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CONFESSIONAL STATEMENTS BY ACCOMPLICES AND *CPC* HEARSAY: AN UNHEALTHY MIX?

Lee Chez Kee v. PP[1]

CHIN TET YUNG*

I. INTRODUCTION

The Court of Appeal in *Lee Chez Kee (C.A.)* handed down a judgment with respect to the law on common intention and hearsay in criminal cases which has already attracted two case notes.[2] This note adds to them by focusing on a particularly thorny issue before the Court, which is the relationship between the two statutory regimes providing for the admissibility of hearsay statements: the *Criminal Procedure Code*[3] and the *Evidence Act*, especially section 30.[4] The case is unusual in that the Court rendered dissonant judgments with different outcomes. Choo Han Teck J. concurred with V.K. Rajah J.A.'s analysis that the confessional statements were not admissible, and thought that there was a need for a retrial, given the prejudicial nature of the evidence wrongly admitted.[5] Rajah J.A.'s view was that there was no need for a re-trial as the other evidence was sufficient to establish the guilt of the accused.[6] His view against a re-trial was also shared by Woo Bih Li J.,[7] who at the same time disagreed with him as to the admissibility of the confessional statements through the

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* Associate Professor, Faculty of Law, National University of Singapore. I am indebted to my colleagues, Professors Michael Hor, Jeffrey Pinsler, Tan Yock Lin and Associate Professor Ho Hock Lai for discussing this case and related issues with me. Thanks are also due to the anonymous referee who made useful suggestions that are incorporated where possible.

1 [2007] 1 S.L.R. 1142 [*Lee Chez Kee (H.C.)*]; [2008] 3 S.L.R. 447 [*Lee Chez Kee (C.A.)*].

2 Kumaralingam Amirthalingam, "Clarifying Common Intention and Interpreting Section 34: Should There be a Threshold of Blameworthiness for the Death Penalty?" [2008] 2 Sing. J.L.S. 435-445, and Tay Eu-yen, "*Lee Chez Kee v. PP*: Murder Beyond Reasonable Doubt?" Sing. Law Gaz. (October 2008) at 9 (a brief but helpful account on the evidence issues).

3 Cap. 68, 1985 Rev. Ed. Sing., ss. 377-385 [*CPC*].

4 *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.), s. 30 [*Evidence Act* or *EA*]. The confessional statements tendered by the prosecution were made by an accomplice who was *not* a co-accused since he was already tried, and the sentence (death) had already been carried out. Technically, therefore, the section does not apply.

5 See *Lee Chez Kee (C.A.), supra* note 1, *et seq.*

6 See Amirthalingam, *supra* note 2 and Tay, *supra* note 2.

7 See *Lee Chez Kee* (*C.A.*), *supra* note 1, at para. 276.

CPC. Woo J. held that they were admissible, but to be given no weight.[8] For good measure, all three appellate judges differed from the trial judge Tay Yong Kwang J.'s reasoning on the issue, though Woo J. expressed sympathy with Tay J.'s efforts at ascertaining the legislative intention, and agreed with him that the confessional statements by the accomplice were admissible under the *CPC*.[9]

The point of law with respect to evidence in this case is deceptively simple to state: whether an accomplice's confessional statements could be admitted in evidence against another accomplice in a separate trial under section 378 of the *CPC*, where the maker is not available as a witness, and where the conditions of section 30 of the *Evidence Act* are not satisfied. This problem arose in the case because the accused was tried for a robbery, which resulted in the death of the victim, only eight years after his other two accomplices. Both of the accomplices were unavailable to give evidence at his trial.[10]

The brief facts, in so far as they are pertinent to this note are these: The accused was charged with the murder of the robbery victim in furtherance of a common intention with two others to commit robbery that took place in 1993. The victim died of asphyxiation as a result of being strangled, although he also had other injuries. The prosecution sought to admit the statements of the accomplice, Too Yin Sheong,[11] which were highly incriminating of the accused, while playing down, if not totally exonerating, his own role in the murder.[12] The trial judge, Tay J., held these statements admissible by virtue of section 378 of the *CPC*,[13] and not excluded by section 30 of the *Evidence Act* (which requires a joint trial and an identical charge before a co-accused's confession could be used against another accused) even though the *CPC* provisions were expressly subject to the "rules of law governing the admissibility of confessions".

