such circumstances by the election of the defence to put the matter in issue and by the precise definition of what is in contest. This is not, however, the only instance of particular relevancy. In testing for particular relevancy, much is going to depend on the particular facts of the case and the strength of the similar fact evidence in the light of those facts. What is similar fact evidence cogent to rebut intention to cheat in one instance may be cogent only to rebut absence of knowledge in another. It follows just as logically that what may be cogent to rebut may in an appropriate case be cogent to prove, irregardless of what defence is going to run. So another instance of particular relevancy arises where the similar fact evidence is so cogent to prove the *mens rea* of the accused that we can say it shows that the state of mind exists not generally but in reference to the particular matter in question. Then the prosecution should be entitled to put in the evidence as part of its case. In the language of section 14, the existence of a general state of mind is not in issue. The existence of a particular state of mind is in issue and the prosecution is entitled therefore to prove it by the similar fact evidence which establishes that particular state of mind.

Of necessity, when particular relevancy is insisted upon, there must be a weighing in borderline cases where the relevancy is debatable and the fact may be adjudged not particularly relevant but apt to raise confusion. If the side issues abate, the generality must also abate. The particularity must correspondingly increase. In that dim penumbra, one way of saying

[17] Section 14 states: "Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling *is in issue or relevant."* [Emphasis added.] Section 15 states: *"When there is a question* whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

that the requisite particularity is unsatisfied is to assert that the prejudicial effect overwhelms the probative force of the evidence.[18]

There is evidence that certain, though admittedly not all, judges have thus apprehended the ambit of sections 14 and 15. In these cases we have early indications and anticipations of a *Boardman* flexibility and recognition therefore of the discretion. Contrast the adamant insistence of Terrell J. in *Tea Koon Seng*[19] that a defence must be put up before similar fact evidence is admissible in rebuttal and his quiet recant in *V.K.S. Samy* that "[i]t is not only to rebut the defence of accident that such evidence can be admitted; it can also in a *proper* case be called to prove a state of mind, to prove criminal intention."[20] [Emphasis added.] Nor is Terrell J. alone in approving this apprehension of sections 14 and 15. Burton Ag. C.J. in *S.T. James* is of similar opinion:

> I think [the evidence was properly led to anticipate the defence] because, even if the defence were not put up, the prosecution must prove dishonesty as part of the substantive offence. Therefore as the duty of the prosecution is to prove the charge substantively irrespective of the defence, I think the evidence was admissible for that purpose, *irrespective of the question of anticipating the defence.*[21] [Emphasis added.]

Another important provision which arguably contains an in-built discretion is section 9. In that provision an in-built discretion may be discovered in the concept of necessity where in sections 14 and 15 it resides in the concept of particularity. Section 9 says that:

> Facts necessary to explain or introduce a fact in issue or relevant fact, *or which support or rebut an inference suggested by a fact in issue or relevant fact,* or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact in issue or relevant fact happened or which show the relation of the parties by whom any such fact was transacted, are relevant *in so far as they are necessary for that purpose.* [Emphasis added.]

The provision declares that facts which support or rebut an inference suggested by a fact in issue or relevant fact are relevant. What is meant

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[18] There is thus no difficulty in Thomson J.'s acceptance of the class of cases in which although the evidence is strictly admissible, it is of little value to the prosecution but would prejudice the accused: see *Rauf bin Haji Ahmad* [1950] M.L.J. 190, at pp. 192-193.

[19] [1936] M.L.J. 10.

[20] [1937] M.L.J. 172, at p. 173.

[21] See Burton Ag. C.J. in *James* [1936] M.L.J. 8, at p. 10.

by support or rebut? What is meant by an inference? The terms are not defined. But they are obviously extremely important. Though few words are involved, a whole realm of circumstantial evidence is catered to. These few words would in a case like *Sunny Ang*[22] virtually and practically determine the relevancy of all the facts there adduced. This is also precisely the area in which the concept of probative force or logical relevancy is tested. In inferential or circumstantial evidence cases logical relevancy must be put to work to sift those with acceptable logical connection from those which go a bit beyond.

Even if fortuitously so, the fact that the terms "support" and "rebut" are undefined turns out to be precisely right because we can say that what we mean by "support" is support in the logically probative sense. Similarly, with "rebut." Next, facts which support or rebut relevant facts are relevant (or indirectly relevant) only in so far as they are necessary for that purpose. The illustration mentioned discloses no clue that these words import a judicial discretion to rule out those that may support or rebut but are not strictly necessary for that purpose. But there is no reason why we might not so construe the words, according to which if facts support an inference suggested by a relevant fact, they may still be unnecessary for that purpose because they exert a disproportionately greater prejudicial effect.

Judges have warned against relying on evidence worthless to the prosecution and prejudicial to the accused. It was held in one case that the evidence that the accused, charged with unlawful possession of dangerous weapons, had pointed out objects or places to the police was of little value and often prejudicial to the accused. Such evidence should always be received with great caution.[23] In another, evidence of identification by means of a police identification parade was rejected by the appellate court because of "unfairness" to the accused.[24] The production of a police photograph has been held to be apt to prejudice a jury and to embarrass a judge. It was obviously a police record and was tantamount to saying that the accused was a man of bad character.[25]

Admittedly, there is no hint that the judges in these cases speak of ruling out prejudicial indirectly relevant facts in terms of the lack of necessity for the purpose for which they are alleged. They are concerned with achieving a safe verdict. They consider the extent to which evidence worthless to the prosecution and prejudicial to the accused has impinged on the safety of the verdict. But we know that the line is thin between admissibility on the one hand and satisfaction of the standard proof on the other. Is it possible

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[22] [1966] 2 M.L.J. 195.

[23] *Tai Chai Keh* [1949] M.L.J. 68.

[24] *Mohamed bin Majid* [1977] 1 M.L.J. 121, at p. 122; see also *Teo Peen Soon* [1956] M.L.J. 241, at p. 242.

[25] *Girdari Lall* [1946] M.L.J. 87. *Cf. Raju* [1953] M.L.J. 21.

that if they give no hint, they would equally think it unexceptionable when confronted with such prejudicial facts to reject them as inadmissible in the first place? No doubt that which renders a verdict unsafe must not hastily be equated with the inadmissible, though reception of the inadmissible tends to render an unsafe verdict. The significance of conferring the status of "inadmissible" to a fact is to confer a right of appeal if that fact is then let in. But conferring through section 9 a discretion to exclude will not inflate the incidence of appeal. If that discretion be exercised, no appellate court is going lightly to estimate the labours of the effort.[26]

By suitably construing section 9, we may arrive at the conclusion that the judge has a discretion to exclude indirectly relevant evidence. This seems better than offering no explanation, which is what the majority of a court of three judges of the High Court in *Cheng Swee Tiang*[27] do. They tell us that the discretion exists but they do not answer Ambrose J.'s vigorous protest that:

> The Singapore Evidence Ordinance and certain rules of evidence to be found in other Singapore Ordinances form a complete code for Singapore: and the English rule of evidence, save so far as they are embodied in a Singapore Ordinance, have no application whatsoever in Singapore ... To my mind the discretion ... seems to be a new development of the common law in England ... I do not see how the courts in Singapore can recognize such a discretion without express statutory provision.[28]

The answer is that sections 14, 15 and 9 are indeed express statutory provisions providing for the exclusionary discretion. Sections 14 and 15 contain an in-built discretion in the evaluation and assessment of particularly relevant similar fact evidence. Section 9 contains the discretion to exclude indirectly relevant evidence which is unnecessary for the purpose of the prosecution's case.

III. Supposed Inadequacies of Positive Relevancy

The system of positive relevancy in the Evidence Act has been criticized but with respect, not all the criticisms are entirely justified. It has been said that Stephen's definition of relevancy differs from the modern concept in two ways:

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26 The principle is that in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223. See *O'Leary* (1988) 87 Cr. App. R. 387, 391.

27 [1964] M.L.J. 292.

28 R. Margolis, *op. cit.,* at p. 294.

> First, while purporting to be a concept of logical relevance the term "relevant" means something much more restrictive than logically probative ... Second, under the Evidence Act, relevance is the sole and necessary condition of admissibility, rather than precondition of it; that is, under the Act, relevant means admissible.[29]

This is not altogether true. Far from purporting to be logical relevancy, relevancy in the Evidence Act means legal relevancy or admissibility (to use a modern term). The criticism draws its substance from Thayer and fails to notice that Thayer is wide off the mark when he describes Stephen's Act[30] as a formal system of logically probative evidence. If Stephen had not thought of admissible hearsay or admissible similar fact evidence as relevant, that charge might not be baseless. Since Stephen employs relevancy in that fashion, the charge is unjust.

The more serious criticism which has been made is that:

> Stephen's concept of relevance and that of Thayer is more than a difference in nomenclature. It reflects Stephen's fundamental misconception of the principles underlying the rules of admissibility of evidence. Relevance is not ... an inherent attribute of any fact, and it is probably not possible, and is certainly not useful to provide as a basis of admissibility a set of propositions which purport to cover every situation where one fact is related in a logically probative way to another.[31]

This is saying that hard formalistic propositions which purport to "supply in advance for every conceivable situation" a relevancy relation must fail and that it is better to rely on a general principle of logical relevancy supplemented by a principle of exclusionary discretion.[32] But again, the criticism ignores section 9 of the Evidence Act which provides a catch-all for all categories of indirect relevancy. Impossible it is that all categories of indirect relevancy can be enumerated. So section 9 simply provides that evidence which supports or rebuts relevant evidence is also relevant in so

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[29] *Ibid.,* at p. 32.

[30] *A Preliminary Treatise on the Law of Evidence at Common Law* (1898), at p. 266. The root of the problem is that J.B. Thayer is addressing Stephen's definition in the *Digest of the Law of Evidence* and true enough, that definition seems to be nothing more than a statement of logical relevancy. But the statutory definition as drafted by Stephen departs significantly from that in his book. It is that which Thayer has overlooked.

[31] Margolis, *op. cit.,* at p. 40.

[32] Even so, it may be interesting to observe that in so recent a case as *D* v. *Hereford Worcestershire C.C.* [1991] 2 W.L.R. 753 Ward J. was willing to adopt Stephen's definition of relevancy in *Digest of the Law of Evidence* (1936, 12th ed.), Art. 1.

far as it is necessary for that purpose.[33]

It may be objected that finding the discretion in sections 9, 14 and 15 is artificial on the ground that Stephen, the draftsman, perhaps never intended it that way. This is not a serious objection. We follow the will of the legislator according to the measure in which it has been expressed. We collect the legislative intention from the words used. Whether Stephen intended it or not is less important than what the words say.[34]

It may be objected that there are alternative solutions to the apparent lack of provision for an exclusionary discretion. Section 2(2) of the Evidence Act preserves unwritten law consistent with the tenor of the Act and is capable no doubt of supplementing it with the developments which are logical progressions from the former common law rules. Take the problem posed by the modern approach to similar fact evidence. Since the modern approach merely liberates the court from a narrow insistence that the defence must raise an issue rendering similar fact evidence relevant as rebuttal evidence, its reception will certainly not put the existing provisions in jeopardy of desuetude and will probably enhance their efficacy. But recourse to section 2(2) really can only be justified if there is no other provision in the Evidence Act touching the matter.[35] Since section 138(1) directs the judge to admit all that is relevant, to find the existence of an exclusionary discretion through section 2(2) must trench on section 138(1). But if that discretion is found to exist in such provisions of relevancy as already exist (*i.e.* sections 14 and 15), then section 138(1) remains intact. Resting upon sections 14 and 15 and arguing that they contain the seeds of discretion is a sounder approach.

IV. Scope of Discretion Where Illegal Procurement

If the discretion exists, what is its scope? The traditional formulation stresses the importance of avoiding prejudice and unfairness out of proportion to probative force. Prejudice to the defendant or accused is reasonably straightforward.[36] Unfairness is a more open-ended notion. Is unfairness to be gauged only in relation to the conduct of the trial or in relation to matters preceding the trial as well? In particular, would the introduction of illegally obtained or improperly obtained evidence amount to unfairness, when obtained from the accused or defendant or even when not so obtained?

Among writers there is considerable disagreement on the limits of

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[33] See also section 11 of the Evidence Act.

[34] See Holmes J. in *Towne* v. *Eisner* 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

[35] See also 1. Pinsler, "Similar Fact Evidence: The Principles of Admissibility" [1989] 2 M.L.J. Ixxxi.

