Singapore Journal of Legal Studies
[2016] 249–276

ON THE OBTAINING AND ADMISSIBILITY OF INCRIMINATING STATEMENTS

HO HOCK LAI*

Effectiveness in crime control has been a dominant concern in regulating police interrogation and the admissibility of statements obtained from suspects in Singapore. This will be illustrated by an examination of three main topics in this area: (i) the suspect's right of silence and privilege against self-incrimination; (ii) the tests for the admissibility of his statements to the police; and (iii) the judicial discretion to exclude statements obtained wrongfully from him by the police. Crime control ideology has been used by officials to justify erosion or weak enforcement of the suspect's rights and is manifested in judicial sensitivity towards compromising the efficacy of police investigation. But the interest in crime control and the interest in due process are not as diametrical as they are often made out to be. Informed evaluation of the official discourse requires recognition of the complexity of the choices that have to be made.

I. INTRODUCTION

Tensions in the criminal process are often perceived as arising from a conflict between the interest in crime control and the interest in due process.[1] The view is taken in Singapore that she, like any other sovereign state, has the prerogative to decide how the balance is to be struck and that rights of the accused may legitimately be weakened or sacrificed for the sake of order and security. This article explores the supposed conflict in the context of police interrogation. The rights which are relevant in this context, and which will be examined, are the accused's right of silence, his privilege against self-incrimination, and the right to exclusion of involuntary statements. We will also consider the judicial discretion to exclude evidence which has been obtained wrongfully but which is not strictly inadmissible.

Official discourse tends to assume a direct and negative correlation between the insistence on rights and effectiveness in combating crime. But due process and crime control are not as diametrical as they are commonly made out to be and the value choices are more complex than are supposed. Rules that bind police investigation

---

* Amaladass Professor of Criminal Justice, National University of Singapore, Faculty of Law.

1 See Herbert Packer, "Two Models of the Criminal Process" (1964) 113 U Pa L Rev 1 (later developed into Part II of Herbert Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968)). Packer's work has been cited in official discourse. A prominent example is the tenth Singapore Law Review Lecture delivered in 1996 by the then-Attorney-General Chan Sek Keong, "The Criminal Process—The Singapore Model" (1996) Sing L Rev 432 [Chan, "Singapore Model"]. See generally Michael Hor, "Singapore's Innovations to Due Process" (2001) 12 Crim LF 25 [Hor, "Singapore's Innovations"].

and rights of the suspect may serve to enhance the reliability of fact-finding and thence promote efficiency in controlling crime at the systemic level. Erosion of those rights and weak enforcement of those rules are often defended on the assertion that they help to maintain order and security. However, whether they will have that effect is not always obvious and claims that strong insistence on certain features of due process will significantly undermine the capacity to suppress crime are typically made without empirical support. It may be granted that the existence of some rights and strict enforcement of some rules will slow down the speed of case disposal and sometimes result in the unavailability of incriminating evidence. Even so, we have to weigh against these costs the benefits that are gained in enhancing the reliability and legitimacy of the criminal process and the value in protecting civil liberties. Also of relevance is the role of the judiciary in upholding the rule of law: how strongly should the court, in a system of separation of powers and checks and balances, hold the executive to legal rules and standards in their enforcement of the criminal law? The interplay of these considerations will be studied with specific reference to the procurement and use of self-incriminating statements.

Part II examines the relevant law and probes the underlying assumptions. First, it describes the current state of the right of silence and the privilege against self-incrimination, highlights concerns that have been raised, and shows how the law has been officially defended. Secondly, the tests for the admissibility of statements obtained by the police from the suspect will be examined. Attention will be paid to the practical application of the tests and judicial attitudes toward exclusion of evidence. Thirdly, the availability of the discretion to exclude wrongfully obtained statements will be considered. We will explore the concerns and motivations that have shaped its scope. Part III takes stock of and evaluates the key themes that have emerged from the exploration in Part II. Crime control ideology is evident in these themes. They include an emphasis on law and order, trust in the professionalism of the police, judicial restraint from "interfering" with the police in its enforcement of the criminal law, and the belief that strong recognition of the suspect's rights will overly compromise the effectiveness of criminal investigation.