The so-called "qualifying phrase", "subject to the … rules of law governing the admissibility of confessions" was inserted by the Singapore draftsman, and this was obviously because there was no intention of replacing the *Evidence Act* provisions on confessions with those in the U.K. draft *Bill*.[14] The phrase, according to the judges, was capable of (at least) two interpretations: the narrow one (by the trial judge)

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8 Unfortunately for the appellant, the cumulative outcome of these views secured him only a Pyrrhic victory.

9 See *Lee Chez Kee (C.A.)*, *supra* note 1, at paras. 285 and 295.

10 One (Too Yin Sheong) was already hanged, having been found guilty of murder, and the other was repatriated to Malaysia after serving his sentence and could not be found.

11 Too made six statements (four written and two oral), which apparently counsel agreed to be confessions but inadmissible under any of the provisions in the *Evidence Act*: See *Lee Chez Kee (H.C.)*, *supra* note 1 at para. 29. The statements were all "custodial", that is, made after the accused was charged and incarcerated.

12 The gist of Too's statements was that Lee was the one who strangled the victim after trying unsuccessfully to stab him. He was just a bystander. For a fuller account, see *Lee Chez Kee (H.C)*, *supra* note 1 at paras. 46-48. Basically, the two accused blamed each other in their statements for the injuries including the fatal one (asphyxia).

13 S. 378 permits the admission of hearsay subject to notice. An oddity was that two oral statements of Too's were admitted under s. 378(2), *i.e*., Too's oral statements were reduced into writing by an officer. But it is a requirement of the subsection that this must be done "at the instance of the maker": it is highly unlikely that Too will make such a request. It is probably erroneous to use this subsection.

14 The corresponding *Evidence (Amendment) Bill 1976*, which was introduced at the same time the *CPC Bill* was introduced, did not make any substantial change to the provisions on confessions, other than to replace "inspector" with "sergeant' in s. 25. The U.K. draft *Bill* contains a similar but not identical provision to s. 30: see cl. 31(2), *infra* note 31. (Note: Though there are references in the judgments to

was that it referred only to the provisions dealing with the voluntariness test, as this determines whether the confession is or is not *admissible*;[15] the broad interpretation (by Rajah J.A.; Choo J. (agreeing)) was that the phrase also includes section 30 among others.[16] Under the narrow interpretation, the confessional statements of Too would be admissible (as the conditions of section 30 need not be met, *i.e.*, a joint trial in which the accused persons were charged with the same offence), but not under the wider interpretation, which would only permit co-accused's confessional statements to be taken into account if the conditions of section 30 were satisfied.

At the outset, several preliminary points need to be made. First, the Criminal Law Revision Committee's draft *Bill* was never enacted in the U.K., even though subsequent legislation tended to support some of the recommendations made,[17] though not in respect of hearsay; second, in 1976 when the provisions were introduced in Singapore, the law in Singapore relating to the effects of section 30 was more restrictive than that established in *Chin Siew Noi v. PP*[18], in that such statements could not of themselves be sufficient for convicting an accused. Third, the common law frowns on the use of such co-accused confessional statements as evidence against an accused, but it appears that if the prosecution had tendered in an accused's confession at a joint trial, his co-accused might be able to take advantage of any exculpatory remarks made about him in the confession. The main problems at common law have been related to a co-accused seeking to admit an accused's confessional statement, which might expressly or impliedly contain exculpatory remarks.[19] Fourth, the Legislature expressly preserved the operation of the "exceptions" against the hearsay rule contained in the *Evidence Act*.[20] It is therefore possible to admit statements either through the *Evidence Act* or the *CPC*, whichever is more appropriate.[21]

"the *U.K. Bill*", it is pertinent to note that it remained a *draft bill,* as it was never tabled as such in the U.K. Parliament.)

15 But as Rajah J.A. correctly points out, 'voluntariness' as defined in *Evidence Act*, s. 24 is not the *only* test of admissibility; a confession otherwise voluntary will still be inadmissible (cannot be proved) if taken by an officer lower than the rank of sergeant, for instance (*Evidence Act*, s. 25 , *CPC* s. 122(5)): see *Lee Chez Kee (C.A.)*, *supra* note 1 at paras. 95-97.