[36] See *e.g. Noor Mohamed* [1949] A.C. 182, *Harris* [1965] 2 A.C. 694, *Christie* [1914] A.C. 545.

unfairness. The question calls for an appreciation of the forensic process, its proper boundaries and the extent to which the search for evidence can be the legitimate concern of a trier of fact. Its resolution is not made any easier by the range of situations in which the question may be raised. There may be at one extreme a trifling infraction as when evidence is obtained by means of an irregular search warrant.[37] At the other extreme there may be an egregious violation of every moral scruple by unscrupulous law officers bent on getting a promotion. Solutions which have been canvassed fall roughly into three lines. The first solution is that the court must balance the considerations of relevancy against prejudice, but unfairness in terms of conduct out of the trial is disregarded.[38] The second solution unashamedly breaches the role of a court and bestows upon it the powers of a ward of the police. An evidentiary remedy is prescribed as abatement of police excess. This is a role easily assumed by a court enjoined by the constitution to ensure due process. Any other court not similarly fettered can only uncomfortably handle it. Therefore, such arguments as have been advanced sound a little lame, when they are rested not upon due process but upon a clean hands principle that the fountains of justice must not be tainted (also termed, the integrity rationale). By such protagonists, it is said that a question of balancing, of reconciling the conflicting interests is involved.[39] The third solution is the extreme one of excluding all evidence improperly obtained on analogy with the fruits of a poisoned tree. It advances the second to a point of purity, its protagonists believing that the protection of human rights extends to the procurement of evidence,[40] warning that the reception of illegally obtained evidence is not the less pernicious for the good meaning of the prosecutor.

A. *The Australian Solution*

Not less varied are the judicial solutions. The contrariety appears in the divergence in Australian and English case-law, which may be noticed for obvious reasons of precedent and persuasiveness. In the Australian decision

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[37] For example, the police armed with a search warrant for materials relating to one crime stumble upon materials pertaining to other crimes. They seize the materials. The seizure is illegal but the illegality might be regarded as a trifling infraction in these circumstances: *cf. H.M. Advocate* v. *Turnbutt* 1951 J.C. 96.

[38] J. Wigmore supported this solution, arguing that otherwise the course of trial would be deflected and turned into a forum for discussion of public policy: *Wigmore on Evidence* (1940, 3rd ed.), vol. 8, s. 2183.

[39] See A. Zuckerman, "Illegally-Obtained Evidence – Discretion as a Guardian of Legitimacy" (1987) C.L.P. 55.

[40] See the judicial application described by J. Driscoll, "Excluding Illegally Obtained Evidence in the United States" [1987] Crim. L.R. 553. But see especially *U.S.* v. *Leon* 104 S. Ct. 3405 (1984).

in *Bunning* v. *Cross,*[41] which has won much academic approbation, a question of the admissibility of evidence obtained in breach of the Road Traffic Act arises in a trial of the accused for being drunk and driving while under the influence of drink. Finding as a fact that the accused has been unlawfully coerced into undergoing a breathalyzer test,[42] the trial judge holds the evidence of the breathalyzer test inadmissible. On remission for a new trial, it is held that the evidence is admissible but, nevertheless, to be excluded in the exercise of judicial discretion. On appeal, that is held to be an incorrect exercise of discretion so that the evidence should have been received instead of excluded. The High Court of Australia then intervenes on a review of this exercise of discretion.

The decision is that the evidence should have been received. The statement of principle in one of the High Court's earlier cases, *Ireland,*[43] is adhered to. The trial of the accused by fair out-of-trial means is elevated to a public interest so that the issue once again is regarded as touching two competing public interests. The interest in public conviction is one, and against it must be weighed the other, which is the public interest in fair treatment of an individual. "Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."[44] This discretion is to be exercised by having regard to certain considerations such as:

(1) the nature of the illegality, whether deliberate or unfortunate;
(2) but whether the illegality affects the cogency of the evidence is irrelevant unless the evidence is critical and of a perishable nature or the illegality is unfortunate;
(3) the ease with which compliance might have been achieved;
(4) the gravity of the offence with which the accused is charged; and
(5) the policy of the legislature as appears from the enactment constituting the offence.[45]

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[41] (1978) 19 A.L.R. 641.

[42] Because a preliminary test had not been performed and there were no reasonable grounds to believe that the accused person was so much under the influence of alcohol as to be incapable of having proper control of his vehicle.

[43] (1970) 126 C.L.R. 321.

[44] (1970) 126 C.L.R. 321, at p. 335.

[45] Two basic features of the decision may be noticed. First is the awareness of the court that the impact of its decision would be felt most in relation to illegally obtained real evidence; and there is express articulation of a desire to put a break on a phenomenon seen as open to great abuse. Second is the way in which the statute is handled. Beyond the fact that the statute enables a determination whether evidence has been illegally obtained, it does no more. Once it has enabled that determination, it has no further role to play in the exercise of discretion. Strictly speaking, there is an intermediate position which is glossed over, for the statute itself may provide for automatic exclusion, in other words inadmissibility.

The next case of *Cleland*[46] adds an important gloss. It shows that the Australian courts will resolve a question of an illegally obtained confession in precisely the same manner as illegally obtained real evidence. Since confessions which are illegally obtained will be excluded, if they are involuntary, the *Bunning* v. *Cross* principle is reserved for those cases in which the confession is voluntary but induced by such improper and illegal means that the public interest in individual liberty must be vindicated by a rejection of the confession.

The Australian solution is not unattractive. There is a cutting through of distinctions to the basic rationale. A certain righteous impatience with artificial distinctions is discernible. But the logical objections to a policing role for the judge are transmuted by moving on to a higher conceptual plane and not all will be convinced that this is not a sleight of hand when there is absent a constitutional provision such as Article 9 of the Singapore Constitution which provides that a man is not to be deprived of life, liberty and movement save in accordance with law. When such a constitutionally entrenched fundamental liberty exists, it seems rather easier for a court to arrogate to itself the task of policing the police. After all, the guarantee which this constitutional provision affords must not be rendered nugatory by paying lip service to a law which violates fundamental principles of natural justice and for that reason it subjects any law to the scrutiny of fundamental natural justice.[47] Can there be less protection for the accused in a purely procedural respect?

The answer given by the Privy Council in *King*[48] is that fundamental natural justice does not prohibit the reception of evidence which has been illegally obtained from the accused. To the extent that the Privy Council favours the discretion to exclude illegally obtained evidence, its holding is superseded by the cautious curtailment in subsequent English cases. To the extent that the constitutional fundamental right to due process was involved, the Privy Council clarifies that "This constitutional right may or may not be enshrined in a written constitution, but it seems to their lordships that it matters not whether it depends on such enshrinement or simply on the common law as it would in this country [*i.e.* England]."[49] A provision in the Singapore constitution such as Article 9 is simply an embodiment of the common law and attracts no higher principle and exacts no greater vigilance in relation to the exclusion of illegally obtained evidence in the trial. Even in the face of such constitutional legislation, the rejection of

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[46] (1982) 121 C.L.R. 1.

[47] *Haw Tua Tau* [1981] 2 M.L.J. 49, *Jayakumal* [1981] 3 W.L.R. 408.

[48] [1968] 2 All E.R. 610.

[49] *Ibid.,* p. 617.

a policing role for the trial judge is not wrong, a view reinforced by the refusal elsewhere to let a denial of the right to counsel render evidence either inadmissible or subject to the discretion to exclude.[50]

B. *The English Solution*

The leading English decision is still *Sang*.[51] At its narrowest, *Sang* denies that evidence obtained by entrapment (or by an *agent provocateur*) is to be *ipso facto* excluded.[52] At its broadest, the judgments of the House of Lords are confusing.[53] A generous reading yields a theory of exclusion which measures unfairness in terms of its impact on the trial (hence, prejudice in the trial) and which generally refuses to concern itself with the means of procuring evidence.[54] Lord Diplock's judgment represents the hardline.[55] He draws a distinction between (1) evidence procured before or in the or after the commission of an offence, which is not an admission; and (2) evidence procured after the commission of an offence by way of admission or confession. The privilege against self-incrimination explains why there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair. But in relation to all other evidence (*i.e.* category one) the task of the judge is to exclude if the prejudicial effect outweighs the probative force. "It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them."[56] Though otherwise broadly in agreement, Lord Scarman does not agree that that is the way to draw the line. He says:

> If an accused is misled or tricked into providing evidence (whether it be an admission or the provision of fingerprints or medical evidence

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[50] *Elliott* [1977] Crim. L.R. 551, *Lemsatef* [1977] 2 All E.R. 835; *cf. Allen* [1977] Crim. L.R. 163.

[51] [1980] A.C. 402. Before *Sang* there was the celebrated statement of Lord Goddard L.C.J. in *Kuruma* [1955] A.C. 197, 204: "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused ... If, for instance, some admission of some piece of evidence, *e.g.* a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

[52] For a critique of this aspect of the holding, see L. Taman, "Judicial Approaches to Entrapment: *R.* v. *Sang* (1981) 23 Mal. L.R. 286. For the American approach to entrapment, see R. Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs" (1951) 60 Y.L.J. 1091.

[53] See J.D. Heydon, "Unfairly Obtained Evidence in the House of Lords" [1980] Crim. L.R. 129.

[54] See *Phipson on Evidence* (1990, 14th ed.), at para. 28-06.

[55] Viscount Dilhorne agrees with him.

[56] *Supra*, note 51 at p. 436.

> or some other evidence) the rule against self-incrimination ... is likely to be infringed. Each case must, of course, depend upon its circumstances. All I would say is that the principle of fairness, though concerned exclusively with the use of evidence at trial, is not susceptible to categorisation or classification, and is wide enough to embrace the ways in which, after the crime, evidence has been obtained from the accused.[57]
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> The common base line is that the evidence must have come from the defendant after commission of the crime.

1. *The notion of the analogous admission or confession*

According to Polyviou,[58] Lord Diplock's formulation is logically inconsistent, because on the one hand, it subjects the self-incriminatory confession or admission to the unfairness test,[59] but withdraws the test from all other evidence. Polyviou argues with some force that for Lord Diplock's exposition to be logically coherent, he must either not allow any role to the rule against self-incrimination at all or else apply it to all evidence. He cannot confine it to statements. To allow such a role is to admit that the judge is concerned indeed with matters which happen before trial, for the rule against self-incrimination at common law may be invoked before trial as where a witness or accused person refuses to answer an interrogatory on the ground that his answers may incriminate him. Once Lord Diplock has accepted, under the privilege against self-incrimination, responsibility for the unfair manner in which statements have been obtained, he must accept similar responsibility over evidence other than statements. If this complaint is right, we look for clarity and are dogged by logical inconsistency. But this complaint is only partly right.

The key to inconsistency, if any, lies in the distinction between a statement of admission or confession on the one hand and other evidence (especially real evidence). In proportion, as we can explain why statements deserve special treatment under the privilege against self-incrimination, the inconsistency is only apparent. No explanation is directly vouchsafed in Lord Diplock's judgment but there are some clues in the way he approves of two striking Court of Appeal cases involving illegally obtained real evidence. These

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[57] *Ibid.,* at pp. 456-457. Lord Fraser favours a wider discretion in relation to documents obtained from the accused person in premises occupied by him but considers that this view is reflected in Lord Diplock's formulation. Lord Salmon favours a wider discretion which he prefers to leave undefined.

[58] "Illegally Obtained Evidence and *R.* v. *Sang",* in *Crime, Proof, and Punishment* (1981), at pp. 226-247.

[59] Heydon, *op. cit.,* comments that this second category has the appearance of having slipped in as a compromise.

are *Payne*[60] and *Barker.*[61] He gives the following explanation of these cases: in the first, medical evidence of an examination obtained as a result of tricking the accused into consenting while in the second, documents of accounts obtained illegally by government officials, were analogous to an admission or a confession. So while he confines the rule against self-incrimination to statements of admission or confession, he is ready to admit into this category, by way of exception and extension, evidence which is analogous to an admission or confession.

Why is it that a court is conceived as possessing the power to exclude the confession illegally obtained? To Lord Diplock, "the underlying rationale of [the law of confessions], though it may originally have been based on ensuring the reliability of confessions is, in my view, now to be found in the [right against self-incrimination]. That is why there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair."[62]

On the other hand, the Supreme Court of Canada reminds us that the sheer reliability of physical evidence or real evidence is a pre-eminent consideration. A sharp distinction, says the court, exists between physical evidence and evidence of statements of admission or confession. The admission of real evidence though illegally procured must be fair because it is necessarily reliable and cannot be fabricated. "An accused cannot be forced to disclose any knowledge he may have about an alleged offence and thereby supply proof against himself but (i) bodily condition, such as features, exhibited in a court-room or in a police line-up, clothing, fingerprints, photographs, measurements ..., and (ii) conduct which the accused cannot control, such as compulsion to submit to a search of his clothing for concealed articles or his person for body markings or taking shoe impressions or compulsion to appear in court do not violate the principle."[63] Such evidence, though taken by force, violate neither section 2(d) of the Canadian Bill of Rights which protects against self-crimination nor section 11(c) and (d) of the Canadian Charter of Rights and Freedoms, Constitution Act 1982.

Convinced by the reliability of real evidence, the Supreme Court of Canada ignores the privilege against self-incrimination.[64] Persuaded that the true rationale of the law of confessions lies in the privilege against self-incrimination, Lord Diplock ignores reliability of real evidence and translates

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[60] [1963] 1 All E.R. 848.

[61] [1941] 2 K.B. 381.

[62] *Supra,* note 51 at p. 436.

[63] See Dickson J. in *Marcoux and Solomon* (1975) 24 C.C.C. (2d.) 1, 60 D.L.R. (3d.) 119, [1976] 1 S.C.R. 763.

