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STATEMENTS OF WITNESSES TO THE POLICE: A STORY OF STRANGE BEDFELLOWS IN THE CRIMINAL PROCEDURE CODE AND EVIDENCE ACT

This article focuses on the lack of symbiosis between provisions within the Criminal Procedure Code and between that statute and the Evidence Act concerning the admissibility at trial of statements of witnesses to the police. The subject is of immense importance because the determination of guilt and innocence can often turn on the admissibility of a witness's previous statement. The article will examine the difficulties which arise from the legislation and consider the appropriateness of reform.[1]

I. Introduction

THE introduction of new provisions to a statute necessitates a consideration of their effect on existing sections of the Act or other legislation concerning the same area of law. Modifications or words of qualification may be necessary when the new provision impinges on the scope of the current law so that conflict and uncertainty are avoided. This is particularly the case where the new provision is adopted from a foreign source which endorses an approach not recognised by Singapore's statutory regime. Imprudence in this context may compel the courts, in the interest of maintaining the integrity of legislative authority, to superimpose new doctrines not supported by the underlying principles of the statute, resulting in a more convoluted legal framework. This article focuses on these concerns in respect of certain provisions in the Criminal Procedure Code[2] and Evidence Act affecting the admissibility of statements of witnesses in the course of police investigations.[3]

1 Reference should also be made to a previous article by the same author: 'Previous inconsistent statements: Scope of s 147(3) of the Evidence Act and its applicability where the witness does not testify to the facts mentioned in his previous statement' [2001] 13 SAcLJ Part 1, at pp 1-33. This article focused on the specific topic of whether a witness who does not testify to the facts contained in his previous statement can be cross-examined on that statement (on the basis that it is a previous inconsistent statement) pursuant to s 147(3) of the Evidence Act (Cap 97, 1997 Rev Ed) (hereinafter referred to as the 'EA').

2 Cap 68, 1985 Ed (hereinafter referred to as the 'CPC').

3 In particular, ss 122, 371, 377-384 of the CPC, ss 32 and 147(3) of the EA.

II. Section 122 of the Criminal Procedure Code

Section 122 consists of a series of sub-provisions which govern the admissibility of statements to police. Section 122(1) of the CPC precludes the adduction of statements to police officers as evidence except as provided by the section:

> *Except as provided in this section,* no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence other than a statement that is a written statement admissible under section 141.[4] (emphasis added.)

The remaining provisions in section 122 state the circumstances in which statements may be used in the examination of witnesses or admitted as evidence:[5]

> (2) When any witness is called for the prosecution or for the defence, other than the accused, the court shall, on the request of the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy of it; and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act.
>
> (3) Nothing in this section shall be deemed to apply to any statement made in the course of an identification parade or falling within section 27 or 32 (a) of the Evidence Act.
>
> (4) When any person is charged with any offence in relation to the making or contents of any statement made by him to a police officer in the course of a police investigation made under this Chapter, that statement may be used as evidence in the prosecution.
>
> (5) [Conditions pertaining to the admissibility of an *accused person's* statement to the police.]

[4] The words 'other than a statement that is a written statement admissible under section 141' were included in 1972 by the Criminal Procedure (Amendment) Act (12/72).

[5] These are set out in sub-sections (2) to (5) below. Note that sub-sections (6)-(8) of s 122 are procedural and relate to statements made by the accused person. They are not pertinent to this article.

Therefore, section 122 excludes all statements made to the police in the course of a police investigation except as permitted by this section. A previous statement of an *accused person* to the police is admissible pursuant to section 122(5) provided that the conditions imposed by that paragraph are satisfied. However, the only circumstances in which section 122 permits a statement of a *witness who is not the accused* to be used as evidence are as follows: statements admitted for the purpose of preliminary enquiries;[6] statements made in the course of an identification parade or admissible pursuant to section 27 and 32(a) EA;[7] and statements admitted in proceedings involving a prosecution for an offence 'in relation to the making or contents of any statement' to a police officer.[8]

A number of preliminary observations may be made in respect of section 122. Section 122(1) declares that statements made in the course of police investigations may only be admitted pursuant to the provisions of this section.[9] Section 122(3) specifies the only sections in the EA which constitute exceptions to the general rule in section 122(1) that statements made in the course of police investigations are only admissible under the provisions of section 122.[10] Section 122(2) of the CPC also makes reference to the previous statement of a witness. However, unlike section 122(3)-(5), section 122(2) does not state that the previous statement becomes evidence in the case. It merely allows the witness's credit to be impeached by a previous statement which he made. The words 'in the manner provided by the Evidence Act' are a reference to section 147(1) and (2) of that Act which set out the procedure for putting a previous inconsistent statement to a witness.[11] In accordance with the traditional common law principle, section 122(2) and section 147(1) and (2) were never intended to admit the previous

6 S 122(1), CPC.

7 S 122(3), CPC.

8 S 122(4), CPC.

9 *Ie,* the commencing words of s 122(1) are: 'Except as provided by the section'. See the main text at note 4.

10 The sections in the EA are ss 27 and 32(a). See *Abdul Rahim bin Ali* v *PP* [1997] 2 SLR 249, at paras 27-28, where this interpretation is supported.

11 Prior to the introduction of s 147(3) in 1976 (by the Evidence (Amendment) Act (No 11 of 1976)), there were only two provisions in section 147. They set out the procedure for putting a witness's previous inconsistent statement to him.

> S 147(1): A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

inconsistent statement as evidence.[12] Accordingly, a witness for the prosecution or defence[13] could be impeached by a previous statement which he had made, but the statement did not become evidence.[14]

III. Relationship Between Section 122 of the Criminal Procedure Code and Section 147(3) of the Evidence Act

Section 147(3) is part of a series of provisions[15] introduced to the Evidence Act in 1976.[16] It states:

> S 147(2): If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement.

These sections were part of the Evidence Ordinance when it was introduced in 1893 (No 3 of 1893). At the time, these provisions were formulated in s 145(1) and (2).

12 For previous formulations of s 122(2), see s 121(2) of the Criminal Procedure statutes in 1955 Rev ed (vol 3) (Cap 132) and 1926 Rev ed (vol 3) (Ord No 121).

13 Except the accused person himself. The admissibility of the accused's statements is determined by s 122(5), which was introduced in 1960 by the Criminal Procedure (Amendment) Act (18/1960).

14 Hence, in *Muthusamy* v *PP* [1947] MLJ 57, at 58, Taylor J said: 'He [the magistrate] completely misunderstood the principle of using the former statement to impeach credit and took the view that the former statement could be 'put in' and that the court could then choose whether to accept the unsworn police statement or the witness's sworn statement in court as his evidence of the incident. This is utterly illegal. In no case can the former statement become his evidence.' In *Jones* v *R* [1948] MLJ 182, Murray-Aynsley CJ said at p 182: 'These statements can only be used to impeach the credit of the witnesses. That is to say, when these statements have been proved, they do not become independent evidence of facts contained in them.' Also note the observations of Chua J in *Yohannan* v *R* [1963] MLJ 57, at 58, Murray-Aynsley CJ in *Wee Boo Soh* v *R* [1947] MLJ 93 and Terrell CJ in *R* v *Chua Eng Hong* [1937] MLJ 260. *Muthusamy* and *Jones* were considered correct by the Court of Criminal Appeal in *Syed Abdul Aziz* v *PP* [1993] 3 SLR 534 and *Somwang Phatthanasaeng* v *Public Prosecutor* [1992] 1 SLR 850.

15 These provisions were s 147 (3)-(6). In the 1997 reprint of the Evidence Act, para (4) (which concerned a statement used to refresh memory) was reformulated as paras (4) and (5); para (5) (which concerned weight) was reformulated as para (6); and the provision disqualifying the previous statement as corroboration (originally para (6)) became para (7).