II. The Right of Silence, Privilege against Self-incrimination and the Admissibility of Incriminatory Statements

A. *The Privilege against Self-incrimination and the Right of Silence*

The police are empowered under s 22(1) of the *Criminal Procedure Code*[2] to question a suspect and take statements from him. Section 22(2) of the *CPC* gives the suspect the privilege or right against self-incrimination, namely, the right to refuse to "say anything that might expose him to a criminal charge".[3] This right has been weakened in a number of ways. First, the Court of Appeal has held that the police do not need

---

2 Cap 68, 2012 Rev Ed Sing [*CPC*].

3 This is more than a privilege in the Hohfeldian sense of an absence of duty to self-incriminate; it is also a claim-right: the police have a duty to refrain from interfering with the suspect's choice to remain silent.

to inform the suspect that he has this right.[4] Secondly, the police may and often do deny the suspect access to a lawyer before the completion of investigation.[5] As such, the suspect who is being interrogated, unless himself legally-trained, would likely not know that he has the privilege against self-incrimination.[6] There is not much point in having a right that one does not know of.[7] That the suspect was not told, prior to making a statement, of his right against self-incrimination does not affect its admissibility.[8]

Thirdly, under amendments passed in 1976 and which came into force in 1977,[9] the judge may draw an adverse inference against the accused from his failure to disclose to the police facts he subsequently relies upon in his defence at the trial.[10] When the police charge a person with an offence, or inform him that he may be prosecuted for it, they are required under s 23 of the *CPC* to serve the person with a notice. The notice sets out the charge and invites the person to make a statement. It also contains a caution to the effect that if he keeps quiet about any fact in his defence and raises it only at the trial, the judge may be less likely to believe him. He is also told that this may have a bad effect on his case in court and it may be better for him to mention such matter forthwith.[11] The "whole purpose" of introducing the power to draw adverse inferences is, according to the High Court in *Yap Giau Beng Terence v Public Prosecutor*, "to compel the accused to outline the main aspects of his defence immediately upon being charged so as to guard against the accused raising defences at trial which are merely afterthoughts."[12]

---

4 *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR (R) 968 (CA). In the past, the police had to inform the suspect of his right not to say anything before questioning him. This duty was contained in rules 3, 4 and 5 of Schedule E to the *Criminal Procedure Code* (Cap 113, 1970 Rev Ed Sing). The Schedule was repealed in 1976. See *Mohamed Bachu Miah v Public Prosecutor* [1992] 2 SLR (R) 783 at paras 43, 48 (CA) [*Mohamed Bachu Miah*].

5 See discussion in Part II.B.4.

6 See Ho Hock Lai, "The Privilege against Self-incrimination and Right of Access to a Lawyer—A Comparative Assessment" (2013) 25 Sing Ac LJ 826. An empirical study conducted in the United States shows that people generally do not know their rights in their encounters with the police: Kathryne M Young & Christin L Munsch, "Fact and Fiction in Constitutional Criminal Procedure" (2014) 66 SCL Rev 445 at 474. The authors comment that:

> Expecting people to simply "know their rights". . . bespeaks either naïve idealism or hostility to the prospect of people actually *using* their rights. It is hard to avoid the conclusion that many police investigations must be built on the backs of people's entirely understandable ignorance of how their rights work in practice.

7 The Law Society of Singapore recently published a pamphlet entitled "Criminal Investigations—Know Your Rights". The pamphlets were distributed to police centres, police posts and community clubs and centres. See Lim Yi Han, "Pick up 'pamphlet of rights' to get it right", *The Straits Times* (11 April 2015). However, follow-up checks revealed that "some Investigating Officers had never heard of [the pamphlets], they were unavailable in a number of land divisions, and not available in the lockups where they were most needed". This was reported by the President of the Law Society in Thio Shen Yi, "Vulnerable Suspects and Access to Counsel", *Singapore Law Gazette* (February 2016), online: Singapore Law Gazette <http://www.lawgazette.com.sg/2016-02/1480.htm>.