[64] Perhaps paradoxically in another judgment of the Supreme Court of Canada, *Wray* [1971] S.C.R. 272, the twin rationales are clearly perceived and lucidly articulated: see Cartwright C.J. at pp. 279-280.

reliable real evidence analogous to a confession or admission into the realm of protected evidence. If the fault of the Supreme Court of Canada is that it overvalues reliability, that of Lord Diplock is that he undervalues it.

Reliability and averting self-incrimination are twin rationales. Each has its proper sphere of influence. A confession may be true but it is excluded when its procurement violates the privilege against self-incrimination. Where the confession is involuntary, it is likely to be unreliable and therefore irrelevant. So reliability is also a rationale. Further proof that there are twin rationales is that physical evidence obtained pursuant to a confession is admissible to the extent as confirmed by the confession, but no more. The rest of the confession could well also be true but the privilege against self-incrimination must shut it out.[65] With a confession, the privilege against self-incrimination is determinative. Lord Diplock's analogous confession rightly stresses that if confessions can be as reliable as physical evidence, but are shut out by the privilege against self-incrimination, physical evidence in principle must be shut out on the same basis. The true point of distinction is that a person may be hanged upon a confession while physical evidence may be just one piece of evidence. But where the physical evidence is not just one piece of evidence but the critical evidence as in *Payne* and *Barker,* what is the difference between confession and physical evidence? To call the physical evidence analogous confessional evidence is perfectly right and achieves some measure of protection for the accused who would otherwise be made to condemn himself.

When, however, this category is extended to an analogous admission, illogicalities appear, and because Lord Diplock fails to see this, his concept of analogous admission has run into trouble. Faced with the assimilation of the analogous admission to the analogous confession, a later Court of Appeal has been driven into an embarrassing position. In *Trump,*[66] it was found that the analogous admission was voluntary and the means of procurement unfair, thus attracting the exercise of discretion. The discretion was then exercised against exclusion in such circumstances that it would be hard to envisage situations in which the discretion would ever be exercised in favour of exclusion. A much earlier case, *Palfrey and Sadler,*[67] decided before *Sang* had rejected the notion of analogous admissions or confessions:

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[65] There is now clear recognition of the multiplicity of rationales in *Lam Chi Ming* [1911] 3 All E.R. 172. Lord Griffiths says at p. 178: "Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilized society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law... that a confession is not admissible in evidence unless the prosecution establish that it was voluntary."

[66] (1980) 70 Cr. App. R. 300; [1980] R.T.R. 274.

[67] [1970] R.T.R. 127; affd in [1970] Crim. L.R. 284.

> As it is, the evidence is not evidence properly analogous to or to be compared with a confession, since the very strict rules excluding admissions or confessions made upon inducement or promise by persons in authority are limited in their application to confessions or admissions not to the discovery of material real evidence which itself has probative meaning. Thus, if the first footman leaving the mansion is found to have in his suitcase the duchess' tiara, it is not really a question of confession if he voluntarily or involuntarily opens the suitcase, and it is found that it is there. The tiara is not a confession but real evidence.[68]

This observation obviously needs reconsideration in the light of Sang. Take the observation seriously, there will not ever be such a thing as an analogous confession. But as an argument for rejecting the analogous admission the observation cannot be faulted.

No doubt an admission which is extracted by threat, inducement or promise of advantage will equally be shut out as a confession would. An involuntary admission is excluded because it is likely to be unreliable, and that alone is enough for its exclusion. No inquiry into the privilege against self-incrimination is needed. If an admission is voluntary, but has been obtained by illegal means, it is not at all clear that it should receive the self-incrimination protection accorded to a confession which is voluntary but has been obtained by illegal means; since unlike a confession, an admission is seldom the critical evidence by which an accused would be made to condemn himself. In contrast, real evidence which is analogous to an admission is nearly always reliable. Why should there be favourable treatment of real evidence analogous to an admission? If the voluntary but illegally obtained admission should not attract the privilege against self-incrimination, there is even less reason to favour evidence which is analogous to an admission. Lord Diplock over-emphasizes the privilege and under-emphasizes reliability. That is why he is led to grant the analogous admission the favour accorded to an analogous confession. Then he falls into logical inconsistency because then when nearly every case can be construed as analogous to an admission, the court is engaging in sophistry when it denies it has any concern with pre-trial unfairness.

To avoid illogicality, Lord Diplock's category of analogous confessions or admissions must be kept strictly to confessions. Only then will sensible results be obtained. There will still remain another shortcoming, namely, an ambiguity as to the terms upon which evidence analogous to an admission or a confession is received. Lord Diplock warns that "there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair."[69] If so, unlike the true admission

[68] *Ibid.,* at p. 134.
[69] *Supra,* note 51 at p. 436.

or confession which is automatically excluded when shown to be involuntary, is the involuntary analogous admission or confession automatically excluded or is it subject to an exclusionary discretion? Since there are two kinds of confession, one which is automatically excluded and another which may be excluded, Lord Diplock must state clearly whether analogous confessions can likewise be of two kinds. Throughout his judgment, he curiously supposes that the analogous admission or confession is voluntary, although the reference to *Barker*[70] must be to an involuntary analogous confession while the reference to *Payne*[71] is to a voluntary analogous confession. Presumably only the voluntary analogous confession is present to his mind when he approves the exercise of discretion to exclude such a confession. But what if the analogous confession is involuntary? If he accepts that there is discretionary power to exclude the one, must he not necessarily admit that there is automatic power to exclude the other? So Lord Diplock's analogous admission or confession hides two different ideas. The ambiguity may perhaps be resolved simply: the trial judge must exclude the involuntary analogous confession as he would any involuntary confession and the trial judge may exclude a voluntary analogous confession as he would any voluntary confession arrived at through breach of the Judges' Rules.[72]

2. *The distinction between past offence and present commission*

The other distinction taken in *Sang* between past offences and present commission may also be criticized. This distinction, as Lord Diplock conceives it, partially explains the decision in *Sang*. The argument which he has to address is that but for the inducement of the agent provocateur the accused would not have committed the offence. That would not be an accurate description of the facts where the accused would have committed the offence anyway whether or not the inducement existed, the inducement being as good an occasion as any other. It is obvious, for example, that if a man has an illegal lottery concealed in his drawer and stands ready to produce it to the first customer who is a bettor, he will commit an offence whether or not the police employ an agent provocateur. Lord Diplock does not, however, pause to investigate the circumstances in which it is alleged that but for the inducement, no offence would have been committed by the accused.[73] His response is a general one – to reject the evidence of

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[70] [1941] 2 K.B. 381.

[71] [1963] 1 All E.R. 848.

[72] *Cf. Trump* [1980] R.T.R. 274 where the Court of Appeal puts no difference between the voluntary and involuntary analogous confession; both are subject to the exclusionary discretion.

[73] *Cf.* Lord Salmon's remarks that "There can, however, be little doubt that [*Sang*] would have tried to sell the forged notes to anyone ... whom he considered safe.": *supra,* note 51 at p. 443.

the agent provocateur would be tantamount to establishing a substantive defence of entrapment, quite contrary to the substantive criminal law. The privilege against self-incrimination cannot be turned into a defence.

The answer of Lord Diplock fails to differentiate between two possibilities in which the considerations are very different. First, someone who would have committed the offence anyway, whether or not there was an agent provocateur, clearly should not be allowed to assert the privilege against self-incrimination. He cannot prevent the offence being proved, for the proof of it would not have been unfairly elicited from him. No doubt in this situation, allowing the accused to raise a privilege against self-incrimination might come close to inventing for him a substantive defence of entrapment. But there is a difference where but for the inducement, the accused would not have committed the offence. If it is wrong to force a man to condemn himself by his own mouth, it cannot be less wrong to lure a man into a crime which he would not but for the inducement have committed. Provided we are satisfied that but for the inducement, the accused would not have committed the offence, the condemnatory proof of the offence in a real sense requires the help of the accused and would have been excited from him without full disclosure to the accused of all the consequences that would follow. Making the privilege thus available to the accused would not create a defence of entrapment. It would merely make the offence non-provable against him by such direct evidence as the police can testify to.

The facts of a local case, *Teja Singh & Mohamed Nasir,*[74] will point the meaning of the distinction. Two officers from the Criminal Investigation Department accompany a lorry driver, Ng Keow Pong, across the causeway. Following upon the arrest of Ng Keow Pong by the Johore police for not having the requisite haulage permit, they bail him and then approach Teja Singh with a view to getting him to use his influence with the magistrate in order to procure leniency for Ng Keow Pong. Teja Singh agrees to do so. Both Teja Singh and the magistrate are later charged with corruption offences. Suppose the principal evidence is clearly that of the agents provocateurs. Now if Teja Singh has been suspected of such corruption, but the offences cannot be found out in any other way, that might explain the need to "fix him up".[75] But if Teja Singh were a relative of Ng Keow Pong and were provoked by the police into committing an offence, he would be condemned for an offence as good as by his own mouth. Other examples of true "provocation" to commit an offence are a policeman impersonating a female prostitute and bribing another police officer to conceal the offence of soliciting or a policeman feigning to be a homosexual in order to trap another homosexual into committing an offence. If someone is provoked in the sense here explained into committing an offence, it is neither here

[74] [1950] M.L.J. 71.

[75] See also Lord Alverstone C.J. in *Mortimer* (1910) 80 L.J. K.B. 76.

nor there to retort that "it was open to Teja Singh when he was approached in the matter, if he had been an honest man, either to refuse to interfere or to have confined his activities to giving advice."[76] The privilege against self-incrimination protects the accused although he may well have committed the offence. Its protection exists to the extent of compelling the prosecution to seek their evidence elsewhere and apart from the accused. So likewise, although an accused, like Teja Singh, who is provoked to commit an offence may be a less than honest man, he would still seem to deserve this protection. The privilege against self-incrimination should be invocable in such circumstances where but for the inducement the accused would not have committed the offence; not, however, in those cases where the accused would have committed the offence anyway whether or not the inducement existed, the inducement being as good an occasion as any other. Making the privilege thus available will imply that if the principal evidence in the case is coming from the agents provocateurs, the offence committed by Teja Singh will be non-provable (that committed by the magistrate will be). But if the prosecution can make out a case without this direct evidence, for example, if there is independent evidence of the transaction between Teja Singh and the magistrate (and there was in the case itself), such evidence being outside the privilege against self-incrimination, Teja Singh will be convicted.

There appears to be a second reason why a distinction is drawn between past offence and present commission.[77] Lord Diplock in *Morris* v. *Beardmore*[78] decided shortly after *Sang* states that:

> Where the charge is one of failure to produce a specimen of breath for a breath test under section 8(3), evidence of a requirement to provide a specimen of breath made in the circumstances specified in section 8(2), and of the failure of the accused to provide it, is direct evidence of the two essential elements of the *actus reus* of the offence itself. No question of weighing its probative value against its prejudicial effect can arise; if believed, it is conclusive of the guilt of the accused. Nor is it evidence subsequently obtained from the accused himself relating to an offence *that has already been committed by him,* so as to be capable of falling within the secondary category of evidence which, although it was discussed in detail, was recognised in *Reg.* v. *Sang* as subject to the trial judge's exclusionary discretion. Like the evidence

[76] See Spenser-Wilkinson J., at p. 75, *ibid.*

[77] Lord Diplock hints that there may be a third explanation when he traces the rule against self-incrimination to the days in which the police was not yet a disciplined force. But it is illogical to tie the rule to the police force. We might as well say that since nowadays the police is a disciplined force, the rule should go overboard.

[78] [1981] A.C. 446.

> of acts done by the accused on the (assumed) instigation of the police as agents provocateurs, which was held in *Reg.* v. *Sang* not to be subject to the exclusionary discretion, it is evidence of conduct by the accused which in itself constitutes the offence charged and is given by a witness who himself observed that conduct.[79]

Is Lord Diplock saying that evidence of present commission is highly relevant and direct but evidence by way of a confession is indirect? Is this supposed to be the reason that evidence of an agent provocateur is withdrawn from the exclusionary discretion whereas evidence by way of an analogous confession relating to a past offence is not? Where evidence is directly relevant, it must truly be harder to resist its reception than where it is indirect. There must be grave prejudice of a very high order (if this is possible) before direct evidence may, if ever, be rejected. But in what way is a confession less direct than the evidence of an agent provocateur? How does confessing to a past offence make it less direct when we accept that upon this evidence alone a conviction is secure?

Morris v. *Beardmore* was an excellent occasion to reconsider the privilege against self-incrimination in relation to analogous confessions of present commission. The opportunity was missed. On this occasion, the police follow a car which has been involved in an accident. They suspect the driver is drunk. He arrives home before they can stop him to require a breath test, with a view to arresting him. He goes upstairs. They enter his home. When they tell him what they propose to do, he tells them to leave. They arrest him. He refuses absolutely to provide a specimen of breath. Is he guilty of the offence of failing to provide a specimen?[80] In the appeal before the House of Lords, all are clear that *Sang* is irrelevant. All agree more or less that where the arrest is unlawful because in violation of the rights of a landowner to keep out intruders, the offence was either non-provable or the evidence inadmissible (it is unclear which). Lord Edmund-Davies' judgment is the fullest on this point. He says that "the admitted illegality of the police action [was] an inseparable part of the prosecution's case ..., a case which turns on whether the appellant was obliged to pay any heed to what the police superintendent said to him."[81] Later he adds that "Since the true issue in the case turns upon the lawfulness of the requirement with which the appellant was accused of failing to comply, the topic of judicial discretion to exclude evidence, which was examined in *Reg.* v. *Sang* [1980] A.C. 402, has no relevance."[82] So the actual solution is to read in by implication

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[79] *Ibid.,* p. 454.