16 Woo J. took an "in-between" position: while agreeing that on a literal interpretation s. 30 would be within the phrase, he took the "purposive" approach and held that s. 30 should not prevent the admission of confessional statements that otherwise meet the conditions of admissibility in s. 378-79; see text accompanying note 24.

17 U.K., H.C., "11th Report of the Criminal Law Revision Committee on the Draft Evidence Bill", Cmnd 4991 in *Sessional Papers* (1972) [*CLRC Report*]. Notably, the so-called restrictions on the right to silence: see especially. *Criminal Justice and Public Order Act 1994* (*U.K.*), ss. 34-38. S. 34(1) is very similar to *CPC* ss. 122(6)-(8).

18 [1994] 1 S.L.R. 135 [*Chin Siew Noi*]. For the pre-*Chin Siew Noi* position and how the case law has developed since that case, see Michael Hor, "The Confession of a Co-Accused" (1994) Sing. Ac.L.J. 366; and his follow-up, "Co-Accused Confessions: The Third Anniversary" (1996) 8 Sing. Ac.L.J. 323. Briefly, the pre-*Chin Siew Noi* position is that a co-accused's confession could not of itself be substantive evidence against an accused and could only be supportive at best. An accused could never be convicted on the basis of a co-accused's "confession" alone.

19 That is to say, where the statement was not adduced by the prosecution: see Peter Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (New York: Oxford University Press, 1997) at 65-68 and the cases discussed therein.

20 See *CPC*, s. 384: "Saving for exceptions to rule against hearsay in *Evidence Act*". Rajah J.A. had commented unfavourably on the use of the language of exceptions when speaking of the hearsay provisions in the *EA*, but it must be said that the Legislature is "guilty" of the same imprecision as evidenced by the subsection's header.

21 It is outside the scope of this note to discuss the tactical advantages/disadvantages of using the two statutory regimes.

II. The Legislative Intent, Principles and Policies

The search for a clear legislative intent on the issue turned out to be chimerical. Both the trial judge (Tay J.) and Woo J. emphasised the purposes of the *CPC* scheme as articulated by the then Minister for Law, especially "to admit all hearsay evidence likely to be valuable to the greatest extent possible without undue complication or delay…".[22] Tay J. then duly concluded that "Parliament's intention … clearly accords with a more limited interpretation of the qualifying phrase"[23] by restricting the meaning of the qualifying phrase to the requirement of voluntariness and excluding, *ex hypothesi*, section 30. Woo J. in the appeal, however, would not take such a restrictive view and agreed with the two other appeal judges that on a literal interpretation, section 30 would be included. After stressing the purpose above, his conclusion is that section 30 will no longer apply when the conditions in section 378(1) of the *CPC* are met.[24] He then referred to Rajah J.A.'s citation of Sir Henry Cunningham's explanation for section 30 which stated that "judges are relieved from attempting to perform an intellectual impossibility" of ignoring a co-accused's confession incriminating an accused person as evidence against the latter when the confession is otherwise admissible.

The discussion of a similar draft provision in the *CLRC Report* supports such a rationale. Referring to the sub-clause similar to section 30, the CLRC was of the view that a jury should be spared from such an intellectual exercise.[25] The reasons for such a provision were: first, that the accused might be unavailable as a witness for the prosecution (as he is both incompetent and not compellable for the prosecution) and second, that there should be a policy (although not unanimously accepted by the members of the Committee) that "there are many cases where the interests of justice requires that what any of the accused had said out of court about the part played by the others in the events in question should be before the court."[26] What was significant in the discussion of the policy underlying this sub-clause was the assumption that if it had not a joint trial, and if the accomplice were unavailable as a witness due to any of the reasons listed, his statement *would* ordinarily be *admissible* under the general provision that is now section 378. The majority also felt that it would be an absurd situation that "where A has made a statement implicating himself and B, it is necessary to direct the jury that the statement is admissible against A and not against B. This is a subtlety which must be confusing to juries, and in reality they will inevitably take the statement into account against both accused."[27] However the

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22 Sing., *Parliamentary Debates*, vol. 34, cols. 1222-23 (19 Aug 1975) (E.W. Barker), cited in *Lee Chez Kee (H.C.)*, *supra* note 1 at para. 42, *per* Tay J., and *Lee Chez Kee (C.A.)*, *supra* note 1 at para. 286, *per* Woo J. Actually the Minister merely adopted *verbatim* the CLRC statement of purposes: See *CLRC Report, supra* note 17 at 139, para. 238.