8 *CPC*, *supra* note 2, s 258(3), Explanation 2(c), (d).

9 *Criminal Procedure Code (Amendment) Act 1976* (No 10 of 1976, Sing).

10 *CPC*, *supra* note 2, s 261.

11 *CPC*, *ibid*, s 23.

12 [1998] 2 SLR (R) 855 at para 38 (HC). *Cf Mohamed Bachu Miah*, *supra* note 4 at para 51:

> The aim of the new subsection is to prevent or reduce the incidence of an accused person springing a defence at the last minute leaving the police with no opportunity or possibility to investigate the defence due to the long lapse of time.

The 1976 amendments were enacted over resistance from the criminal bar. For example, one lawyer, Mr H E Cashin, raised these concerns before the Select Committee that was constituted to examine the proposed amendments:

> [I]t would seem that upon being served with a written notice that person must inform the police. . . of all the facts that are relevant to his defence. This presupposes that such a person understands and is aware of the nature of the offence he is to be charged with, that he knows the elements which make up the charge and that he can perform the task of an experienced criminal lawyer in deciding what are relevant facts and what are not. One would have thought that this imposes an almost insuperable burden on most of the population of Singapore. . . Aside from being able to understand the nature of the charge and what ingredients must be proved, the accused is expected to be able to recall all the relevant facts immediately he is served with the written notice. In certain cases the facts are highly complicated and what may not seem relevant to the accused may well turn out to be highly relevant at the trial.[13]

Notwithstanding these reservations, it would appear that trial judges have not been reluctant to draw adverse inferences against accused persons for not disclosing material facts to the police.[14]

The risk of an adverse inference being drawn from silence provides strong inducement for the accused to speak. It may be argued that the s 23 notice and the power to draw adverse inferences from silence do not undermine the right against self-incrimination as they merely encourage the suspect to make early disclosure of *exculpatory* facts—which are facts supporting his defence as opposed to facts revealing his guilt.[15] While this is true, so far as it goes, the practical reality is that the suspect is induced to incriminate himself. The suspect may not fully understand the notice.[16] At this stage, he has no access to a lawyer and since the beginning of 2011, the police no longer have a legal duty to explain the notice to him.[17] He may form the mistaken impression that he is required to disclose everything that he knows about the case. Further, as Professor Choo has pointed out, the "exculpatory information may well be inextricably linked with self-incriminating information."[18] It must also be remembered that some defences, such as provocation, works as a "confession and avoidance". To raise such a defence is already to confess to the elements of the offence. The suspect may not be aware that it is for the prosecution to prove the elements of the crime beyond reasonable doubt. The s 23 notice and the power to

---

13 Sing, "Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill" (Parl 4 of 1976) presented to Parliament on 24 June 1976 at A9, A10.

14 See *eg*, Stanley Yeo Meng Heong, "Diminishing the Right to Silence: The Singapore Experience" [1983] Crim L Rev 88; Alan Khee-Jin Tan, "Adverse Inferences and the Right to Silence: Re-examining the Singapore Experience" [1997] Crim L Rev 471.

15 *Kwek Seow Hock v Public Prosecutor* [2011] 3 SLR 157 at paras 18, 19 (CA).

16 Andrew L-T Choo, *The Privilege against Self-incrimination and Criminal Justice* (Oxford: Hart Publishing, 2013) at 102.

17 Prior to 2011, the police was required to explain the notice to the accused. On the practical difficulties that this created for the police, see *Tsang Yuk Chung v Public Prosecutor* [1990] 2 SLR (R) 39 at paras 27, 28 (CA) [*Tsang Yuk Chung*].