16 Introduced by the Evidence Amendment Act (No 11 of 1976). Until the amendments in 1976, there were only two provisions in s 147 (s 147(1) and (2)). They set out the procedure for putting a witness's previous inconsistent statement to him. This reform has its roots in the Report of the English Criminal Law Revision Committee (CLRC) on Evidence. (Cmnd 4991). The Report (the '11th Report') was presented to Parliament in June 1972. The provision in the CLRC Report corresponding to s 147(3) EA is clause 33(1) (at pp 193 and 242 of the Report).

> Where in any proceedings a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of this section, that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

This provision changed the law which had, hitherto, allowed the previous statement to be used for the purpose of impeachment. The statement was not admitted as evidence of the facts referred to.[17] The position under section 147(3) is that the previous statement now becomes substantive evidence in the case.[18] In the context of this article, the concern of section 147(3) is whether it extends as far as admitting a previous inconsistent statement of a witness *made in the course of police investigations* as substantive evidence in the case. This begs a consideration of the relationship between section 147(3) EA (a general provision), and section 122 CPC which purports to be a self-contained code for the governance of such statements.

Although the issue has attracted much judicial attention, it has yet to be satisfactorily resolved. Indeed, even after the introduction of section 147(3) to the EA in 1976,[19] the Singapore courts showed their reluctance to admit previous inconsistent statements pursuant to section 147(3). In *PP* v *Sagar s/o Suppiah Retnam,*[20] Kan Ting Chiu J held that section 147(3) could not apply to a statement governed by section 122 of the CPC. In *Syed Abdul Aziz* v *PP,*[21] the Court of Criminal Appeal regarded the trial court as having acted properly in not considering the previous inconsistent statement of a prosecution witness (the previous statement had been made to the police) as substantive evidence against the accused, even though the trial court had been invited by the prosecution to treat the previous statement as substantive evidence pursuant to section 147(3).[22] The Court of Criminal Appeal came to its conclusion on the basis of the common law authorities.[23] Again, in *Somwang Phatthanasaeng* v *PP,*[24] the Court of Criminal Appeal

[17] See the main text from note 9 onwards.

[18] The weight of the statement being dependent on the criteria set out in s 147(6) EA.

[19] By the Evidence Amendment Act (No 11 of 1976).

[20] Unreported; CC 6/94. A decision of the High Court exercising its original jurisdiction. Although this case went up to the Court of Appeal ([1995] 1 SLR 660), the construction of s 147(3) was not an issue before that court.

[21] [1993] 3 SLR 534.

[22] *Ibid,* at 539.

[23] *Ibid,* at 538. The authorities being *Muthusamy* v *PP* [1947] MLJ 57 and *Jones* v *R* [1948] MLJ 182. See note 14.

[24] [1992] 1 SLR 850 at 862.

reiterated its position and stated emphatically in relation to the effect of impeachment by a previous statement made to the police:

> We do not think the principle of law is in any doubt: a previous statement made by an accused which has been used to impeach his credit, is only admissible for that limited purpose, *ie,* to impeach his credit, and not as substantive evidence of the content thereof.[25]

The court pointed out that the trial judges had acted in accordance with the principle by not relying on the previous statements as substantive evidence. However, in the immediate years after *Somwang,* the Court of Criminal Appeal and Court of Appeal indicated that while the emphatic conclusion in that case might not be wrong, the position would have to be reconsidered. In *Ukthunthod* v *PP,*[26] the Court of Criminal Appeal declared that its pronouncement in *Somwang Phatthanasaeng* v *PP* was *obiter dicta,* and furthermore, that as section 147(3) was not cited in that case, the court did not have the benefit of argument on the relationship between this provision and section 122. The point should be made that *Ukthunthod* did not involve *a statement to a police officer,* and therefore, section 122 was not in issue.[27] Moreover, the High Court and Court of Criminal Appeal in *Syed Abdul Aziz*[28] were fully aware of section 147(3) and did not regard this provision as having the effect of admitting the previous statement of a witness to the police as substantive evidence.

The matter re-arose in *Lee Lum Sheun* v *PP,*[29] but the Court of Criminal Appeal did not elucidate the legal position as it found that the trial court had not regarded the previous statement as substantive evidence in the case. The Court of Appeal had a further opportunity to express its view on the relationship between section 147(3) of the EA and section 122(2) of the CPC in *Foong Seow Ngui* v *PP.*[30] Although this case has been cited by the High Court as being authority for the proposition that section 147(3) extends to the admission of statements to police officers within the scope

[25] Although the case involved the previous statement of the accused, the court referred to the 'principle of law' (and the cases cited in support thereof) concerning the impeachment of witnesses generally. See the cases cited in note 14 and the case of *Syed Abdul Aziz* immediately above in the main text. Also see *Ukthunthod* v *PP* [1994] 1 SLR 225 (a case involving a witness) in which *Somwang* was examined. *Ukthunthod* is considered immediately below.

[26] [1994] 1 SLR 225 at 229-230.

[27] This was recognised by the Court of Appeal (*ibid,* at 229) which left the matter open for subsequent deliberation (*ibid,* at 230).

[28] *Supra,* note 21.

[29] [1994] 2 SLR 497.

[30] [1995] 3 SLR 785.

of section 122(2),[31] it does not appear to carry this significance. In *Foong Seow Ngui,* Thean JA, in delivering the judgment of the Court of Appeal, stated:

> We now turn to the evidential value of [the previous] statement. In our view, it is clear from the terms of section 147(3) of the Evidence Act that the underlined parts of the statement may be used as evidence of the facts stated therein.
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> ...
>
> It was argued by counsel [for the defence] that notwithstanding section147(3), [the accused's] statement is not admissible in evidence by reason of section 122(1) of the CPC which provides ...
>
> The short answer to this is that [the sergeant] who recorded the statement is a narcotics officer, and it is settled law that a narcotics officer is not a police officer and therefore the admissibility of that statement is not subject to section 122(1) of the CPC; it is governed by section 24 of the Evidence Act: *Tan Siew Chay & Ors* v *PP* pp 26-28. It was also urged on us on behalf of the prosecution that the statement is admissible in evidence under section 122(5) of the CPC, and that there is no inconsistency between section 147(3) of the Evidence Act and section 122 of the CPC. No contrary argument was advanced on behalf of Lim. We are disposed to agree with the prosecution.

The points which arise from this extract of the judgment are patently clear. First of all, the effect of section 147(3) is to admit previous inconsistent statements as evidence of the facts they refer to.[32] Secondly, no ruling or

[31] In *Sng Siew Ngoh* v *PP* [1996] 1 SLR 143, at 155 (para I), the High Court (Yong Pung How CJ) stated: 'The Court of Appeal clearly did not see any difficulties in applying s 147(3) to s 122 (CPC) statements.' The High Court in *Sng Siew Ngoh* also stated that 'it must be asked whether the reasoning of Kan Ting Chiu J [in *PP* v *Sagar s/o Suppiah Retnam]* would survive *Foong Seow Ngui & Ors* v *PP' (ibid,* at 155, para D) and 'the sole authority on the issue is *Foong Seow Ngui' (ibid,* at 156, para C). The High Court further stated in the context of the application of s 147(3) to s 122 (CPC) statements: 'Following *Foong Seow Ngui,* the indication is that the Court of Appeal is inclined to give full effect to s 147(3)' *(ibid,* at 156, para C). However, the High Court also pointed out that 'This decision did not conclusively dispose of the issue'. In *Tan Khee Koon* v *PP* [1995] 3 SLR 724, the High Court (Yong Pung How CJ), in applying s 147(3) to s 122 statements, said: 'Following *Foong Seow Ngui,* the indication is that the Court of Appeal is inclined to give full effect to s 147(3)'. Also see *Sng Siew Ngoh* ([1996] 1 SLR 143, at 156 (para C), where the same words are uttered. Both *Sng Siew Ngoh* and *Tan Khee Koon* are considered further in the course of this article.