23 *Lee Chez Kee (H.C.)*, *supra* note 1 at para. 43.

24 *Lee Chez Kee (C.A.)*, *supra* note 1 at para. 291.

25 See *CLRC Report*, *supra* note 17 at paras. 236, 251-52. In para. 236, the Committee stated that "the prosecution will be able to give in evidence against one accused a statement made by another accused *jointly tried* with him, *as the maker cannot be called for the prosecution*" (emphasis mine) In Annex 2 of the Report, which contains the notes on the Bill, the Committee emphasised that the provision is intended to "make it absolutely clear that the subsection overrides the present rule that a confession by one of a number of accused persons is admissible only against the maker" (at 237).

26 See *CLRC Report*, *supra* note 17 at para. 251.

27 *Ibid*. The assumption is not backed up by empirical evidence.

minority in the Committee felt that this provision "is too prejudicial to the accused whom it implicates"—they postulated a scenario where A was deeply involved in the offence and "obviously a person whose statements cannot be relied on", while on the other hand, "the other evidence against B is weak and he took at most a minor part in the offence."[28]

Woo J.'s analysis, coupled with the rationale that appeared to have the concurrence of the whole appeal court, presents an attractive interpretation and theory of section 30 in particular—that section 30 is *not* an admissibility section *as such*. Its header[29] clearly assumes a confession that has already been "proved", that is admitted, and that in a joint trial where more than one accused is charged with the same offence, it is permissible to take into consideration such a confession. This section is necessary because of the general rule that in joint trials, the evidence against each accused must be considered separately, and there must be no "seepage" of evidence between the accused and others jointly tried and charged: "It is necessary to consider the case against each defendant separately. That is part of the very alphabet of criminal practice."[30] Thus section 30 would be triggered only where there is a joint trial and the accused persons charged with the same offence.[31] It follows that where these conditions are not met, the facilitative part of the section (taking the confession as against both the maker and the co-accused) is not needed and does not apply even if section 30 forms part and parcel of the provisions within the qualifying phrase. The confessional statements by Too therefore were admissible once the conditions of section 378 were met.

But this is not what the majority decided (Rajah J.A., with the concurrence of Choo J. on this issue). Essentially, Rajah J.A. observed that it would be wrong to exclude section 30 from the qualifying phrase, and that before a confession of an accomplice could be used against an accused, the conditions of section 30 must be satisfied. He pointed out that illustration (b) in the section clearly shows that where there was no joint trial, the confession of one accomplice incriminating another could not be taken into consideration.[32] This reinforces the view that if the confessional statements of Too were admitted through section 378, it would be inconsistent with section 30, and would "uncouple" the *CPC* from the *EA*, which was obviously not "the legislative intent." He also emphasised that not allowing the statements to come in *via* section 378 would "address the dangers of the unreliability of co-accused's statements" and would not lead to absurdity or inconsistency. Taking this view would virtually close the door on the admissibility of accomplices' statements through the *CPC*. Under this view, the wider provision (for admissibility) in the *CPC* would give way to the more specific provision in the *Evidence Act*.

But is this strict view justified, given the fact that the Legislature clearly declared that the objective of the *CPC* hearsay provisions is to "admit all hearsay evidence

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[28] *Ibid*. The majority's answer to this scenario is that there is nothing exceptional in this case, and that courts could be relied on to give the evidence its proper weight.

[29] "Consideration of proved confession affecting person making it and others jointly under trial for same offence".

[30] *R v. Hayter* [2005] 1 W.L.R. 605 (H.L.) *per* Lord Steyn.

[31] In cl. 31(2) of the U.K. draft *Bill* (see *CLRC Report*, *supra* note 17), there is only a requirement of joint trial.