[80] Under section 7(4) of the English Road Traffic Act 1972. The accused is also charged under section 6(1) for driving with excess alcohol.

[81] *Supra,* note 78, at p. 460.

[82] *Ibid.,* at p. 462.

(for none is expressed in the statute) a condition precedent of lawful entry to the offence of failing to provide a specimen of breath.

No doubt such implication is justifiable because a landowner's rights are extremely important and have always been regarded jealously. But to say that something is an inseparable part of the prosecution's case introduces great uncertainty. Only the fact of the infraction of a landowner's rights can explain the decision that the infraction crosses the line between the separable and the inseparable. In other cases, say of *mala fides* of the police rendering the arrest unlawful, will the line between inseparable and separable part of the case be crossed?[83] With respect, there seems to be less ambiguity in allowing the privilege against self-incrimination to operate in relation to present commission as well as past offences. It would achieve the same result. The evidence of present commission would be inadmissible because it would have been obtained from the accused in circumstances such that without his participation it could not have been obtained. The advantage would be that this manner of resolution is more flexible and more capable of growth and development than that adopted in *Morris* v. *Beardmore.*[84]

3. *Prejudice to accused – insights from Road Traffic Act cases*

There is yet a further way in which Lord Diplock's analysis can be rendered more convincing. This is to emphasize that prejudice in relation to trial may occur as a result of illegal procurement when it impairs the ability of the accused adequately to prepare his defence. Helpful insights in this regard are forthcoming from the cases on procurement of evidence under English statues such as the Road Traffic Acts 1960, 1962, the Road Safety Act 1967, the Road Traffic Acts 1970, 1972, 1974, the Transport Acts 1981, 1982.[85] These cases will touch importantly on the relationship between the principle in *Sang* and statutory procedures and will be useful in the evaluation of the local case of *Ajmer Singh.*[86]

The cases show that statute may make the proof of lawfulness of procurement of evidence a constituent part of the offence. A number of offences are created by the English road traffic legislation. Of the two most pertinent, there is, first, the offence of driving with alcohol in the blood above a prescribed limit "as ascertained from a laboratory test." There is, secondly, the offence of driving while unfit to do so through drink or drugs. Then there are procedures laid down concerning arrest and the provision and testing of blood or urine. A person who has been arrested may be required to provide blood at the police station or while at the hospital. For purposes of the

[83] See *Matto* [1987] Crim. L.R. 641 where the distinction is not even raised.

[84] See the unsuccessful attempt of counsel to apply the decision in *Fox* [1986] 1 A.C. 281.

[85] On which the Singapore road traffic legislation is in part modelled.

[86] [1987] 2 M.L.J. 141.

offence of having alcohol in excess, before 1981, a person might be arrested only after a preliminary screening breath test (usually conducted outside the police station). To facilitate proof of the offence, a certificate of analysis and a doctor's certificate of examination are declared to be evidence of the matters certified therein for purposes of proceedings for the offences here considered.

Not the smallest comfort is derived from the fact that statute may make the procedures part of the offence.[87] In case after case from *Scott* v. *Baker*[88] to *Pinner* v. *Everett*[89] it was either assumed or held that a man could not be convicted of an offence of having alcohol in excess unless there had been strict compliance with the procedural requirements of the preliminary screening breath test. This principle in *Scott* v. *Barker* as affirmed by the House of Lords in *Spicer* v. *Holt*[90] was derived by statutory construction. Since the offence contains in its definition reference to ascertainment by a laboratory test as prescribed, the courts took the view that the "means of measuring [was] itself part of the definition of the offence, not [merely] evidentiary probative material."[91] Further, since the test as prescribed referred to requiring a blood test from a person who had been arrested (after a preliminary screening test), where a person had not been lawfully arrested (through a failure to administer the screening breath test), the certificate of analysis arrived at through failure to require a preliminary screening test was inadmissible. The condition precedent of a preliminary screening breath test could be read into the provision defining the offence.[92]

The principle in *Scott* v. *Baker* is perhaps confirmation that unfairness cannot be the legitimate concern of the trial judge unless the legislature makes it his concern. It indicates that only the legislature can legitimately decide as a matter of policy and protection of individual liberty that evidence obtained in violation of certain limits will be inadmissible. In *Spicer* v. *Holt* the explanations why the legislature would make the procedures part of the offence of having alcohol in excess are to this effect. Viscount Dilhorne

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[87] Statute may even make the offence non-chargeable and not just non-provable. For a local case, see *Then Mee Kom* [1983] 2 M.L.J. 344.

[88] [1969] 1 Q.B. 659.

[89] [1970] R.T.R. 3.

[90] [1977] A.C. 987.

[91] See Winn L.J. in *Sadler and Palfrey* [1970] R.T.R. 127, at p. 132. Decision aff'd. in [1970] Crim. L.R.

[92] As *Fox* [1986] 1 A.C. 281 affirming *Fox* v. *Gwent Chief Constable* [1984] R.T.R. 402 shows, all this is now changed and in particular, lawful arrest is no longer a condition precedent to admissibility of the analysis, provided the specimen for analysis has not been obtained by threat, inducement and so on. Section 8 of the English Road Traffic Act 1972 has been replaced by section 25(3) of and schedule 8 to the English Transport Act 1981. The relevant provision now states that: "In the course of investigation whether a person has committed an offence under s. 5 or s. 6 of this Act, a constable may ... require him – (a) to provide two specimens of breath ..."

surmises that "it is likely that it was introduced to protect motorists from harassment. But for it any motorist who came to a police station for reasons unconnected with driving when affected by drink or drugs might be required to provide a specimen and liable to prosecution if he did not."[93] According to Lord Edmund-Davies, "The statutory provision under section 1(1) was intended to go some distance to allay the fears of a large and vocal section of the community that random breath-tests were contemplated, and it provided safeguards lest motorists unlawfully restrained might thereafter be improperly induced to provide laboratory specimens which could alone be used against them."[94]

Then, short of making the procedures essential to the commission of the offence, the legislature, although not making proof of lawfulness of arrest constituent, may make the reception of evidence conditional on compliance with prescribed procedures. A good example occurs in *Bove,*[95] where a conviction of failing to provide a specimen was quashed because it was held that the illegality of the accused's arrest rendered the evidence inadmissible.[96] There is another clear instance of this technique in the provision that an accused who, at the time a specimen of blood or urine is taken, asks to be supplied with such a specimen, must be so supplied. Unless he has been supplied with part of the specimen, the evidence of analysis is inadmissible. This, as explained by Widgery J. in *Mitten,*[97] is the true ratio of *Price.*[98] The effect of the provision is to provide for admissibility in evidence and especially where the court's obligation to have regard to the evidence of analysis is made expressly subject to compliance with this provision.

What can explain such a provision being given a mandatory status, such that its violation will render inadmissible any analysis made of the sample? The need to protect individual liberty is less pressing, being already catered to elsewhere in those provisions which make the procedure a constituent element of the offence. More important here is that having a sample would enable the accused to have his own analysis performed, should he desire to do so. How can trial be fair if the accused has to challenge evidence to which he has no access and upon which his case rests or falls? As Widgery J. explains, "a failure to supply a part of the specimen under s. 2(4) will always be potentially prejudicial to the accused."[99]

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[93] *Supra,* note 90 at p. 997.

[94] *Ibid.,* at p. 1006.

[95] [1971] R.T.R. 261.

[96] Notice that Lord Parker CJ. slips into the language of non-provable when, at p. 263, he describes the illegality as a defence to this charge. The reason for the decision is that the offence is the failure to provide in pursuance of a requirement made "under this section".

[97] [1966] 1 Q.B. 10.

[98] [1964] 2 Q.B. 76.

[99] *Supra,* note 97, at p. 19.

Thirdly, when the statute does not make it incumbent on the trial judge to exclude automatically, it may still be that he has a discretion to exclude.[100] An example is the provision regarding offering, when taking a specimen of blood, a sample of it to the accused, where the main difficulty has been to work out precisely what the statute means and the cases in this regard are particularly worth looking at because they warn against too liberal indulgence in necessary implication. (This provision is different from the provision that the accused who requests a sample must be so supplied.) No direct sanction is prescribed unlike the preceding subsection regarding the supplying of a part of the blood or urine specimen upon the accused person's request. Contrasting these two procedures in *Mitten,* Widgery J. says:

> Thus, if the accused refused to provide a specimen at a time when he was unaware of his rights under s. 2(5) [to an offer of a sample], it would be clearly unjust to hold his refusal against him, but if he willingly gave a specimen well knowing the purpose for which it was to be used and was in fact given a part of the specimen when it was taken, a failure of the police to inform him of his rights at the time when he was requested to give the specimen may be a purely technical default which has not prejudiced him in the least.[101]

So the effect of a breach of section 2(5) through failure to offer a sample is not inadmissibility but merely to attract the exclusionary discretion in *Sang.*

The absence of a clear link to admissibility in the provision regarding making an offer of a sample implies the absence of automatic exclusion upon breach. But it seems from *Sherrard* v. *Jacob*[102] that not much of a link is demanded. That was a decision of the court of Northern Ireland on a fairly similar provision. Unlike the corresponding English provisions, there is a more obvious link up between the two procedures in section 40(5) of the Road Traffic Act (Northern Ireland) 1964. On the one hand, one provision stipulates that the person taking (instead of the constable requesting) the sample shall offer to supply a part of it to the accused and on the other, it is prescribed that evidence of the proportion found in the specimen shall not be admissible unless the accused has been supplied with a part. This suffices for Lord MacDermott L.C.J. who says that we have now a command that the person taking the specimen *shall* offer to supply a part. With this, Curran L.J. is broadly in agreement, although he observes

[100] The reason that *Bunning* v. *Cross* involves the exclusionary discretion in spite of being a case on the Road Traffic Act is precisely this.

[101] [1966] 1 Q.B. 10, at p. 19.

[102] [1965] N.I. 151.

that at first sight the section seems to be directory because no action is prescribed for its non-compliance. McVeigh L.J. however dissents, being "unable to read the provisions together in any way which makes a failure to offer to supply a specimen under subsection (5) subject to the provisions in subsection (4) which excludes evidence of its contents."[103]

Difficult questions of construction will be involved in such an exercise. There is common ground. Without some reference to inadmissibility, no court will presume that whenever a safeguard is laid down, it will have an evidentiary impact. Once, however, some link is found, some courts more than others will be willing to imply what may be necessary to fill in the gaps. So regarding the argument that only the certificate would be inadmissible by breach of procedure, the court in *Mitten* disagreed; and the judgment implies that if the certificate is inadmissible, the oral evidence of both doctor and analyst also must be inadmissible. No distinction can nor will be drawn between the admissibility of the certificate and the admission of oral evidence given by the analyst. Again, the majority in *Sherrard* v. *Jacob* were clear that if the accused has not asked for a part and the person taking a specimen has failed to offer a part, then that person has failed to give the defendant an opportunity to ask and cannot be heard to say that the defendant has not asked for it.

We might ask: if it is clear that the legislature does not consider a contravention of procedure to be such a great infraction of liberty of person as to render the offence non-provable, or even to render the evidence obtained inadmissible, what role is the court performing when it goes on to exercise a discretion to exclude? Cases such as *Mitten* are pretty explicit on the need to avoid prejudice to the accused in view especially of the difficulties confronting the accused at a time when he is vulnerable. Although they do not elaborate on what this prejudice might be, they contain enough hints. An accused must decide whether to refuse to give his blood or urine and commit the offence of refusing to give or give and run the risk of conviction upon evidence which is hard to controvert. The power of such evidence is evident from a survey of road traffic cases and where the offence is driving with alcohol exceeding a prescribed level, the power of the evidence is unparalleled. On the other hand, mistakes do occur in measurement and the court rightly must be concerned about the prejudice caused to an accused by the inability to prepare his defence on account of breach of the procedural steps, even if breach does not preclude the use of the evidence obtained. An accused has pretty limited access to prosecution materials.[104] What if he wishes to check the accuracy of the breathalyzer? He has no access to service reports and test reports. How can he prepare an adequate defence? This therefore must be a legitimate concern of the trial court.

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[103] *Ibid.,* at p. 183.

[104] See *e.g. Kulwant Singh* [1986] 2 M.L.J. 10.

If the legislature takes all these factors into consideration (at bottom, both the public interest of individual protection and the administration of justice interest), and transforms them into a rule of inadmissibility, well and good. Where the legislature has not so done, presumably it is not sufficiently impressed with the concern of individual liberty, not that it is not convinced by any need to further the interest in the accused in a fair trial. For that is eminently within the court's power, and the legislature should rather be taken as presuming that the court will supply what it has always supplied, namely, a check on prejudice to the accused in the trial.