[32] Assuming that the conditions in s 147(1) or (2) are complied with.

observations could be made in this case as to the relationship between section 147(3) of the EA and section 122 of the CPC as the previous statement was not made to a police officer[33] and, therefore, the latter provision did not apply.[34] Thirdly, as the previous statement was made by the accused, it would be admissible as substantive evidence under section 122(5).[35] The Court of Appeal quite rightly agreed with the prosecution on this point. Section 147(3) would not be in issue where an accused's previous statement is admissible as evidence pursuant to section 122(5).[36]

Therefore, in the series of cases just discussed, the Court of Appeal[37] was not in a position to finally determine the nature of the relationship between section 147(3) of the EA and section 122 of the CPC and, more particularly, whether the former provision puts into evidence statements to the police within the scope of the latter section. In contradistinction, the High Court has had no qualms in reaching its own conclusion on the issue. In *Tan Khee Koon* v *PP,*[38] Yong Pung How CJ commented on *Foong Seow Ngui* v *PP*[39] as follows:

> The Court of Appeal did not deal directly with a situation where a statement has been made under section 121 of the CPC by a witness who is not the accused. Nonetheless, in view of the disposition of the court to accept that there is no inconsistency in the application of section 147(3) of the Evidence Act to a statement under section 122 of the CPC, it should follow that there is similarly no difficulty in applying the former to a statement made under section 121 but admissible under section 122(2). In any event, section 122(2) contemplates the operation of section 147(3) of the Evidence Act.

His Honour then referred to the terms of section 122(2)[40] which ends with the words 'the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act'. The learned judge continued:

[33] It was made to a narcotics officer.
[34] As was the case in *Ukthunthod* (main text at note 26).
[35] Assuming it was made voluntarily.
[36] As will be shown in the course of this article, a distinction must be made between the admission into evidence of statements of ordinary witnesses and statements of the accused person.
[37] And its predecessor, the Court of Criminal Appeal.
[38] [1995] 3 SLR 724, at 741.
[39] Considered in the main text from note 30.
[40] The wording is set out in the main text after note 5.

Such impeachment is governed by section 157 of the Evidence Act, which reads:

> The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:
>
> ...
>
> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;
>
> ...

His Honour concluded:

> Such proof in turn is governed by section 147 of the Evidence Act, and it is the whole of section 147 that is brought in, including section147(3). It was possible therefore for the judge to use section 147 of the Evidence Act, alongside section 122 of the CPC. He was entitled to rely upon the truth of the facts stated.

There are certain difficulties to this approach. First, the Court of Appeal in *Foong Seow Ngui* v *PP* was specifically concerned with the previous statement of an accused person and made it clear that it was considering the relationship between 147(3) and 122(5), not 122(2). As has been said, a distinction must be made between the previous statements of a witness and accused. The underlying rationale of section 122(2) is entirely different to section 122(5). There is no conflict between 147(3) and 122(5) because the latter admits into evidence statements of the accused to (or in the hearing of) police officers[41] when they are voluntary.

Secondly, the learned judge in *Tan Khee Koon* applied section 147(3), a substantive provision (which admits the previous inconsistent statement as evidence of the facts it refers to), indirectly through the procedural mechanisms of section 122(2) and section 157(c). Section 122(2) provides for impeachment in the '*manner* provided by the Evidence Act'. Section 157(c) states that a witness may be 'impeached in the following *ways*' including contradiction by previous inconsistent statements. The 'manner' or 'way' in which the witness is cross-examined on his previous inconsistent statement is governed by section 147(1) and (2), which are procedural provisions.[42] Section 147(3) is an admissibility provision which has nothing

[41] Of the rank of sergeant or above. If s 122(5) does not apply, the statement may be admissible as a confession or admission pursuant to s 17 and 21 EA.

[42] See note 11.

to do with the 'manner' or 'way' in which the witness is cross-examined on his previous inconsistent statement. Accordingly, it is respectfully submitted that the cited words in sections 122(2) and 157 did not justify his Honour's conclusion that the judge 'was entitled to rely upon the truth of the facts stated'.[43]

One of the leading cases on the effect of section 147(3) on previous inconsistent statements is *PP* v *Sng Siew Ngoh.*[44] Yong Pung How CJ ruled[45] that a previous inconsistent statement used to impeach a witness pursuant to section 122(2) of the CPC is admissible in evidence by virtue of section 147(3) of the EA because the latter provision is expressed to apply to 'any proceedings'.[46] Kan Ting Chiu J had stated in *PP* v *Sagar s/o Suppiah Retnam*[47] that section 147(3) did not affect section 122 statements because:

> [s]ection 122 was enacted to regulate the use of police statements, and the protection it gives to an accused person should only be removed by clear and unequivocal amending legislation and not through a sidewind.[48]

This view was rejected by the learned Chief Justice in *Sng Siew Ngoh* primarily on the basis that 'the purpose of section 122 is not so much to regulate police behaviour, but to ensure that reliable evidence is given'.[49] Having referred to authorities which expressed the need to protect the accused from 'overzealous' or 'unreliable' police interrogators,[50] His Honour stated:

> The recording of statements in criminal proceedings ought to be closely regulated, yet it is doubtful that the deprecatory attitude towards police officers should be condoned in these times. There is every reason for the courts to accept the professionalism of police officers and the efficiency of their training.[51]

[43] Nevertheless, the learned judge re-endorsed his approach in *Tan Khee Koon* in *PP* v *Sng Siew Ngoh* [1996] 1 SLR 143 at 149-150; *Kwang Boon Keong Peter* v *Public Prosecutor* [1998] 2 SLR 592, at para 22; and *Chai Chien Wei Kelvin* v *Public Prosecutor* [1999] 1 SLR 25, at para 55 (CA).

[44] [1996] 1 SLR 143. An appeal from the subordinate courts.

[45] *Ibid,* at 153-154.

[46] *Ibid,* at 153 (para I). His Honour rejected the position taken in the unreported case of *PP* v *Sagar s/o Suppiah Retnam* (CC 6 of 1994). See immediately below.

[47] Unreported judgment (CC 6 of 1994).

[48] *Ibid,* at p 23

[49] *Supra,* note 44, at 154, para A.

[50] *Ibid,* at 150, paras G to I.

[51] *Ibid,* at 151, para A.

> Rather, section 122(1) ensures that evidence given out of court to police officers is only adduced as evidence if there is either a good foundation for the reliability of these out of court statements either as being exceptions to the hearsay rule or exceptions governed by policy considerations that is, being within one of the exceptions listed in sections 122(2), (3) and (5).[52]

Again, with respect, issue may be taken with the learned Chief Justice's view that the 'professionalism of police officers and the efficiency of their training' in the Singapore of today no longer justifies the view that section 122(1) is intended to protect the accused against 'overzealous or unreliable police officers'.[53] Surely, a more professional and sophisticated approach to interrogation does not guarantee the reliability of statements taken by police or other law enforcement officers. Professionalism does not ensure moral integrity. As long as there is the risk that the responsibility of those involved in interrogation may be compromised by the demand for results or other factors, the danger of an incorrect conviction resulting from the admission of an unreliable statement persists. As advocated in *PP* v *Sagar s/o Suppiah Retnam,* it is a danger against which section 122(1) seeks to protect the accused.

The court in *Sng Siew Ngoh* appreciated that an out of court statement to a police officer may be unreliable and that it is generally hearsay.[54] In concluding that section 122 is intended to ensure reliability rather than regulate police behaviour,[55] it expressed the view that only section 122(5) of the CPC (which governs the admissibility of statements by the accused to the police) 'can be regarded as a regulatory provision *per se*'[56] and had to be distinguished from the sections affecting witnesses:

> It is clear then that sub-section (5) is intended to regulate the activities of the police. The basis of the proviso to sub-section (5) is not rooted in the reliability or otherwise of the statement made to the police, but is intended clearly to prevent any impropriety on the part of the interrogators. Subsection (7) reinforces this by making it clear that the administration of the warning would not amount to an inducement, threat or promise within the meaning of sub-section (5).