[32] *Lee Chez Kee (C.A.)*, *supra* note 1 at para. 105.

likely to be valuable to the greatest extent possible without undue complication or delay". Rajah J.A.'s view was that there was a preoccupation by the trial judge on this first purpose of enacting the *CPC* provisions with a consequent discounting of the third purpose, *viz*., that there must be necessary safeguards against the dangers of manufactured evidence, of which a suspect's statements while in custody and facing the death penalty, must be an example of a particularly untrustworthy type of statement, where exclusion might be the rule rather than exception.[33]

On principle, there is clearly a case for arguing that the *CPC* hearsay provisions should not be used for rendering accomplices' out-of-court statements admissible because of the triple dangers of admitting such evidence: first, that evidence from an accomplice, *even if given on oath*, needed to be treated with caution[34]; second, *a fortiori*, that the statements were *not given on oath*, and the accused had *no opportunity to confront* directly his accuser in a situation where it may be a case of his word against the other, especially if that other were to incriminate him;[35] and third, given the wide definition of "confession" accepted in Singapore law, which allows a statement to be treated as a confession if it "connects" an accused with the offence,[36] it is possible to admit a "confession" like that of Too's where he incriminated the accomplice, and sought largely to exculpate himself. In other words, extremely prejudicial and unreliable statements may be admitted as a result of applying the *CPC* provisions to this type of situation. It is small consolation that the *CPC* provides grounds for attacking the credibility of the maker of the statements and that ultimately it is a question of weight. The *CPC* contains provisions that would allow evidence to show that the maker of the statement (here the accomplice) had an incentive to conceal or misrepresent the facts.[37] Given the *prima facie* unreliability of such statements, it might be asked whether this type of statement would be regarded as "valuable" hearsay (purpose 1) that the Legislature would want to admit, or whether it would be better to exclude them altogether except in the limited circumstances envisaged by section 30. Rajah J.A.'s concise explanation of the whole problem deserves quoting:

> [I]t appears that s 30 of the *EA* was designed to avoid a situation in a *joint trial* whereby one of the co-accused had confessed to the charge, and yet, the court was being asked to perform the intellectually difficult task of excluding this evidence against the other co-accused. This means that the court should still be cautious of the dangers of a co-accused's statements, given the potential lack of an opportunity to cross-examine its maker. But rather than being forced to pretend the irrelevance of such confessions in relation to another co-accused, s 30 of the *EA* removes the need for such pretence and admits such confessions, *but only in the limited circumstances as prescribed under the section*. The law has not seen it fit to entirely discard its concerns with the unreliability of such confessions; indeed, apart from this limited circumstance, there is no admissibility of such confessions. In only the limited circumstance of joint trials has the law

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33 *Ibid.* at para. 99.

34 *Evidence Act* s. 116, illustration (b).

35 This is especially so when the co-accused elects not to give evidence. Of course in such a situation, the judge might draw adverse inferences on his silence and this may redound on the extent to which his statement or confession could be trusted.

36 See *e.g.*, *Tong Chee Kong v. PP* [1998] 2 S.L.R. 843.

37 *CPC*, s. 381.

> struck the balance between the prevention of unreliability and the prevention of an impossible intellectual exercise in favour of the latter.

However, Woo J. clearly thought that there would be a merit in admitting them even though in the case, he would attach no weight to the accomplice's statements, being in the main exculpatory of himself and inculpatory of the accused. But he opted for admissibility and that:

> it depends on the facts in each case. For example, such a confession may be useful in considering the weight to be given to another confession from the same accomplice which exonerates the accused person.[38]

In other words, the case for admissibility rests on the Legislature's technique of shifting the goalposts from one of admissibility to weight when enacting the *CPC* provisions on hearsay. The reasons for moving the goalposts are three-fold: first, that there should be as little exclusion of relevant evidence as possible (hence, "relaxation" of the hearsay rule); second, that the triers of fact could be counted on to reach the right decision even when weighing unreliable evidence, and much has been made of the ability of judges as triers of fact to reach unbiased and fair findings of fact, unaffected by prejudice; third, it may allow the accused himself to tender in evidence under section 378—a statement by an accomplice exonerating him.[39] If the statement were to amount to a confession, that would not be open to him according to the majority view unless one argues that section 30 only concerns inculpatory statements of co-accused *against* the accused.