Another type of provision may merely impose an obligation on the court to consider a specified category of evidence. An example is the provision which is relevant in connection with the offence of being unfit to drive. It does not contain a description of any procedure to be followed. It states that the court shall have regard to any analysis of a blood specimen taken with the consent of the accused person. An obligation is thus imposed on the court to have regard to the evidence of analysis. Touching the ambit of the obligation, Lord Parker C.J. observes in *Scott* v. *Baker* that:

> It may, of course, well be that in the case of [such an offence], where a person has been charged, not of having a proportion of alcohol on his breath exceeding the prescribed limit, but of driving when he is unfit to drive through alcohol, that the specimen provided then can be used, to prove the offence, notwithstanding that there have been no breath tests prior thereto at all.[105]

This part as well of Lord Parker C.J.'s judgment was cited without adverse comment by the House of Lords in *Spicer* v. *Holt.*[106] It says that the requirement of a preliminary screening test forms no part of the process of lawful arrest for an offence of being unfit to drive through drink. Again, Viscount Dilhorne in *Spicer* v. *Holt* assumes that "no arrest was necessary for an analysis of blood or urine to be admissible in evidence in support of a charge under section 5(1) of driving while unfit to drive through drink."[107] The learned editors of *Wilkinson's Road Traffic Offences* are of the contrary opinion that unlawful arrest in some other manner will render the analysis inadmissible. They express the principle in *Scott* v. *Baker* in comprehensive terms, extending it beyond proof of driving with alcohol in excess to proof of driving while unfit through drink:

> Before a certificate of analysis was admissible in law the defendant had, in accordance with the former section 9(1), to have been "arrested

[105] [1969] 1 Q.B. 659, at p. 672.

[106] [1977] A.C. 987.

[107] [1977] A.C. 987, at p. 997.

> under sections 5(5) or 8". Following *Scott* v. *Baker* [1969] 1 QB 659 these words were held to mean *lawfully* arrested under section 5 or section 8; and in order to prove that the arrest was lawful, the police had to prove either that they had strictly complied with the procedural provisions of the screening roadside breath test under the former section 8, or that the defendant had been lawfully arrested under section 5 for driving whilst unfit.[108]

If the learned editors of *Wilkinson's Road Traffic Offences* are right, it must be because the provision requiring the court to have regard to evidence of the proportion of alcohol in the blood directly refers to the analysis as ascertained from a specimen taken by a medical practitioner, which in turn must be taken to mean, as ascertained in accordance with the other procedures laid down relating to the requiring of a sample after arrest and the use of certificates of analysis. Even then, the learned editors are still short of the vital proof. It is more likely that any unlawfulness in the procurement of evidence of blood analysis merely removes the obligation to have regard to the evidence. There would have been no power to exclude that evidence if every step involved was lawful. Equally there would have been no power to exclude if some unlawfulness was involved which was not contemplated by the terms of the provision.

But if some step contemplated by the provision is unlawful or if consent is lacking, the effect of such provision must be to leave the matter squarely at common law and within the principle in *Sang*. This is borne out by the decision in *Trump*[109] where in a charge of being unfit to drive through drink, the court after deciding that there is no automatic exclusion, proceeds to discuss whether the *Sang* discretion to exclude should be exercised in circumstances in which consent might be lacking. That certainly seems more consistent with Viscount Dilhorne's dictum than the submission of the learned editors of *Wilkinson's Road Traffic Offences.*

There may be good reason for imposing a duty on the court to have regard to evidence of analysis of a specimen which has been provided willingly. It would remove the possibility of inviting the court in the event of some extraneous illegality (not contemplated in the provision) to consider whether or not, though provided willingly, the evidence should, nonetheless be excluded. Since proof of the offence of driving while unfit through drink is in fact fraught with all manner of difficulties,[110] it would be reasonable for the legislature to insist that an important, though not crucial (in relation to this offence), piece of evidence should count whenever there is consent; in spite of whatever else which may or may not have taken place.

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[108] (1987, 13th ed.), at p. 197.
[109] [1980] R.T.R. 274.
[110] See *Wilkinson's Road Traffic Offences, op. cit.,* at pp. 226-231.

4. *The future of Sang*

The enactment by the English legislature after Sang of section 78(1) of the Police and Criminal Evidence Act 1984 may be an indication that the solution in Sang was not entirely convincing. Section 78(1) is in these terms:

> In any [criminal] proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

That is stated to be without prejudice to the common law but clearly what the legislature means is that there are circumstances in which the judge should and must concern himself with the way evidence has been obtained.[111] For instance, although the common law exclusionary discretion can only operate on evidence obtained from the defendant after the evidence is complete (according to *Sang*), the statutory exclusionary discretion is not so fettered.[112]

Whether influenced by section 78 or not, Lord Elwyn-Jones in *Fox* passes over Sang and refers to resolving the conflict between the two public interests in language redolent of *Bunning* v. *Cross.*[113] While we do not yet know whether section 78 will be used as a licence to convert to an Australian type approach, other recent cases seem to signal the declension of Sang. They explore the significance *of mala fides*[114] in cases not involving agents provocateurs and in one very striking case it has been held that section 78's evidence includes confessional evidence and that the deceit practised by the police on the accused (and his solicitor) justified the discretionary exclusion of his confession.[115] In another, the fact that the arresting police officer knew that his implied licence to remain on private property had terminated was significant and influenced the court to say that the trial judge should have considered the exercise of discretion.[116] Perhaps more interesting is the disagreement between two differently constituted Courts of Appeal as to whether section 78 in a way supersedes Sang so that evidence of

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[111] D.J. Birch expresses the view that this section was intended to supplement, not replace *Sang:* see the commentary in [1987] Crim. L.R. 642.

[112] *Christou* [1992] 3 W.L.R. 228, 234. But the criterion of unfairness is the same.

[113] In fact he employs the language of *Lawrie* v. *Muir* 1950 J.C. 19.

[114] See *e.g. Fox* [1986] 1 A.C. 281, *Matto* [1987] Crim. L.R. 641.

[115] *Mason* (1988) 86 Cr. App. R. 349.

[116] *Matto* [1987] Crim. L.R. 641.

agents provocateurs under section 78, though not under *Sang,* may be excluded.[117] Prediction is the folly of academics. But even as the development of confession law in relation to oppression and breach of codes of procedure gains in momentum and range,[118] it will be increasingly odd if in relation to real evidence there is not some similar pull factor. In the end the contribution in *Sang* may be reduced to nothing more than frustrating attempts to preclude reliance on the evidence of agent provocateurs.[119]

V. WHAT THEN FOR SINGAPORE?

We are fortunate to have in Singapore a considerable body of corresponding case law matching English case law in essential respects. The latest Court of Criminal Appeal decision in *How Poh Sun*[120] is a straightforward application of *Sang.* As in the more complex case of *Ajmer Singh*[121] the court assumes that nothing is wrong with *Cheng Swee Tiang.*[122] Examples of the use of agents provocateurs abound.[123] In many of them, the principle of exclusionary discretion is passed over. In some of them, judges declare that they have no concern with the way evidence is procured unless statute provides otherwise.[124] In a good deal of them, judges express their disquiet and dismay at the use of practices more suitable to and more becoming of offenders than their apprehenders.[125] It is in *Cheng Swee Tiang*[126] that arguments are seriously pressed upon the full High Court to reject evidence procured illegally by an agent provocateur. The agent is a subordinate police officer. He is sent by a superior officer to the grocery shop of the accused. He pretends to be a bettor and buys a few dollars worth of lottery tickets from the accused. Then a raid is carried out by the superior officer. Articles of gambling and moneys are seized. The accused is convicted and appeals. The appeal is allowed because the Attorney-General chooses not to support the conviction on the evidence. But full arguments and submissions are received on the point of law arising. The unanimous decision is that there

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[117] *Harwood* [1989] Crim. L.R. 285, *Gill and Ranuana* [1989] Crim. L.R. 358. See also the earlier case of *Marshall* [1988] 3 All E.R. 683.

[118] See *e.g. Keenan* [1989] 3 All E.R. 598, *Mason* (1988) 86 Cr. App. R. 349, *R.* v. *H.* [1987] Crim. L.R. 47.

[119] See *Marshall* [1988] 3 All E.R. 683.

[120] [1991] 3 M.L.J. 216.

[121] [1987] 2 M.L.J. 141.

[122] [1964] M.L.J. 292.

[123] See *e.g. Lionel de Silva* [1956] M.L.J. 203, *Teja Singh* v *Mohamed Nasir* [1950] M.L.J. 71, *Teoh Siew Lean* [1958] M.L.J. 145.

[124] The gambling cases to be discussed later in the text.

[125] See *e.g. Teja Singh* v. *Mohamed Nasir* [1950] M.L.J. 51, *Teoh Siew Lean* [1958] M.L.J. 145.

[126] [1964] M.L.J. 292.

is no expression of public policy requiring the rejection of illegally obtained evidence. The majority hold that there is a discretion to exclude on the ground of prejudice to the accused (adopting the formulation in *Kuruma*[127]), but as the appeal is disposed of in other terms, the question of how the discretion would be exercised is unnecessary and left unanswered. Ambrose J. argues that there is no such discretion since it is not provided for in the Evidence Act which forms a complete code on evidence for Singapore. If there is indeed such a discretion, he thinks its exercise is warranted only by proof of oppression, false representation, trickery, bribery or anything of that sort. He doubts whether the subordinate police officer can be called an agent provocateur when he neither has provoked nor instigated the offence.

The unanimous rejection of any place for public policy is decisive against any importation of the Australian solution. The majority holding that a weaker and more restrained exclusionary discretion (not founded on public policy) exists[128] can be supported by the argument that section 9 contains such exclusionary discretion.

Then, in the light *of Sang,* and to the extent it will not subject the evidence of agents provocateurs to the discretion whereas there is no hint of such favour in *Kuruma,* a paper by Taman argues that "the flexible approach enunciated in *Cheng* ought to be followed in preference to the pre-emptive approach in *Sang."*[129] *How Poh Sun* perhaps dashes all hopes of that. Yong Pung How C.J., delivering the judgment of the Court of Criminal Appeal, does not mention *Cheng Swee Tiang.*[130] This is because counsel apparently accepts the authority of *Sang.* He seemingly makes no attempt to persuade the court to prefer *Kuruma,* a Privy Council decision and, therefore, of higher authority in Singapore than a decision of the House of Lords. So his argument, as appears in the judgment, is that the employment of an agent provocateur should be taken into account "in convicting and sentencing the appellant."[131] He would be relying on the observations of Lord Diplock that "the conduct of the police may well be a matter to be taken into consideration in mitigation of sentence",[132] although generally irrelevant to the admissibility of evidence of an agent provocateur. Curiously though, the decision is that "the defences

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[127] [1955] A.C. 197.

[128] Because Ambrose J. seems willing to consider what the result would be if there was an exclusionary discretion. L. Taman, *op. cit.,* goes too far perhaps in describing Ambrose J.'s dissent as obiter: see footnote (3).

[129] *Op. cit.,* at p. 286.

[130] A full court is a court with jurisdiction co-ordinate to the Court of Appeal: *Chia Kuek Chin* (1909) 13 S.S.L.R. 1.

[131] *Supra,* note 120, at p. 218.

[132] *Supra,* note 51 at p. 433. Lord Salmon at p. 443 is more insistent that "There are, however, circumstances in which an accused's punishment in such a case might be mitigated, and sometimes greatly mitigated."

of agent provocateur and entrapment do not exist... in Singapore."[133] Earlier, it is stated that the court "did not find it necessary to consider whether Goh is an 'agent provocateur' or not, as the defence of agent provocateur is not recognized in Singapore."[134] What about mitigation of sentence? Is it not necessary to consider whether Goh is an agent provocateur for the purposes of mitigation of sentence? Or is it that in this case mitigation of sentence is impossible because the statutory death sentence is mandatory? We are left to guess.[135]

Sang cannot now be avoided in Singapore. But so long as there is no Singapore equivalent to the English section 78, it will pay to take heed to the limitations of *Sang*. *Sang's* approach to self-incrimination is illogically extended to analogous admissions and stopped short of present commission evidence. *Sang* also neglects to emphasize that the way evidence is obtained may in a very real manner disable the accused from preparing an adequate defence.

A. *Where Relevancy is Direct*

If we remove the illogicalities from Lord Diplock's conception of the self-incrimination privilege, we can start to develop an ampler privilege against self-incrimination untrammelled by its restriction to past offences. Then although in a case where relevancy of the illegally obtained evidence is direct, there will be no discretion to exclude in terms of unfairness, yet there may be room for a more fully developed privilege against self-incrimination once it is no longer confined to confessions or analogous confessions of an offence committed in the past. This should not be equated with the principle in *Bunning* v. *Cross* which sanctions a direct policing role for the court. If a sort of policing role emerges as a result of expanding the privilege to present commission of an offence, it is incidental. The main focus of the privilege is still the accused, not the police.