52 *Ibid,* at 151, para B.
53 *Supra,* note 44, at 150, para I – 151, para A.
54 See the extract of the judgment in the main text at note 52. Also see pp 154, para A and 157, para D of the judgment.
55 *Supra,* note 44, at 154, para A. Also see the extracts cited in the main text at notes 51 and 52.
56 *Ibid,* at 154, para B.

> The position of a mere witness is in any event quite different from that of the accused. The accused may be expected to be exposed to the danger of pressure or harassment, but the mere witness would not be. That is clearly reflected in the absence of any overt safeguards against impropriety acting on witnesses. There is none simply because there is generally no need for any.[57]

This distinction between the regulation of police behaviour and the reliability of evidence in the context of section 122 of the CPC is not helpful, even confusing. Section 122 is about the use at trial of statements made to the police[58] and this is obviously dependent on the manner of the interrogation. The concerns about proper interrogation and reliability are intertwined for an improper interrogation may taint the information given by a witness in his statement. Section 122(5) is an admissibility section for statements given by an accused person. The prosecution will use such a statement if it incriminates the accused in the form of a confession or admission.[59] The voluntariness requirement in the proviso to section 122(5) is intended to ensure that the evidence is reliable, a condition primarily determined by whether the interrogation was proper. Accordingly, the primary purpose of the proviso to section 122(5) is to ensure the reliability of evidence, the underlying basis of which is the propriety of police interrogation. This is obvious from the fact that when a court determines the voluntariness of the statement it normally conducts a *voir dire* in order to examine the circumstances of the interrogation.

The court in *Sng Siew Ngoh* was of the view that the absence of a voluntariness proviso in relation to mere witnesses[60] in section 122(2) indicated that, unlike section 122(5), section 122(2) was not concerned with the regulation of police behaviour, but with the reliability of evidence.[61] The court concluded that safeguards (such as a voluntariness proviso) had not been included in respect of a witness who is not an accused person because 'there is generally no need for any'.[62] It is submitted that the reason for the absence of the voluntariness proviso in relation to mere witnesses is that *their statements were never intended to be admitted into evidence except as provided by section 122* because of the potential unreliability of such

[57] *Ibid,* at 154, para I – 151, para A.
[58] The marginal note to s 122 of the CPC states: 'Admissibility of statements to the police'.
[59] Such evidence constitutes an exception to the hearsay rule. See ss 17 and 21 EA.
[60] *Ie,* not the accused.
[61] *Supra,* note 44, at 154, para A.
[62] *Ibid,* at 155, para A.

statements.[63] The court's proposition in *Sng Siew Ngoh* that a witness who is not an accused is not 'exposed to danger of pressure or harassment' does not take into account the very real possibility that a potential prosecution witness may be just as vulnerable (particularly when his evidence is crucial) thereby justifying the general rule of exclusion in section 122(1). The difference between section 122(2) and section 122(5) is that the admissibility of an incriminatory statement made by the accused pursuant to section 122(5) is based on *its relative reliability.* It is indicative of guilt because it is reasonable to expect that an innocent person would not willingly incriminate himself. Therefore, such evidence forms the basis of a hearsay exception[64] and is admissible if voluntary.[65] *In contrast, such reliability does not attend a statement of a witness who generally has nothing to lose (and sometimes much to gain) in incriminating someone else and is, therefore, normally inadmissible.*[66] It is pertinent to point out that in the course of coming to its conclusion, the High Court in *Sng Siew Ngoh* considered section 122(2) to be an exception to the general rule in section 122(1)[67] and, therefore, could be applied to admit the previous statement as substantive evidence quite apart from section 147(3). This is contrary to the principle propounded

63 See the cases cited in note 14. The exceptions to this general rule of exclusion are set out in the main text from note 4.

64 In the same way that confessions and admissions do pursuant to ss 17 and 21 EA.

65 Indeed, it is for the prosecution to prove the voluntariness of the accused's statement beyond a reasonable doubt. See *Koh Aik Siew* v *Public Prosecutor* [1993] 2 SLR 599.

66 It might be admissible where, for example, the statement incriminates him or concerns the circumstances or cause of his death or is a statement in the course of business or a professional communication (s 32(c), (a) and (b) EA respectively), but in these situations (there are others in s 32), the precondition to admissibility is that the maker of the statement is not available for one of the reasons mentioned in the preamble to s 32. Note that if the statement amounts to a confession then such evidence may be used against a co-accused in the appropriate circumstances (s 30 EA). There are other exceptions to the hearsay rule which might apply. The hearsay exceptions in the Criminal Procedure Code are considered below, under 'Relationship between s 122 and other provisions of the Criminal Procedure Code'. Note that in the very recent case of *Thiruselvam s/o Nagaratnam* v *PP* (CA 19/2000; Criminal Case 38/2000/02), the Court of Appeal ruled that the statement of a witness who is not an accused does not have to satisfy the voluntariness test. According to the court, the issue of voluntariness is determined by the criteria in s 147(6) EA. *Cf PP* v *Heah Lian Khin* [2000] 3 SLR 609, at paras 82-83, where the High Court expressed the view that the previous statement of a witness who is not the accused, but who may be involved in the alleged crime (as was the case in *Thiruselvam s/o Nagaratnam* v *PP* (above)), should be subject to the common law discretion to exclude evidence which would operate unfairly against the accused. Also see the cases cited in *PP* v *Heah Lian Khin* [2000] 3 SLR 609, at para 85.

67 *Supra,* note 44, at 151, para B (extract set out above) and 155, para B.

by the Court of Criminal Appeal in *Syed Abdul Aziz* v *PP*[68] and *Somwang Phatthanasaeng* v *PP*[69] that a previous inconsistent statement does not become substantive evidence merely through the process of impeachment.[70]

There are other difficulties with the High Court's interpretation of section 122(2) in *Sng Siew Ngoh.* It considered section 122(2) CPC (as well as section 147(3) EA) to be a 'a natural development of recent case law',[71] and cited *Foong Seow Ngui* v *PP*[72] to this effect. Yet, as has been shown,[73] *Foong Seow Ngui* was not concerned with section 122(2) CPC because the statement was recorded by a narcotics officer rather than the police. The Court of Appeal limited its observations to the admissibility of an *accused person's* statement pursuant to section 122(5) CPC, which does not involve the same considerations as those applicable to section 122(2) CPC.[74] An additional point which goes against the High Court's interpretation of section 122(2) in *Sng Siew Ngoh* is the omission of any wording suggesting that the statement is admissible in evidence. While it only provides for impeachment 'in the manner provided by the Evidence Act', other paragraphs of section 122 leave no doubt that statements within their stipulated categories do become evidence in the case.[75] Furthermore, if section 122(2) does have the effect of admitting the statement as evidence of the facts to which it refers, there is a vital omission of ancillary provisions and safeguards affecting such matters as the weight and the limits on the use of the statement.[76] The fact that such ancillary provisions are included in section 147(6) and (7),[77] but not section 122, is indicative of the different, rather than similar, approaches of section 147(3) and section 122(2).

[68] *Supra,* note 21, at 539. Referred to in the main text at note 21.

[69] *Supra,* note 24, at 862. The case is considered, and the actual pronouncement is set out, in the main text from note 24.

[70] This is consistent with the traditional position that s 122(2) CPC is not intended to admit previous inconsistent statements as evidence of the facts stated therein. See the cases cited in note 14. The previous statement of an accused person would, of course, be admissible pursuant to s 122(5) (which, unlike ss 122(2), is an admissibility provision), if the prescribed conditions are satisfied.

[71] *Supra,* note 44, at 155, para D.

[72] *Supra*, note 30.

[73] See main text from note 30.