In so far as an accused may try to seek to exculpate himself by relying on an out-of-court statement made by another person, he may have to overcome an additional problem, which is the issue of relevancy as the heavily criticised House of Lords decision in *R. v. Blastland*[40] had illustrated: a third party's statements that he knew about the murder of a boy with which the accused was charged were held not to be admissible as being insufficiently relevant apart from them being hearsay.[41] However, it could be said that the statements from accomplices such as the ones made by Too in the present case stand on a different footing in that they represent a far higher degree of relevancy and of greater probative value than that proffered in *Blastland* where there was no evidence that the third party and the accused were acting in concert. In this case, as is generally the case for accomplice evidence, the high relevancy was admitted without doubt and whether one would believe it to be true or not is a question for the judge to decide.[42]

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[38] See *Lee Chez Kee (C.A.)*, *supra* note 1 at para. 294. But the scenario described by Woo J. would presumably be to show two inconsistent statements, and not really to aid the accused.

[39] It is accepted that this is very unlikely in Singapore as the rules of criminal discovery (or lack thereof) would not allow the accused to gain access to the co-accused's statements in order to prepare his defence.

[40] [1986] A.C. 41 [*Blastland*]. Only the trial judge, Tay J., referred to the case.

[41] Extensively discussed in Ian Dennis, *The Law of Evidence*, 3rd ed. (London: Thomson Sweet & Maxwell, 2007) at 74-77. See also, Mike Redmayne, "Analysing Evidence Case Law" in Paul Roberts & Mike Redmayne, eds., *Innovations in Evidence and Proof—Integrating Theory, Research and Teaching* (Oxford: Hart Publishing, 2007) c. 4 at 120-26.

[42] But there may be other problems had the minority view been accepted, *e.g.*, if an accomplice died before coming to trial, can the accused adduce his statements to the police (assuming he knew of them) to exculpate himself, and if so, is it incumbent on the accused to show that the statements were voluntary?

It is also pertinent to note here that if the accomplice were alive and available to give evidence, and if he were called to give evidence either by prosecution or the accused, his out-of-court statements might be admissible as facts stated either on the basis of his inconsistencies in cross-examination between his account in court and his out-of-court statement,[43] or if he were to be cross-examined regarding a document from which he refreshed his memory.[44]

III. Conclusions

Even if the minority view on the admissibility of the accomplice's statements were accepted, the use of section 378 of the *CPC* is likely to be limited, as joint trials are normally held where several accused are on trial for offences committed in one transaction. Now that the majority has ruled against the use of section 378 of the *CPC* in separate trials, the "escape" route for tendering accomplices' statements is closed both for the prosecution and defendant in the rare case where there is a separate trial. While one may sympathise with Woo J.'s more flexible approach, there may be a more compelling case for a bright-line exclusion approach, given the dangers inherent in this type of hearsay, and Rajah J.A.'s analysis is as clear as it is comprehensive in advocating the exclusion of such statements. Essentially, it is making good what is a very awkward situation, as he himself explains at the outset:

> I agree that the present statutory framework is not satisfactory… Much of the difficulty … stems from the manner in which statutory provisions were incorporated in 1976 without careful consideration of the pre-existing legislation in this area. The way forward must surely involve a reconsideration of these principles and their appropriate statutory reformulation. However, until such reformulation is actually realised, the courts will do well to be simply aware of the different conceptual bases underpinning the admissibility of hearsay evidence in both the *EA* and the *CPC*, and be equally alive to the problems which might arise as a result.[45]

It is certainly hoped that the suggestion made by Rajah J.A. for a "reconsideration" and reformulation of the principles and statutory schemes, especially on hearsay in criminal cases, should be sooner rather than later. No matter how well-intentioned the judiciary is in trying to ascertain a clear legislative intent, a practice of make do and mend for legislative amendments is bound to give rise to even more problems as illustrated by this case.

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[43] See *Evidence Act*, s. 147(3).

[44] *Evidence Act*, s. 147(4)-(5).

[45] See *Lee Chez Kee (C.A.)*, *supra* note 1 at para. 77.