Would any thing in the privilege as it is understood in Singapore impede this suggestion? The so-called right to silence has been diminished somewhat by the introduction of provisions allowing adverse inferences to be drawn from the failure to explain one's involvement to the police at the time of being charged.[136] But the right of silence though diminished is not at all abrogated. There remain cases in which the judge even if he were minded to do so could pass no adverse comment, simply because no adverse comment would be possible. Then also, section 134 in the Evidence Act eliminates

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[133] *Supra,* note 120, at p. 219.
[134] *Ibid.,* at p. 218.
[135] See Yeo [1992] S.J.L.S. 202.
[136] See *Chua Beow Huat* [1970] 2 M.L.J. 29, *Tang Tuck Wah* [1991] 2 M.L.J. 404.

the common law absolute privilege of a witness when actually giving testimony. But the witness is still entitled to assert it when resisting an interrogatory, or discovery in pre-trial proceedings[137] and in any case the absolute privilege is not gone, only substituted for by a qualified privilege. Again, while the accused certainly cannot hold up the privilege when he takes the stand, it is still his right not to take the stand.

The chief obstacle to the existence of a more generous self-incrimination privilege lies in section 29 which says that:

> If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him.[138]

But the decision in *Seow Tai Keng*[139] gives us a way round section 29. Charged with the duty and conferred the power to ask questions of persons having knowledge of the existence of gold which should be offered for sale to the government, the Controller of Foreign Exchange purported to question the accused in these circumstances. An informer having personal knowledge of the fact of the accused's possession of gold in contravention of the statute had made statements to that effect. There was no reason to doubt his veracity. The police acting upon that information had seized the gold in the accused's possession. In those circumstances the purposes of the statute would have been exhausted. According to Brown J:

> The compliance with the Regulations had already been secured by the seizure of the gold; and the continued evasion ... had already been detected and frustrated ... Then what purpose was served by taking this statement from the appellant except to confirm and corroborate what Ng Seow Ng had already said and strengthen the case against the appellant by obtaining an incriminating statement? This is not one of the two purposes for which the Controller is empowered to require information ... It follows that the Controller, in taking this statement,

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[137] *Riedel-de-Haen A.G.* v. *Liew Keng Pang* [1989] 2 M.L.J. 400. See J. Pinsler, (1986) Mal. L.R. 78.

[138] For confessions generally, see T.Y. Chin, *Evidence* (1988) ch. 3, M. Hor, "The Confessions Regime in Singapore" [1991] 3 M.L.J. Mi.

[139] [1953] M.L.J. 132.

> exceeded his powers. And the appellant was induced to make this statement in the erroneous belief that he was bound by law to make it and could be punished if he did not. For that reason the statement was inadmissible under section 24 of the Evidence Ordinance.[140]

Brown J. did not trouble himself with precisely how inhibitory section 29 is and it helps that section 24 which prescribes the circumstances in which a confession is irrelevant rests the relevancy of a confession on objective, and not subjective, voluntariness. Section 24 requires the court to form an opinion whether the inducement, threat or promise made by a person in authority was sufficient to give the accused reasonable grounds of being influenced into making the confession.[141] If so, the confession is irrelevant. Since when section 29 refers to such confession, it means a confession as ascertained in terms of section 24, the learned judge may well be correct in going straight to section 24 and apparently ignoring section 29. The relevant portion of section 29 is this: that the confession does not become irrelevant simply because it is the result of answering questions which the accused need not have answered. The accused indeed need not have answered the ultra vires questions. But section 29 is avoided by going to section 24 and holding that the confession was irrelevant in the first place. For the confession to be irrelevant by section 24, there must have been a threat, inducement or promise. The learned judge said that although he could see no vestige of a threat in the Controller's demand for information,[142] the appellant was inadvertently misled. He was induced by fear of punishment (although erroneously). The upshot then must be that provided there is a threat, inducement or promise within the meaning of section 24, section 29 is irrelevant. The decision in *Seow Tai Keng* may well be saying that a confession will be irrelevant if the powers are exceeded in a vital way so as to produce a direct self-incriminatory effect.

The term "confession" in section 24 may be extended to include "an analogous confession". An "involuntary" analogous confession will be irrelevant by section 24. An involuntary analogous "confession" of present commission, though not provided for in section 24, is compatible with it.

It is a little more difficult to see how and where the voluntary analogous confession fits in. If there is no express provision for it, can it exist through section 2(2) of the Act? The negative form of section 29 allows some room for reception of the common law privilege under section 2(2) as it applies to an analogous voluntary confession. Section 29 confirms that if relevant a confession does not become irrelevant by virtue of some of the enumerated

[140] *Ibid.,* at p. 133.
[141] Which specifies a more objective test than the subjective test in *Ping Lin* [1976] A.C. 574.
[142] *Supra,* note 139, at p. 133.

circumstances. To introduce an exclusionary discretion would not necessarily be incompatible with the tenor of section *29.*[143]

Otherwise, it will be only a small consolation that the phraseology of section 24 may give some scope for automatically excluding those analogous confessions which under the more subjective test of voluntariness at common law might be considered to be voluntary but as "involuntary" under section 24. It may be that those voluntary analogous confessions which at common law would be excluded as a result of the discretion would automatically be excluded under section 24 because a more objective assessment leads to their classification as "involuntary" analogous confessions. But there are converse cases where although the accused has in fact been coerced into making an analogous confession, that is denied by an objective assessment. Where an objective assessment brands it as voluntary, there would be no exclusionary discretion to deal with it.[144]

There will be a most serious shortcoming if in fact there is no provision for the voluntary analogous confession which has been obtained illegally. Section 27 will only furnish a partial answer. It says that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. Of course, the scope of section 27 is already circumscribed. Struck by the anomaly that if torture results in a finding, the torture is somehow condonable, the judges constantly admonish us that they will be very strict in construing section 27. They justify their posture by reminding us of the primacy of section 24 which makes the forced confession irrelevant. They maintain that the primacy of section 24 must not be undermined by an unrestrained reading of section 27. If the confession leads to the discovery of the real evidence, the whole confession does not *ipso facto* become relevant, but only such part of it that indicates knowledge of the existence and whereabouts of the real evidence.[145] Suppose that the discovery of subsequent facts through a forced confession, would under section 27, lead to the reception of the entire confession (no doubt these cases are less common). Since section 27 contemplates the admissibility of so much of the confession as distinctly relates to the discovery, the expression "so much" should not, because of the primacy of section 24, be read to mean "so much and all of the confession,

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[143] Especially as section 29 has been held to embody the common law: *Santokh Singh* [1933] M.L.J. 178.

[144] Section 9's exclusionary discretion is here irrelevant.

[145] See *e.g. Pulukri Kottaya* (1947) 74 I.A. 65, *TohAh Keat* [1977] 2 M.L.J. 81. See also A.V. Winslow, "Confession, Confirmation and Resurrection: The Rescue ofInadmissible Information to the Police" (1982) 24 Mal. L.R. 88.

if necessary." There is a point at which it would no longer be consistent with section 24 so to read section 27.

We see this in the recent Privy Council decision in *Lam Chi Ming*.[146] "[I]t is surely just as reprehensible to use improper means to force a man to give information" that will ensure his conviction through discovery of evidence as it is to force him to make a full confession.[147] So where police brutality led to the accused pointing out the spot in the river where the murder weapon had been cast, which weapon was then recovered, the video which recorded the conduct of the accused leading the police to the place of concealment was to be excluded. As Lord Griffiths said: "The admission of this evidence was ... virtually as damning to the appellants as if their entire confessions were admitted. It showed that they knew where the murder weapon had been thrown into the sea and it was inconceivable that any other than the murderers would wish to dispose of the knife in this fashion."[148] "And so that part of the confession which is shown to be reliable by the discovery of the evidence"[149] could not be admitted. By virtue of the antecedent brutality, it would be against, the privilege against self-incrimination to admit it.

There is more than a clear analogy between an analogous confession and real evidence which confirms an earlier confession. Section 27 which is dealing with real evidence confirming a previous admission or confession can be read as implicitly dealing with the analogous admission or analogous confession.[150] If that analogous admission or confession is forced, section 27 must be read with section 24. But section 27 is not confined to the forced admission or confession. Nothing in it points to such a limitation. The provision also is directory. The evidence, it says, "may" be proved, not "shall" be proved.[151] So a voluntary analogous confession made during police custody, in the spirit of section 27, may be proved but the court must decide whether it should, nonetheless, be excluded. But importing the exclusionary discretion to rule out a voluntary analogous confession through section 2(2) of the Evidence Act is better. That approach is less desperate and results in the discretion being available whether or not the voluntary analogous confession is made outside or during police custody.

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[146] [1991] 3 All E.R. 172. An opinion rendered on appeal from the Hong Kong Court of Appeal which also states the law of England.

[147] To borrow the language of Lord Griffiths in *Lam Chi Ming* [1991] 3 All E.R. 172.

[148] *Ibid.,* at p. 174.

[149] *Ibid.,* at p. 175.

[150] Interestingly, Lord Griffiths observes in *Lam Chi Ming* [1991] 3 All E.R. 172, 178 that "This, perhaps the most fundamental rule [the privilege against self-incrimination] ... never did admit of the exception to be found in the Indian and Ceylon Criminal Codes". Section 27 is the exception referred to. But the observation appears to be too hasty.

[151] *Cf.* section 26.

B. *Where Relevancy is Indirect*

In indirect relevancy cases where the privilege against incrimination is not invocable, the test of admissibility by virtue of section 9 is whether the evidence is necessary for the prosecution's case. The epithet "necessary" may be an invitation to consider the prosecution's case apart from the illegally obtained evidence to see what additional impact or effect its introduction will achieve. Even more powerfully, the court might put itself in the shoes of the prosecution and ask whether that evidence could have been procured in another way that is legal.[152] But it probably seems right to restrict the meaning of "necessary" to the avoiding of prejudice in the trial; hence following *Sang*. Prejudice should include inadequate trial preparation occasioned by the illegality in the means of evidentiary procurement. The prosecution should be put to the proof of necessity of its evidence.

C. *What about Statutes?*

Legislation can do one of four things:[153]

(1) Make by express language the proof of lawfulness of procurement of evidence a constituent element of the offence; this will happen when the legislature feels strongly that the protection of liberty cannot be compromised.[154]

(2) Make by express language the proof of lawfulness of procurement of evidence a condition precedent to the admissibility of the evidence.

(3) Make by express language the proof of lawfulness a matter of the judicial discretion to exclude.

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[152] It is interesting that Woolf L.J. when applying section 78 in *Marshall* [1988] 3 All E.R. 683 took into account this consideration. He says at p. 684: "If the justices are entitled to exclude evidence on the basis which the justices in this case decided to exclude the evidence, that could have wide-reaching implications on the methods adopted of obtaining evidence in a large range of criminal offences of this sort. In regard to the particular offences which are alleged in this information, one can conceive that by keeping the premises under observation the police could have obtained the evidence without adopting the stratagem which was adopted in this case. Clearly, while that could have been done it would have been more time consuming and difficult."

[153] Leaving out the case where statute obliges the court to consider specified evidence. For an interesting example, see section 40A of the Malaysian Dangerous Drugs Act 1952 which provides that evidence of an agent provocateur shall be admissible and be treated as any other evidence of any ordinary witness.

[154] See also *Then Mee Kom* [1983] 2 M.L.J. 344.

(4) Leave it to the judge to apply the principle in *Sang.*

Clear recognition of all of these possibilities exists. Although express language is demanded, all that is needed is some link or reference to the procedures. We see this from a line of local cases on the gaming legislation, in particular on section 14 of the Common Gaming Houses Ordinance:

> If any instruments or appliances for gaming are found in any place entered under this Ordinance ... it shall be presumed until the contrary be proved that the place is a common gaming house and that the same is so kept or used by the occupier thereof.[155]

Local courts have consistently maintained that this presumption does not arise unless the prosecution shows an entry under this Ordinance, *i.e.* under a search warrant issued upon written information or under section 13.[156] Without a lawful entry proved, the prosecution must make out its case apart from the presumption. On the other hand, implications are resisted. The items which have been found illegally are, nonetheless, admissible.[157] But there is more than meets the eye because where it is a matter of illegal search of person as opposed to unlawful entry of premises and seizure, the judicial attitude is set against excluding the presumption from possession of lottery tickets. Such presumption, unlike the presumption of common gaming house, has been held not to depend upon a showing of a lawful search of person.[158] That is so even where the lottery tickets are found on a person in a house as to which evidence of lawful entry is not given.[159] Again, it has been held that lottery documents found as a result of an unlawful search of the accused's car are admissible.[160]

The reason judicially assigned for this difference appears very clearly from Callow J.'s judgment in *Lee Sin Long:*

> The privacy of a person in his home must be respected, and cannot be disturbed unless first shown to proper authority that reasonable cause for interference is warranted. Without a warrant the householder might be justified in refusing admission to a police officer. [Moreover, the

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[155] 1936 Rev. Ed. *Cf.* section 8(8) of the present Common Gaming Houses Act, Cap. 49, 1985 Rev. Ed. and see section 8 of Act No. 9 of 1986.