[74] *Ie,* the admissibility of statements made by the accused (not an ordinary witness) to the police subject to the conditions of that provision. See main text from notes 34-36.

[75] *Ie,* the admissibility provisions are ss 122(3)-(5). Ss 122(6)-(8) govern the procedure for taking statements from a person who is charged with an offence or who is informed that he may be prosecuted for it.

[76] Such as the restriction on its use as corroborative evidence.

[77] S 147(6) sets out the considerations for the purpose of determining weight and s 147(7) restricts the statement to non-corroborative purposes.

The view of Kan Ting Chiu J in *PP* v *Sagar s/o Suppiah Retnam* that section 122 has a specific purpose in relation to the use of police statements in court in the interest of protecting the accused against injustice[78] may be justified on the basis that the section is self-contained. Section 122(1) states the general rule and only allows exceptions to the extent that 'they are provided in this section' (namely section 122).[79] Difficulties will arise if, as advocated in *Sng Siew Ngoh,*[80] 'full effect' is given to section 147(3) to the extent of overriding the provisions in section 122. To take just one example, a previous inconsistent statement of an accused person would not be admissible pursuant to section 147(3) if it is involuntary and, therefore, inadmissible under section 122(5). In this context, it is appropriate to reiterate that sections 147(3) to (7) were introduced as a result of the proposals of the CLRC in their 11th Report and based on specific provisions intended for the English Law of Evidence.[81] The CLRC was not faced with a pre-existing statutory framework governing statements to the police, as is the case in Singapore. Clause 9 of the Evidence (Amendment) Bill,[82] which contained section 147(3), was apparently passed without consideration of the provisions in section 122 CPC. When stating the rationale for the introduction of section 147(3), the Minister of Law[83] spoke generally of the situation at common law[84] and under the existing section 147(1) and

78 *Supra*, note 47, at 23.

79 S 122(1) is set out in the main text at note 4.

80 *Supra,* note 44, at 156, para C.

81 *Ie,* Clauses 33(1)(a), 33(2) and 36(4). As acknowledged by the Singapore High Court in *PP* v *Sng Siew Ngoh, supra,* note 44, at 153, para D.

82 *Ie,* the clause incorporating s 147(3).

83 When proposing the adoption of the provision in the course of the Second Reading of the Evidence (Amendment) Bill, which was committed to a Select Committee by a resolution of Parliament passed on 19th August, 1975. The Minister stated: 'Clause 9 [the clause containing the draft s 147(3)] proposes that a previous statement made by a witness should be admissible not only to support or impugn his credibility as a witness but as evidence of the fact stated in it. The present law has caused difficulty when evidence is given that a witness made a previous statement inconsistent with his evidence given in court. Evidence that the witness did so is admissible but it is admissible not in order to prove the truth of what was said in the previous statement but only in order to neutralise the effect of the evidence given in court by the maker of the statement. Many regard this as too subtle a distinction.' (Parliamentary Debates (19 August 1975, Vol 34, pp 1246-1247). This statement echoed the concerns of the CLRC about the state of the law in relation to previous inconsistent statements. (Report of the CLRC, at paras 232 and 257.) Also see the commentary at p 242 under clause 33, the provision corresponding to s 147(3) of the EA. Interestingly, this clause was never implemented in England. Also see the Explanatory Statement of the Evidence (Amendment) Bill (no 34/1975: pp 11-12) (presented to Parliament on 24 June 1976).

84 This was the conclusion of Kan Ting Chiu J in *PP* v *Sagar s/o Suppiah Retnam, supra,* note 47, at 22-23.

(2).[85] These paragraphs are merely procedural in nature leaving the common law to govern the evidential significance of the previous inconsistent statement.[86] Section 122 is of a different genus because it specifically provides for the admissibility of statements to the police in the course of their investigations. Section 122(1) restricts the admissibility of such statements to the categories with the section. As has been pointed out, previous inconsistent statements are not admissible as evidence of the facts stated pursuant to section 122(2).[87] One would assume that if section 147(3) was intended to impinge so dramatically upon the long-established provisions in section 122, this would have been more clearly brought out in the Parliamentary address or Explanatory statement,[88] if not in the legislation itself.[89] It would have been in accordance with ordinary principles of statutory interpretation to expressly extend a general provision such as section 147(3) to one of such specific focus as section 122 (or to make section 122 subject to section 147) and avoid the possibility of contrary construction by the courts.[90] Therefore, it is difficult to justify the High Court's view in *Sng Siew Ngoh* that its interpretation of section 147(3) gives effect to 'the clear expression of the purpose of the legislature' and that 'any argument against [that interpretation] cannot stand'.[91]

The High Court's conclusion in *Sng Siew Ngoh* that section 147(3) applies to statements within the scope of section 122 was based on its belief that this provision 'is not so much to regulate police behaviour, but to ensure that reliable evidence is given',[92] a view which has been challenged in this article.[93] The court also justified its position on its interpretation of the words 'any proceedings' in section 147(3).[94] It is respectfully submitted that such terminology is not sufficiently precise or purposive to unequivocally encompass section 122 statements. An equally (or more) justifiable interpretation could be to the effect that those words are intended to encompass civil proceedings as well as criminal proceedings, but not specific enough to encroach on the separate and distinct area of statements governed by the self-contained and specialised provisions of section 122. In the same vein, a plausible argument may be made to the effect that the words 'in any proceedings' are concerned with the nature of the proceedings rather than with the more

85 These are set out in note 11.
86 See the cases cited in note 14.
87 See main text after note 67.
88 The relevant extract of the Minister's speech concerning cl 9 is set out in note 83.
89 See *PP* v *Sagar s/o Suppiah Retnam, supra,* note 47, at 22-23.
90 As in *PP* v *Sagar s/o Suppiah Retnam.*
91 *PP* v *Sng Siew Ngoh, supra,* note 44, at 153, para C.
92 *PP* v *Sng Siew Ngoh, supra,* note 44, at 154, para A.
93 See the main text from note 49.
94 *PP* v *Sng Siew Ngoh, supra,* note 44, at 150, paras A and B and at 153, para I.

specific issue of whether statements given in the course of police investigations will be adduced in evidence. Indeed, the words 'any proceedings' were not incorporated in the Singapore legislation to override section 122, but simply because they appeared in the adopted provisions of the English Draft Criminal Evidence Bill.[95] The terminology may have been appropriate in the English context because, unlike the position in Singapore, it did not encroach upon any existing statutory provisions (such as section 122) in England.[96]

The interpretation of section 147(3) proposed in this article is supported by provisions in section 122 and other sections of the CPC. Section 122(3) specifically excludes the operation of admissibility provisions in the EA in relation to statements in the course of police investigations save for sections 27 and 32(a). Indeed, in *Abdul Rahim bin Ali* v *PP,*[97] the High Court ruled that the district court had wrongly admitted a statement (P5) pursuant to section 32(c) EA as the statement was made during the course of a police investigation and, therefore, was not an exception contemplated by section 122(3) CPC. According to the High Court, section 32(c) could not operate to admit a statement which was excluded by section 122:

> There was no doubt that P5 was a statement made to a police officer in the course of a police investigation. Hence, section 122 of the CPC applied:
>
> ...
>
> As P5 was sought to be admitted under section 32(c) of the Evidence Act, the exceptions stated in section 122(3) did not apply to P5. Section 122(3) makes a specific exception only for evidence admissible under section 32(a) of the Evidence Act. It was therefore beyond argument that the exception did not cover evidence admissible only under section 32(c). As no other exception was applicable, section 122(1) of the CPC applied and P5 should not have been admitted.[98]

This approach raises several questions about the ruling in *Sng Siew Ngoh.* In that case, the High Court had held that section 147(3) EA was not subject to section 122 CPC and could operate independently of the latter provision. Yet, according to *Abdul Rahim bin Ali,* the only exceptions to the general rule that statements in the course of police investigations are not admissible

[95] They appear as 'in any criminal proceedings'.
[96] Therefore, it could literally apply to all criminal proceedings.
[97] See *Abdul Rahim bin Ali* v *PP* [1997] 2 SLR 249, at paras 27-28.
[98] *Ibid.*

in evidence are set out in section 122 CPC itself, and it does not include section 147(3). *Sng Siew Ngoh* might be distinguished on the basis that the ruling in that case (that section 147(3) EA is not subject to section 122 CPC) was justified by the words 'in any proceedings' in section 147(3) EA. The arguments against such a conclusion have already been made from an interpretative standpoint, and they can be buttressed by questioning the rationale of such distinction. There is no reason why section 147(3) EA should have any special status in respect of the admissibility of statements made in the course of police investigations. The fact that it can be a powerful instrument in the hands of the prosecutor[99] is not a basis on which to exclude the protection mechanism of the CPC; but the very reason for invoking it.

Neither section 122(3) nor any other sub-section of section 122 was amended to include section 147(3) as an additional exception when the latter was introduced in 1976. As has been mentioned, section 122(1) is emphatic about the role of section 122 as the governing provision for admissibility of statements in the course of police investigations.[100] The assumption must be that if the restrictions in section 122 were not intended to apply to previous inconsistent statements admitted pursuant to section 147(3), a qualification to this effect would have been incorporated. Indeed, the corresponding provision in the CLRC's draft Criminal Evidence Bill specifically provides that other clauses in the Bill restricting the admissibility of evidence do not affect the admissibility of previous inconsistent statements.[101]

If section 147(3) had been intended to admit such statements as evidence, this purpose could have been easily manifested by the appropriate terminology. For example, section 371 CPC, which governs the admissibility of written statements subject, *inter alia,* to the consent of the opposing party,

[99] As when the prosecution is able to cross-examine its own witnesses, who do not come to proof, for the purpose of having their previous statements recorded by the police admitted into evidence. See, for example, *PP* v *Sng Siew Ngoh* (above). The high water mark of this practice is the case of *PP* v *Heah Lian Khin* [2000] 3 SLR 609, in which a previous statement of a prosecution witness was considered by the High Court to be admissible as evidence of the facts it referred to despite the absence of testimony on the material facts. This case is the subject of another article by the same author: 'Previous inconsistent statements: Scope of s 147(3) of the Evidence Act and its applicability where the witness does not testify to the facts mentioned in his previous statement' [2001] 13 SAcLJ Part 1, at pp 1-33.

[100] By reason of the words 'Except as provided in this section' in s 122(1). The subsection is set out in the main text at note 4.

[101] See clause 33(1), which excludes the operation of clauses 31 and 32 (these impose qualifications concerning the admissibility of hearsay evidence). These clauses are set out at p 193 of the CLRC Report.

commences with the words: *'Notwithstanding anything in any written law,* in any criminal proceedings ....' The italicised words indicate that admissibility pursuant to section 371 is not limited by other statutory provisions such as section 122.[102] Therefore, the words – 'in any criminal proceedings' – in section 147(3) EA do not conclusively establish the admissibility of a witness's previous statement to the police[103] as evidence.[104]

However, as will be seen, a different construction might apply where those words are used in sections which expressly provide (unlike section 147(3) EA) for the admissibility or non-admissibility of such statements.[105]

IV. Relationship Between Section 122 and Other Provisions of the Criminal Procedure Code

There is a fundamental contradiction between section 122 CPC and the series of provisions from sections 377 to 385 CPC.[106] Whereas section 122(1) restricts the admissibility of statements to the police in the course of investigations to very specific circumstances (those enumerated in sections 122(2)-(5)), sections 377 to 385 provide for the admissibility of statements to the police in a variety of situations. This contradiction is epitomised by sections 122(1) and 377 which set out general rules of admissibility. Section 122(1) states:

> *Except as provided in this section,* no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence other than a statement that is a written statement admissible under section 141.[107] (emphasis added.)

The purpose of the words 'Except as provided in this section' in section 122(1) are self-evident. Section 122 proclaims itself as the governing provision for the admissibility of statements to the police in the course of their investigations. To the extent that other provisions in the CPC or EA or

[102] This section was introduced in 1972 by the Criminal Procedure (Amendment) Act of that year (12/72). S 371 CPC is considered under 'Relationship beween s 122 and other provisions of the Criminal Procedure Code'.

[103] *Ie,* pursuant to s 122 CPC.

[104] *Ie,* if the above arguments against the approach in *Sng Siew Ngoh* are accepted.

[105] Such as ss 378 and 380 CPC. These sections are considered below, under 'Relationship beween s 122 and other provisions of the Criminal Procedure Code'.

[106] These provisions were incorporated in the CPC by the Criminal Procedure (Amendment) Act (10/1976).

[107] The words 'other than a statement that is a written statement admissible under s 139' were included in 1972 by the Criminal Procedure (Amendment) Act (12/72). S 139 was subsequently renumbered as s 141.

other statute admit out of court statements as evidence of the facts referred to, these do not, according to section 122(1), extend to admitting statements made to the police in the course of investigations. This is confirmed by section 122(3) CPC which provides that only sections 27 and 32(a) EA[108] may apply to admit such statements. All other admissibility provisions of the EA are impliedly excluded by sections 122(1) and (3).[109] The only other statements to the police in the course of investigations admitted by section 122 are those made at an identification parade,[110] those admitted at a preliminary enquiry,[111] those which are the subject of the proceedings,[112] previous inconsistent statements used for the purpose of impeachment,[113] and statements made by an accused person.[114]

While the approach of section 122 CPC is exclusionary, section 377 CPC is an embracing provision. It states:

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

This inclusionary principle declares that any statement made out of court may be used as evidence of the facts stated if the statement is admitted by a provision of the CPC or any other statute. Section 377 clashes with section 122 in two major respects. The first point is that while section 122(1) purports to exclude the operation of any admissibility provision not specifically mentioned in the sub-sections (2) to (5), section 377 recognises that *any* statutory provision may admit the statement. For example, where a witness makes a statement to the police which constitutes a declaration against his interest, and that witness is not available to give evidence, that statement would be rendered inadmissible by section 122. Although the statement is within the scope of a statutory hearsay exception (section 32(c)

[108] And statements made in the course of an identification parade.
[109] As recognised by the High Court.
[110] S 122(3), CPC.
[111] Pursuant to s 141 CPC. See s 122(1) CPC (which is set out in the main text at note 4).
[112] *Ie,* where the prosecution concerns the making or the content of the statement. See s 122(4) CPC.
[113] *Ibid,* s 122(2). See above, 'Relationship beween s 122 of the Criminal Procedure Code and s 147(3) of the Evidence Act'.
[114] Subject to the conditions in s 122(5) CPC. Note that the admissibility of the accused's statements is not within the scope of this article, which is concerned with the out of court statements of witnesses.

EA),[115] it is not a recognised exception for the purpose of section 122.[116] However, according to section 377, the statement would be admissible pursuant to section 32(c) EA and possibly section 378 or 380 CPC.[117] This is emphasised by section 384 CPC which preserves the independence of the EA:

> Nothing in this Chapter shall prejudice the admissibility in any criminal proceedings of any statement which would by virtue of the Evidence Act be admissible as evidence of any fact stated therein.

The second point is that there is a stronger case for construing sections 378 and 380 as extending to section 122 statements because there are provisions governing the admissibility of statements made after the commencement of police investigations. These provisions render such statements inadmissible in some instances and admissible in others.[118] Hence, section 378[119] admits a statement made after the commencement of investigations if the maker of the statement (the witness) is 'dead, or is unfit by reason of his bodily or mental condition to attend as a witness'.[120] The statement is admissible even though investigations have been commenced because the circumstances[121] are not within the rule barring statements made in the

[115] If the reason for the witness's unavailability satisfies the conditions in the preamble to s 32.