[156] *Setasewan* (1924) 4 FM.S.L.R. 213, *Low Wah* (1930) 7 F.M.S.L.R. 197, *Tan Yok Lan* (1890) 4 Ky. 668, *Lee Ching Seng* [1954] M.L.J. 181, *Kee Ah Low* [1940] M.L.J. 256, *Tan Ann Chuan* [1979] 1 M.L.J. 246; *cf. Re Lim Kwang Teik* [1954] M.L.J. 159.

[157] *Saminathan* (1936) 6 F.M.S.L.R. 39.

[158] *Ng Hiong* [1949] M.L.J. 74.

[159] *Chai Fook* [1949] M.L.J. 60, *Saw Kim Hai* [1956] M.L.J. 21.

[160] *Wong Liang Nguk* [1953] M.L.J. 246.

> wording of the presumptions] contain[s] the phrase "entered under this Ordinance."[161]

However, in the case of the presumption raised by possession of lottery tickets, the provision in the Act which requires a search warrant is merely intended to "assist in apprehension and to sanction search."[162]

Local judges evidently will only attribute to illegality in procurement of evidence the effect of inadmissibility if statute expressly states it as such. There is sensitivity to the power of the evidence. For example, in the prosecution of a house owner for keeping a common gaming house in which instruments of gaming have been found, the illegal entry will destroy the critical evidence, namely the presumption arising from the finding of the instruments of gaming. Take away that presumption, we are no longer dealing with so critical an evidence; so the evidence of finding may be used but without the presumption which but for the illegal entry would have availed. There is also acceptance of the notion that a man's home is his castle which would justify making a difference between evidence obtained by trespass to land as opposed to trespass to person.

1. *No condition precedent to admissibility in Ajmer Singh*

The recent case of *Ajmer Singh,*[163] however, elevates the insistence on express language to a point of strictness and is disconcertingly less sensitive to the power of the evidence than previous case law. A police officer chances upon Ajmer Singh who has toppled from his motor-scooter, takes him (without arresting him) to the hospital where a medical officer is asked to examine Ajmer Singh and to take a sample of his blood. There is apparently no attempt to notify the medical officer of the request for a sample (in relation to the reason for arrest) and the evidence does not reveal whether the medical officer considers it safe to take a specimen from Ajmer Singh for that purpose. Nor does the police officer warn Ajmer about the consequences of refusing to provide a sample. The sample is taken from Ajmer Singh in breach of all these prescribed procedures. The vital question is: what is the effect of these breaches on admissibility of evidence of analysis of the specimen? The decision is that they have almost no effect. Ajmer Singh's conviction of driving while under the influence of drink is affirmed.

Chan J.C., as he then was, points out that:

[161] [1949] M.L.J. 51, at p. 52.
[162] *Ibid.,* at p. 53
[163] [1987] 2 M.L.J. 141.

> In my view the line of decisions culminating in *Spicer* v. *Holt* has no application to the present case, as section 68 of the RTA,[164] [footnote added] under which the appellant was convicted, makes no reference whatever to any procedural requirements whether in section 70 or otherwise for taking a specimen and is not part of a code of procedure, each step of which has to be followed.[165]

In other words, the procedures breached are not part of the offence as they were in *Spicer* v. *Holt.*[166] But the Singapore statute is not exactly silent on the steps to be taken. There are clearly procedural steps to be taken; and the English cases are no guide only to the extent that they deal with different provisions, not when they contain some more general principle or are dealing with provisions *in part materia.* How necessary a careful examination of the relevant provisions is appears in the decision in Northern Ireland in *Sherrard* v. *Jacob.*[167] Obviously, great pains were there exerted in order to discover the impact of the failure to take the prescribed steps. The fact that section 68 which creates the offence makes no reference to the chain of procedures to be complied with only means that the legislature has not made the procedures an essential ingredient of the offence. It is still possible that it has made the procedures, or some of them, a condition precedent to admissibility. But in moving from the rejection of *Spicer* v. *Holt* Chan J.C. moves with unwarranted celerity. The intermediate possibility that some of the prescribed procedures might be conditions precedent to admissibility must not be overlooked.

The Singapore statute, which after all was based on English models, contains these pertinent safeguards. If the accused was not warned that he might be prosecuted for refusing to give a sample on requirement, then any prosecution for refusing to give a sample may be dismissed (section 69(4)).[168] That is one clear safeguard, although the failure to warn will not affect prosecutions for driving while under the influence of drink or for being in charge of a vehicle while unfit to drive through drink. If the accused has been arrested under the provisions creating the offences, the police officer may request a sample of blood but shall not be able to require it if the doctor in immediate charge of the case is not first notified of the proposal to make the requirement or objects on medical grounds to the taking of

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[164] *I.e.* Road Traffic Act, Cap. 276, 1985 Rev. Ed. Note that the provisions have been re-numbered.

[165] *Supra,* note 163, at pp. 142-143.

[166] [1977] A.C. 987.

[167] [1965] N.I. 151.

[168] See also *Brush* [1968] 1 W.L.R. 1740, *Dolan* [1969] 1 W.L.R. 1479.

a sample (section 69(1)).[169] Here is another clear safeguard.[170] It is critical in our case, and what we have to make out is the evidentiary consequence of its breach.

The precise provisions which were governing in *Spicer* v. *Holt* are very different but if we compare like with like, if we compare the corresponding English and Singapore provisions relating to this offence with which Ajmer Singh has been charged, they are really quite similar in many ways. Both provisions state that a police officer may make an arrest without warrant. In both statutes, there is the provision that a person who has been arrested may be required to provide a blood specimen for analysis. The Singapore provision that a doctor's certificate of examination shall be admissible as evidence of the facts which it contains also has an English equivalent.[171]

There are, of course, differences but apart from one to be discussed shortly, they are small and sometimes negligible. The English provisions maintain a kind of a link to the procedure of taking a sample in that one provision enjoins the court to have regard to evidence of proportion of alcohol as ascertained by analysis of a specimen taken with the accused's consent. That provision is absent in Singapore. The absence of such a provision would not be material in many cases. It merely implies that unlike the English court, the Singapore court has no obligation to regard evidence of analysis of a blood specimen which has been given willingly. It emphasizes rather that although willingly given, the Singapore court may still reject it under *Sang* whereas the English court must find some breach of that provision before they can revert to *Sang*.[172] Another difference is similarly virtually immaterial if we are considering the admissibility of the evidence of analysis by certificate. The English statute clothes the certificate of the analyst as well as that of the doctor with hearsay immunity; they shall be evidence of the facts stated therein (including consent of the accused). The Singapore provision refers only to the doctor's certificate, somehow envisaging that the doctor will be responsible for the analysis, for the results of the analysis are contemplated as part of the contents of his certificate (see section 71).

Supposing then that in England, an accused who has unlawfully been arrested is charged with driving while unfit to drive through drink. Most likely, contrary to the submission in *Wilkinson's Road Traffic Offences,* the evidence of analysis is not automatically excluded but a matter for *the* court's exclusionary discretion. Viscount Dilhorne in *Spicer* v. *Holt*

[169] See also *Oxford* v *Lowton* [1978] R.T.R. 237.

[170] Especially if we understand that the prior notification of the proposal to make a specimen requirement is not simply a perfunctory task but that it implies arming the doctor with sufficient knowledge of the circumstances in which a man such as Ajmer Singh is found so as to enable the doctor to form an opinion whether there might be any medical risks in taking the blood specimen.

[171] See the earlier discussion in the text at pp. 74 and 77.

[172] See *Trump* [1980] R.T.R. 274.

gives this opinion: "no arrest was necessary for an analysis of blood or urine to be admissible in evidence in support of a charge under section 5(1) of driving while unfit to drive through drink."[173] At first blush then, the law in Singapore is the same, that breach of the provisions has no effect on admissibility of evidence. If the evidence of analysis is admissible in spite of an absence of arrest, it must also be admissible in spite of unlawfulness of arrest.[174]

We must, however, go on to notice that unlike the English statute, the Singapore statute puts the important relevant safeguards as subsections in one provision. This makes possible a link up which would be precluded if the same provisions had been drafted as independent sections. Subsection (1) of section 69 of the Singapore Road Traffic Act stipulates that when the accused has been arrested, the police may require a specimen of him. Then subsection (3) says that for the purposes of any proceedings for the offence of driving while unfit to drive through drink, a certificate purporting to be signed by a medical practitioner that he took a specimen from the accused with his consent shall be evidence of the matters so certified and of the qualifications of the medical practitioner. Quite clearly, a link up between these two subsections already exists in that the requirement of the accused consenting to a specimen being taken is implicit in subsection (1) only because of being read into it through subsection (3). The second link up proceeds from subsection (1) to subsection (3). Since also by virtue of subsection (1) the medical practitioner must be notified first of the proposal (in relation to the charge), he cannot properly take a specimen and declare under subsection (3) that he has taken a specimen unless he has been notified first. If very little is needed once a preliminary connection is found, a link up to the requirement of arrest (also mentioned in subsection (l))will follow. Subject to a consideration of subsection (4) a weaker and a stronger proposition will follow. The weaker is that the failure to make an arrest leads to inadmissibility of the resultant certificate. The stronger is that the failure to notify first the medical officer of the proposal to make a specimen requirement leads to inadmissibility.

What is the effect of subsection (4) which says that the failure to warn may lead to the dismissal of the charge of failing to provide a specimen? Does it imply that because clear provision has been made in relation to the failure to warn, all other failures are irrelevant, even when pertaining to offences other than failing to provide a specimen? A "two-minute" submission which was attempted in one English case in fairly similar circumstances relies on the principle of *expressio unius exclusio alterius est.* It argues that if there is provision for the consequence of breach of procedure in subsection (4), and no mention of other breaches, then such

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[173] [1977] A.C. 987, at p. 997.

[174] See *Campbell* v. *Tormey* [1969] 1 W.L.R. 189, at pp. 196 and 197.

other breaches have no similar consequence. The answer to this "“two-minute” point is provided by the court in *Palfrey and Sadler.*[175] *Expressio unius* presumes there are only two things to choose from; but statute here may do at least one of four things ranging from making the offence non-provable to reliance on *Sang*. So subsection (4) can have no impact on the question of admissibility of the certificate of analysis and the consequence of an unlawful arrest or lack of arrest, by virtue of the wording of sub-sections (1) and (3) of section 69, would seem to affect at the least the admissibility of the doctor's certificate.[176] Indeed, Chan J.C. seems almost to concede this result (though he does not explain it) in one part of his judgment where he says:

> Neither P5 nor P6 was a certificate which fulfilled the requirements of section 71 itself. *Not only was the appellant not arrested or warned* prior to his blood being taken, P5 did not comply with section 70(3) and P6 was signed by the Chief Scientific Officer ...[177] [Emphasis added.]

The learned judge, however, does not accept that breach of procedures affects admissibility.

To say that breach of procedures by the police precludes the reception of the doctor's certificate would not render the proof of the offence impossible in those cases where there is a genuinely mistaken breach by some tyro, yet unfamiliar with the prescribed procedures. This is because although the certificate is inadmissible, oral evidence of both doctor and analyst probably is still admissible. The prosecution is only constrained to prove the offence by their oral evidence. Only the great facility of proof by way of the certificate is withdrawn. No doubt an English case has taken a hardline view on the question whether oral evidence of the doctor and analyst must also be ruled out when breach of procedure would rule out the certificate of analysis. Widgery J. in *Mitten*[178] says it must. He is dealing with the English provision that an offer of a sample must be made to the accused from whom blood or urine is being taken. After he has shown that failure to do so does not make evidence of the analysis inadmissible as a matter of law, but only requires a consideration of the exercise of the exclusionary discretion, he says that when once it is clear that the evidence of the certificate must be ruled out, then the oral evidence of the analyst must likewise be ruled out. There is no distinction between the two methods

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[175] [1970] R.T.R. 127.

[176] Likewise, unlike failure to warn, an unlawful arrest will render the offence of failing to provide a specimen defensible because of the reference to requirement under this section, which includes the provision on arrest. The result is as in *Bove* [1971] R.T.R. 261.

[177] *Supra,* note 163 at p. 145.

[178] [1966] 1 Q.B. 10.

of proof. Each is admissible subject to the exercise of discretion.

A similar conclusion for Singapore would attract terrible results. It would mean that lawfulness of arrest, for example, will in effect amount to a condition precedent of admissibility of the evidence of analysis when, properly speaking, it is only a condition precedent to admissibility of the certificate. But as the wording of section 69(3) does not go so far as to refer to the oral evidence, it would seem more likely that the analyst may still be called; indeed, the doctor himself may be called, notwithstanding inadmissibility of their certificates.