[116] Because it is not referred to in the sub-sections of s 122 CPC. See *Abdul Rahim bin Ali* v *PP* (considered above).

[117] If the conditions in these sections are satisfied.

[118] See ss 379(1) and 380(3) CPC, which only impose a limited restriction on the admissibility of statements made (pursuant to s 378), or information supplied (in the case of s 380), after the commencement of investigations. These provisions are considered immediately below.

[119] S 378(1) CPC states: 'In any criminal proceedings a statement made, whether orally or in a document or otherwise, by any person shall, subject to this section and s 379 and to the rules of law governing the admissibility of confessions, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible, if – (a) being compellable to give evidence on behalf of the party desiring to give the statement in evidence, he attends or is brought before the court but refuses to be sworn or affirmed; or (b) it is shown with respect to him – (i) that he is dead, or is unfit by reason of his bodily or mental condition to attend as a witness; (ii) that he is beyond the seas and that it is not reasonably practicable to secure his attendance; or (iii) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to give evidence on behalf of that party.'

[120] If the maker could have given direct oral evidence of the facts mentioned in the statement (s 378(1)) and the conditions regarding notice (s 379(2)-(4)) are satisfied.

[121] *Ie,* the maker is 'dead, or is unfit by reason of his bodily or mental condition to attend as a witness'.

course of investigations.[122] Similarly, section 380[123] admits a statement taken by the police in the form of a record in the course of investigations if the person who supplied the information (the witness) 'has been or is to be called as a witness in the proceedings,'[124] or he is 'dead, or is unfit by reason of his bodily or mental condition to attend as a witness',[125] or '... having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement'.[126] As in the case of section 378 CPC, the statement is admissible even though investigations have been commenced because the circumstances[127] are not within the rule barring statements made in the course of investigations.[128] Indeed, section 380 even contemplates the admission, with the leave of the court, of 'a document setting out the evidence which a person could be expected to give as a witness ... for the purpose of any pending or contemplated proceedings'.[129]

Accordingly, the relationship between the hearsay provisions in sections 377-385 and section 122 remains uneasy. While section 122 purports to impose its own comprehensive regime of rules governing statements made in the course of police investigations, sections 377-385 seem to have provided for such statements independently of section 122. This uncertainty

[122] See s 378(1)(b)(i) CPC (which sets out these circumstances) and s 379(1) CPC (which formulates the rule against admitting statements made after the commencement of proceedings and excludes s 378(1)(b)(i) CPC from its scope).

[123] S 380(1)(a) CPC states: 'Without prejudice to s 35 of the Evidence Act, in any criminal proceedings a statement contained in a document shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if – (a) the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty ...'.

[124] S 380(2)(a), CPC.

[125] *Ibid,* s 380(2)(c)(i).

[126] *Ibid,* s 380(2)(c)(iv).

[127] *Ie,* the circumstances in the three categories mentioned.

[128] See s 380(2) (a), (c)(i) and c(iv) CPC (which set out these circumstances) and s 380(3) CPC (which formulates the rule against admitting statements made after the commencement of proceedings and excludes s 380(2)(a), (c)(i) and c(iv) CPC from its scope).

[129] Including a proof of evidence. See s 380(4) CPC, which is the subject of extensive discussion in another article by the same author: 'Previous inconsistent statements: Scope of s 147(3) of the Evidence Act and its applicability where the witness does not testify to the facts mentioned in his previous statement' [2001] 13 SAcLJ Part 1, at pp 1-33.

is underlined by section 382 CPC,[130] which allows the parties to agree to the admissibility of hearsay evidence including statements to the police after the commencement of investigations.[131] Agreement to admissibility is not an exception recognised by section 122. Akin to section 382 is section 371 CPC,[132] which provides for the admission of statements with the consent of the opposing party. That is, a witness's statement might be tendered as evidence pursuant to section 371 CPC in which case, if there are no objections (by the opposing party) to this course, and the conditions of that section are satisfied,[133] it would be admitted. The terminology of section 371 is particularly illustrative of the statutory inconsistencies already considered. The words '*Notwithstanding anything in any written law'* in the first sentence of section 371(1) CPC could be interpreted, *inter alia,* as a measure to avoid the operation of section 122(1) CPC,[134] which would otherwise exclude the statement if it is made by a witness to the police in the course of investigations. The inclusion of those words in section 371(1) CPC and their omission from the other admissibility provisions in the CPC[135] might also give rise to the impression that a distinction is to be made between section 371 (that it is not subject to section 122) and other provisions (that they are subject to the aforesaid provision).

Section 371 also raises another significant point when a preliminary enquiry[136] is involved. Section 122(1) permits the admission of written statements pursuant to section 141 for the purpose of a preliminary enquiry. The normal practice is for statements admitted at a preliminary enquiry to be used by the prosecution as evidence at trial by virtue of section 371.[137] The question arises as to whether a statement permitted by section 122(1) to be used as evidence at a preliminary enquiry should be excluded by that section at the trial because the aforesaid provision does not refer to section 371. The words in section 122(1) which refer to section 141 (those words

[130] S 382(1) CPC, states: 'If, as regards any statement contained in a document or made by a person otherwise than in a document, the parties to any criminal proceedings agree at a hearing that for the purpose of those proceedings the statement may be given in evidence, then, unless the court otherwise directs, the statement shall in those proceedings and in any proceedings arising out of them (including any appeal or retrial) be admissible as evidence of any fact stated therein...'.

[131] Although defence counsel is unlikely to acquiesce in this manner unless this would be of advantage to his client or there is no controversy about the facts.

[132] This section was introduced in 1972 by the Criminal Procedure (Amendment) Act of that year (12/72).

[133] *Ie,* the conditions in s 371(1)-(8).

[134] Unless the wording is construed to refer to statutes other than the CPC.

[135] Such as ss 377-385 CPC.

[136] *Ie*, prior to a High Court trial.

[137] If the conditions imposed by this provision are satisfied. This practice was noted by the Court of Appeal in *Seow Choon Meng* v *PP* [1994] 2 SLR 853.

constitute a subsequent addition to section 122(1)) were introduced in 1972[138] by the same amending statute which brought section 371 into being.[139] Accordingly, one might contend that if the legislators had intended to exclude section 371 from the scope of section 122(1), they would have included both sections 141 and 371 in the words of exception. Those who support such a view might rationalise it on the basis that there is an important distinction between the potential prejudicial effect of the two sections. While statements are only admitted in a preliminary enquiry pursuant to section 141 for the purpose of determining whether the prosecution has a case to take to the High Court, statements are tendered at trial under section 371 for the object of actually deciding whether the accused is guilty of the crime charged.[140] However, a contrary argument might be put on the basis that the opening words of section 371 – *'Notwithstanding anything in any written law'* – are sufficient to exclude this section from the ambit of section 122(1) so that the restriction in the latter does not apply to statements admitted pursuant to section 371. As to the argument that potential prejudice which might arise if the sections are not distinguished, the answer may be that section 371 has sufficient in-built safeguards to protect the accused.[141]

More generally, if the opening words of section 371 – *'Notwithstanding anything in any written law'* – do have the effect of avoiding the restriction in section 122(1), does the omission of those words in respect of other admissibility provisions such as sections 377-385 CPC mean that the latter are subject to section 122(1)? Unfortunately, these uncertainties have not been resolved judicially. The few cases that there are merely touch on the relationship between section 122 and sections 377-385. In *PP* v *Quek Chin Chuan,*[142] the accused was charged with harbouring an immigration offender by leasing his premises to her.[143] His defence was that he had honestly believed that the lessee was not a foreigner. He contended that she had been introduced to him as the wife of a Singaporean who was introduced to him by a China national by the name of Mr Yu. The district judge allowed the accused's application to adjourn the trial so that he could go to China

[138] The words 'other than a statement that is a written statement admissible under s 139', were included in 1972 by the Criminal Procedure (Amendment) Act (12/72). S 139 was subsequently renumbered as s 141.