2. *Relying on section 368 of the Criminal Procedure Code*

Chan J.C. does not reject the doctor's certificate on the ground of breach of prescribed procedure in the procuring of evidentiary samples. It so happens that the doctor's certificate is deficient in other ways quite apart from breach of procedures by the police. It does not recite that Ajmer Singh's blood is taken with his consent and by the certifying doctor. All these deficiencies frustrate reliance on the presumption in section 70 which the doctor's certificate would otherwise create, namely, the presumption of incapacity to control the vehicle if the alcohol in the sample analyzed exceeds a prescribed level. Chan J.C. rejects the doctor's certificate only for the purposes of relying on the section 70 presumption. He is quite willing to let the defective certificate in under a separate provision in the Criminal Procedure Code,[179] namely, section 368 which allows the reception of written reports of enumerated public officials:

> P5 [the doctor's certificate] was certainly not evidence of any of the matters certified or mentioned therein [or rather not mentioned therein] unless it was a certificate admitted under and in accordance with section 368 of the Criminal Procedure Code or PW1 [the doctor] has given evidence of such matters.[180]

Not only, then, is the inadmissibility of the certificate overlooked, but Chan J. C. apparently contemplates that section 368 can interpose to supply what is lacking in a specific provision in specific legislation dealing with the matter of the certificate. If the specific legislation cannot be satisfied, can one still try to satisfy the more relaxed requirements of section 368? This, with respect, cannot be.

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[179] Cap. 68,1985 Rev. Ed. Notice that in this case the doctor's certificate would still be useless when admitted under the Criminal Procedure Code. Since it did not state that *Ajmer Singh's* blood was taken with his consent, it could not prove the taking of a blood sample by the certifying doctor.

[180] *Supra,* note 163 at p. 145.

The centrality of the doctor's certificate is clear. The legislature has made such a certificate extremely powerful. It is proof not just of the consent to giving a specimen but also of the analysis (even where that is performed by someone else other than the doctor taking the blood). It is also the basis on which the presumption in section 70 will operate. So it would be natural and reasonable for the legislature to spell out controls in relation to the admissibility of such a certificate. Such certificate probably is inadmissible if there has been no arrest, or if there has been no first notification of the doctor in charge of the case. Only if there has been no warning given to the accused, would admissibility of the certificate appear unaffected. Then when all this has been done, is it likely that the more general provision in section 368 can step in? What would section 368 do that could more have been done? The use of the doctor's certificate reciting that he has taken the blood with the accused's consent could not under section 368 be proof of consent. Under the Road Traffic Act it is. The use of the doctor's certificate could not under section 368 prove the analysis done by another and not the doctor himself. Under the Road Traffic Act it can. The doctor's certificate in this case contains no recital of taking the blood with the accused's consent. Its admissibility under section 368 is useless if it is sought to prove the taking and the consent. The certificate states the results of the analysis performed by another. Its admission under section 368 would be impossible and would offend the hearsay rule. So then if a doctor's certificate containing the proper recital and results of analysis but obtained in breach of the procedures by the police is inadmissible under the Road Traffic Act, the only advantage that could be gained by admitting it instead under the Criminal Procedure Code would be the facilitation of proof of taking and consent. That may perhaps commend itself but, perhaps, it goes too far. The specific must oust the general. A doctor's certificate which is ruled out by breach of procedures should not slip in by the backdoor of the Criminal Procedure Code.

A separate certificate of the analyst can fare no better unless the Road Traffic Act's contemplation of proof by the doctor's certificate of the analysis is not exclusive. Only then would admissibility of the certificate of the analyst (as opposed to the doctor's certificate) lie elsewhere in section 368 of the Criminal Procedure Code. So is proof of analysis by the doctor's certificate exclusive? Breach of procedures by the police which would shut out the doctor's certificate of analysis might not necessarily shut out the analyst's certificate. But if the best way of securing compliance with the procedures is to preclude any reliance on certificates where there is breach, it cannot matter that technically the analyst's certificate is not mentioned in the Road Traffic Act. It would still be a certificate that is tainted by breach of procedures. These points are not raised in the judgment. Reliance is therefore placed on section 368 of the Criminal Procedure Code for

admission of the analyst's certificate (which it so happens is tendered along with the doctor's certificate). Essentially, this is the evidence that Chan J.C. accepts and it clinches the case against Ajmer Singh.

Even supposing section 368 to be properly invoked, its invocation must be built upon a proper foundation. Since the analyst's certificate can no more prove that the blood is Ajmer Singh's than the doctor's certificate under section 368 can prove that the analysis is such and such, a proper foundation must be laid by showing that Ajmer Singh's specimen of blood was transmitted to the analyst who performed an analysis on the same specimen and not another. This proper foundation must not be laid by hearsay.

The doctor, it seems, is not called for the purpose of proving that he is the taker of the blood specimen and his report which is tendered does not recite that he has taken a specimen of blood. Even if it had that recital, it certainly did not show that he has put the blood into a container, marked it out and sent it to the analyst. His report which contains the analyst's results would according to section 69(3) prove his qualifications and the consent of Ajmer Singh to give a sample for analysis. It would also prove the analyst's result (it appears from section 70 by implication, even in a case where the analysis is done by another). But when the doctor's certificate is thrown out because it does not even satisfy the terms of section 69(3) as to what it should recite, the prosecution is deprived of proof that a doctor has taken the sample. The prosecution perhaps not having anticipated the possibility of rejection of the doctor's certificate has, of course, not bothered to furnish independent proof of these facts.[181] The rejection of that certificate would particularly leave the prosecution without proof of a specimen being taken. It would also leave the prosecution without proof of the analysis by way of the doctor's certificate. The connection must next be made between the taking of the sample and the analyst's report. In *Orell*[182] there was the doctor who testified that he took the sample and who, therefore, had personal knowledge of its identity and the link to the accused. He then testified that he put the sample into a certain marked container. When the analyst testified that he received the same marked container, the link was made without hearsay being involved. In the absence of the doctor's testimony that he has taken the sample and marked the container such and such (because of the rejection of his certificate), any identification by the analyst would involve the hearsay in the label marking the container. Is this an excessively technical argument? If there was other evidence that Ajmer Singh was

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[181] The doctor was a witness but "was not asked or cross-examined as to whether the appellant's blood was taken with consent." *Cf. Saw Thean Teik* [1953] M.L.J. 124.

[182] [1972] R.T.R, 14. See also *Commissioners of Railways (N.S.W.)* v. *Young* (1962) 106 C.L.R. 535 Chan J. C. also relies on the briefly reported case of *Tremlett* v. *Fawcett* (1984) T.L.R. 551 but again there was evidence that the person taking the sample had marked it and transmitted it in a certain manner.

incapable of controlling his vehicle, it might be. If we could be confident that mistakes are never made in the transmission of containers of blood for the purposes of analysis in some other part of Singapore, it would be.

3. *The exclusionary discretion*

For Ajmer Singh, it is contended in the alternative that the admissibility of both certificates (it seems) is subject to the exclusionary discretion. Chan J.C. is urged to exercise that discretion to exclude both certificates. The decision here may be criticized as unyielding. There is observation that counsel in the court below has based his submissions on illegality in relation to the absence of an arrest and failure to administer a warning to the accused concerning the giving of a sample (section 69(4)). Counsel does not take the consent point then. Counsel has failed to argue that Ajmer Singh has not consented to his blood being taken. That failure to Chan J.C. is fatal. Since the point has not been raised in the lower court, it should not now be taken. *Palfrey and Sadler*[183] is cited as concluding the issue.

The refusal of the court to investigate Ajmer Singh's consent, if any, to providing a sample of blood and urine, implies that we proceed on the basis that Ajmer Singh has consented to giving a specimen. The principle of discretion to exclude in *Sang* has to be reckoned with because as *Trump*[184] shows, the court has a discretion to exclude evidence analogous to a voluntary confession which has been unfairly obtained. In that case, the accused gave a blood specimen after a warning by the police of the consequences of failing to provide such a specimen. He was later charged with driving while unfit through drink and he contended that he had not consented to giving the specimen. The evidence of the medical examination was treated as involuntary. In any case, citing *Payne*[185] as preserved by Sang, the Court of Appeal agreed with the trial judge that he had a discretion and agreed that the discretion had rightly been exercised against exclusion. Like the Court of Appeal in *Trump,* Chan J.C. accepts the authority of *Payne.* This rightly implies that if truly the statute is silent on the effect of a breach of its procedures on admissibility, there must be further inquiry whether the evidence that has been obtained is analogous to a confession which is a fit subject for the exercise of the discretion to exclude.

But *Trump* is distinguished by Chan J.C. as a case where "the Court of Appeal ... held that "Giving the blood was very close to making an admission that the appellant had consumed an excessive amount of alcohol" thereby making it clear that what was done there did not amount to an involuntary admission. Here no warning was given to the appellant, but

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[183] [1970] R.T.R. 127.
[184] [1980] R.T.R. 274.
[185] [1963] 1 All E.R. 848.

he did not appear to have objected to his blood being taken."[186]

In *Trump* where there was no illegality because the warning was given, the lack of consent led to an involuntary analogous admission necessitating consideration of the exclusionary discretion. Here there is an illegality because no warning is given, no arrest and no prior notification of the doctor have been made. The resultant analogous admission may be voluntary but the exercise of discretion will be no routine exercise but must seriously be considered. No doubt Ajmer Singh has not objected. Neither would any man who stands in fear of the law and in ignorance of his right against self-incrimination. There must, therefore, be consideration whether the failure to warn, the absence of arrest, the demand for blood and so on all combine to produce analogous self-incrimination.

Perhaps Chan J.C. is influenced by the distinction between a confession and an admission. Perhaps he would have been more prepared to exercise the discretion to exclude if the evidence of analysis was more of an analogous confession than an admission. He says; "Here in the quota, if there had been any confession or admission, it was merely to the fact that the appellant had an excessive amount of alcohol in his blood and not to the fact that he was unable to control his scooter whilst under the influence of drink."[187]

But there would have been a valid distinction between admitting to having excessive alcohol and admitting to being unable to control a vehicle had not section 70 created a presumption of being incapable of having control of a motor vehicle if the specimen is certified to have a blood alcohol concentration in excess of a prescribed limit. When that is the case, any illegally obtained blood analysis would be analogous to a confession unless the blood analysis shows a concentration less than the prescribed limit.

Chan J.C.'s reasoning is in fact more restricted. He is saying that only the analyst's certificate is in view and when admitted under section 368, will not be used (nor is it capable of being used) to fuel the presumption in section 70. Then the argument goes on like this. We must look at that certificate on its own merits. It only contains an admission. There is then at best an analogous admission which should be insufficient to attract the protection of *Sang*. That, however, is still unsatisfactory because as *Lam Chi* Ming[188] teaches, we must take all the circumstances into consideration when deciding whether what we have is only an admission and not a confession. Whether there is infringement of the privilege against self-incrimination is not to be answered mechanically. We are not to say that the evidence of pointing out the place of concealment of the murder weapon is only an admission when considered in the light of the circumstances,

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[186] *Supra,* note 163, at p. 144.

[187] *Supra,* note 163 at p. 144.

[188] [1991] 3 All E.R. 172.

it was inconceivable that anyone but the murderers would wish to dispose of the weapon in that way.[189] We must especially have regard to the objective effect of the "analogous admission or confession." If, as in *Payne,*[190] the alcoholic content in the blood is not critical but there has been a thorough medical examination yielding the damning conclusion of inability to handle a motor-vehicle, the net result is an analogous confession. It was not that the conclusion of the medical examination could not be rebutted in some cases. The classification of an analogous confession does not require that level of reliability at all. So then and in the same way, if the alcoholic content is damningly high, as it is here, the net result is or should be classified as an analogous confession. The reason is that an excessive amount of alcohol is, as a practical matter, conclusive of inability to handle a motor-vehicle. It is not very convincing to continue to draw the distinction between having an excessive amount of alcohol and inability to handle a motor-vehicle when we all know that at a level of between 100-200 mg. per ml. of blood, distinct loss of skill and of co-ordination occurs, although the effect may be less pronounced with a regular drinker.

Ajmer Singh has the effect of obscuring the safeguards which are discernible in the Road Traffic legislation not only in overlooking the effect of breach of procedures by the police on admissibility of the doctor's certificate but also in allowing the use of section 368 of the Criminal Procedure Code for the reception of the analyst's certificate. The setting of a very high standard of "analogous confession", higher than in previous cases, is also regrettable.

VI. Conclusion

Certain provisions of the Evidence Act allow scope for exercising the judicial discretion to exclude relevant evidence when its prejudicial effect exceeds its probative force. Certain liberties in statutory construction may have been taken but if so, they are taken in the belief that in the law of evidence, a greater freedom is warrantable because the need of adherence to dead letter law is smaller.

Sang quite correctly banishes a policing role from the list of responsibilities of a trial judge but it needs to be emphasized that the way evidence is procured may affect the ability of the accused to prepare his defence. Where that happens, and it is submitted that the prosecution ought to be made to prove that that has not happened, the discretion to exclude is properly exercisable.

In relation to directly relevant evidence, although the discretion to exclude

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[189] This amplifies and is in no way incompatible with the test laid down in *Anandagoda* [1962] M.L.J. 289.

[190] [1963] 1 All E.R. 848.

does not exist, a different principle, that of the privilege against self-incrimination does. We should not equate and confuse things which coincide in one point but differ in others. Development of this privilege will serve as a valuable check on the extent to which the prosecution can rely on the help of the accused in condemning himself.

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