[139] *Ie,* s 4 of the Criminal Procedure (Amendment) Act (12/72).

[140] This view would mean that statements made to the police in the course of investigations would not be admissible pursuant to s 371, an outcome which would contradict current practice. See main text at note 137.

[141] *Ie,* the conditions in s 371(1)-(8) CPC.

[142] [2000] 3 SLR 10.

[143] He was charged under s 57(1)(d) of the Immigration Act (Cap 133).

and obtain a statement from Mr Yu who was unable to come to Singapore for the trial.[144] The court imposed certain conditions including the requirement that a police officer accompany the accused to China to verify any statement made by Mr Yu. Eventually, the accused withdrew the application. However, the prosecution applied for a criminal revision of the district court's order.

The case has an important bearing on the role of the court, the prosecution and police in relation to witnesses. However, its relevance to the subject of this article lies in the observations of the High Court as to the admissibility of any statement which might be made by Mr Yu in his capacity as a witness. The High Court accepted the argument that any such statement could not be admitted because it infringed the hearsay rule:

> The next issue raised by the prosecution was whether any statement made by Mr Yu in China to either the respondent or the police officer accompanying him would be excluded under the hearsay rule. Under section 121(1) of the CPC, a police officer conducting an investigation may examine a witness orally and reduce his statement to writing. However section 122(1) of the CPC expressly prohibits the admission of statements of witnesses made to the police in a trial as evidence. The only exception to this is in section 122(2) of the CPC where the witness is called to the stand and it is wished to impeach his credit as a witness. It would therefore serve no purpose to send the police officer to record the statement from Mr Yu.
>
> If the statement was made to the respondent, the content of the conversation would then be excluded as hearsay and cannot be used as evidence of any facts asserted by Mr Yu. None of the exceptions to the hearsay rule apply to the circumstances of this case.[145]

It is not entirely clear from the judgment whether the court considered the possible hearsay exceptions and decided that the conditions for their operation were not satisfied, or that they did not apply in any event *(ie,* even if their conditions were met) because statements to the police in the course of investigations are excluded by section 122(1). If the court was of the view that section 122(1) did not have the effect of barring the operation of other hearsay exceptions in the CPC, it could have considered a number of provisions with varying effect. As Mr Yu's statement would have been recorded by the police officer, it would have invited a consideration of section 380 CPC on the basis that the information was supplied by someone who had personal knowledge of the circumstances (Mr Yu) and the statement

[144] Apparently because he had difficulties in renewing his passport.
[145] *Supra,* note 142, at paras 14-15.

was recorded by someone acting under a duty (the police officer).[146] As police investigations had commenced (indeed, the matter had reached trial), the statement would not have been admissible unless Mr Yu 'has been or is to be called as a witness in the proceedings,'[147] or he is 'dead, or is unfit by reason of his bodily or mental condition to attend as a witness',[148] or '... having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement'.[149] Of these three conditions, only the first could have possibly applied for Mr Yu was called as a witness for the defence and, therefore, had been called as a witness in the proceedings. However, arguments could have been made against the applicability of section 380. It might have been contended by the prosecution that the condition 'has been or is to be called as a witness in the proceedings' assumes that the the witness has been called or is to be called on the basis of a statement *already* recorded, not the situation in which a statement is taken after the witness is called (the circumstances of Mr Yu). The prosecution might also have argued that the condition assumes that the witness will eventually be in court. There is also the issue of whether the record of Mr Yu's statement could have been admitted pursuant to section 380(4) (with the leave of the court) as a document setting out the evidence which a person 'could be expected to give as a witness for the purpose of any pending ... proceedings'. Again, it is not clear that this provision would have been applied to Mr Yu's specific circumstances.[150]

As is evident from the preceding paragraph, the question of whether Mr Yu's statement (if it had been recorded) was admissible pursuant to section 380, would have required a full determination by the court. The admission of the statement pursuant to section 382 or 371 of the CPC might have been less contentious. Section 382 provides for the admissibility of hearsay evidence by the agreement of the parties subject to conditions.[151] Section 371 allows a statement to be tendered as evidence unless there is an objection or a term of that provision is not satisfied.[152] Admissibility pursuant to either section would have been possible if the prosecution

[146] These primary conditions are set out in note 123.
[147] S 380(2)(a), CPC.
[148] *Ibid,* s 380(2)(c)(i).
[149] *Ibid,* s 380(2)(c)(iv). See s 380(3) CPC which formulates the rule against admitting statements made after the commencement of proceedings and excludes s 380(2)(a), (c)(i) and c(iv) CPC from the scope of that rule.
[150] See note 129.
[151] See the main text from note 130. S 382 is set out in note 130.
[152] See the main text from note 132.

accepted the reliability of the statement on the basis that it had been recorded under police supervision.[153] Whether or not these sections would have operated in the circumstances of the case, the point is that they were not considered by the court. The question which arises from this outcome is whether they were excluded from the court's deliberations because they were not raised in argument or because of the restriction in section 122(1).

Another case which illustrates the difficulties involved in the relationship between the various provisions in the CPC is *Abdul Rahim bin Ali* v *PP*.[154] The accused appealed against his conviction in the subordinate court for abetment of theft. Part of the prosecution's evidence consisted of a statement made by a potential witness (one Mohd Sani) to a police officer in the course of an investigation. The statement implicated the accused. Mohd Sani died before the trial. His statement (P5) was admitted by the district judge pursuant to section 32(c) EA on the basis that it was a declaration against the maker's interest. The district court rejected the accused's argument that P5 was not admissible under section 379(2) of the CPC in the absence of the leave of the court.[155] The district court was clearly correct in its conclusion because section 384 CPC preserves the independence of the EA by providing that 'nothing in [sections 364-385][156] shall prejudice the admissibility in any criminal proceedings of any statement which would by virtue of the Evidence Act be admissible as evidence of any fact stated therein'. Accordingly, section 379(2) CPC could not apply to restrict admissibility pursuant to section 32(c) EA. Although the district court does not appear to have relied on section 384 for its conclusion, the omission of the High Court to refer to this provision and its unwillingness to endorse the position taken in the court below[157] may exacerbate the difficulties already highlighted in respect of the relationship between the statutes.

V. Conclusion

The present statutory framework concerning the admissibility of statements of a witness who is not an accused person is not satisfactory. The provisions are scattered, untidy and lack symbiosis. Much of the difficulty has stemmed from the manner in which statutory provisions were incorporated in 1976

[153] Although the prosecution might have wanted the opportunity to cross-examine Mr Yu.
[154] *Supra,* note 97.
[155] This provision requires notice to be given of the statement unless the court otherwise gives leave.
[156] *Ie,* Chapter XXXVII.
[157] *Supra,* note 97, at para 27, where it is said: 'It was not necessary for me to decide whether s 378 and 379 of the CPC displaced s 32 of the Evidence Act'.

without careful consideration of the pre-existing legislation in this area. The outcome has been a degree of judicial activism by the High Court which may not be warranted in the face of the pronouncements of the former Court of Criminal Appeal[158] and the ideology of the CPC. The way forward must involve a reconsideration of these principles and their appropriate reformulation.

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[158] See the main text from notes 21-26. The principle espoused by the Court of Criminal Appeal in *Syed Abdul Aziz* v *PP* [1993] 3 SLR 534 at 539 and *Somwang Phatthanasaeng* v *PP* [1992] 1 SLR 850 at 862 continues to stand in spite of the series of decisions of the High Court. Although the approach in *Sng Siew Ngoh* was endorsed by the Court of Appeal in *Chai Chien Wei Kelvin* v *Public Prosecutor* [1999] 1 SLR 25, at para 55, this case is not an authority on the relationship between s 147(3) EA and s 122 CPC because it involved Central Narcotics Bureau officers rather than the police. Accordingly, ss 122(1) and (2) CPC were not in issue

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