18 Choo, *supra* note 16 at 102.

draw an adverse inference from the suspect's silence have the effect of weakening the right not to speak and the right to put the prosecution to proof at a trial.[19]

The current position has been defended by drawing on strands of crime control ideology. Singapore's political leaders have been praised for having "the political will to enact an appropriate framework to achieve" "a relatively safe and secure environment that is free from crime". This includes the introduction of the power to draw adverse inferences from silence.[20] The changes to the law show a shift from "adherence to due process" towards "crime control... values".[21] It is also claimed that they have "greatly assisted... law enforcement agencies in investigating offences, leading to many more factually guilty persons being convicted through guilty pleas or convictions at trial."[22] This claim does not appear to be supported by the available empirical studies.[23]

B. *Admissibility of Statements: Voluntariness and Oppression*

1. *The voluntariness rule*

Before 1960, no statement made to a police officer in the course of a police investigation may be used as evidence. To be admissible, the statement had to be recorded by a magistrate. The law was changed by a series of amendments.[24] Today, statements obtained by the police from the suspect are admissible[25] provided they were given 'voluntarily'. 'Voluntariness' is "not used in the sense as the word is understood in common parlance."[26] It is a short-hand for a technical test of admissibility that is now set out in s 258(3) of the *CPC*. Under this test, the court must exclude a statement if the accused was caused to give it by any "inducement, threat or promise" proceeding from a "person in authority". The prototypical "person in authority" is

---

19 See UK, *The Royal Commission on Criminal Procedure*, Cmnd 8092, 1981 (Chairman: Sir Cyril Philips) at paras 4.35, 4.37, 4.51, 4.52.

20 Chan Sek Keong CJ, "From Justice Model to Crime Control Model" (International Conference on Criminal Justice Under Stress: Transnational Perspectives delivered at the Golden Jubilee Celebrations 2006 at the Indian Law Institute, 24 November 2006) at 13 [Chan, "Justice to Crime Control"].

21 *Ibid* at 14.

22 *Ibid* at 15. For an earlier expression of the same view in his then capacity as the Attorney-General, see Chan, "Singapore Model", *supra* note 1 at 444.

23 In one study published in 1986, the author concluded from an examination of crime statistics that the 1976 amendments were not "perceived by potential offenders as sufficiently increasing their risk of detection to deter them from crime" and that "there was no visible decrease in the crime rate after the amendments were introduced": Chandra Mohan, "Police Interrogation and the Right of Silence in the Republic of Singapore" [1986] 2 MLJ xxviii at xxxiv. An earlier study by Yeo, *supra* note 14 at 100, 101, concluded that "the amendments have not materially assisted the Singapore police force and prosecuting officers in their combat against crime". It is noted by Tan, *supra* note 14 at 480, that "[e]mpirically, it is less than certain whether the existence of the silence provisions and the courts' invocation of these have truly resulted in accused persons speaking up more readily today than they would have done in the past."

24 On the legislative history, see *Mohamed Bachu Miah*, *supra* note 4 at paras 39-49. The power of the Magistrate to record statements still exists but is practically redundant: s 280, *CPC*, *supra* note 2.

25 *CPC*, *ibid*, s 258(1).

26 *Seow Choon Meng v Public Prosecutor* [1994] 2 SLR (R) 358 at para 30 (CA).

the law enforcement officer conducting the interrogation.[27] Another requirement is that the inducement, threat or promise must be "sufficient... to give the accused grounds which would appear to him reasonable for supposing that by making the statement he would gain any advantage or avoid any evil of a temporal nature".[28] (In addition, Explanation 1 of the same section states that the court must also exclude the confession if it was obtained "by a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will" of the suspect. This is the doctrine of oppression and will be examined in the next section.)

Decisions on what counts as an inducement, threat or promise reveal the extent to which judges are tolerant of police pressure. A shift in judicial attitude may be illustrated by examining a series of decisions on the existence of a threat in a similarly worded exhortation to tell the truth. Low judicial tolerance was exhibited in the 1978 case of *Lim Kim Tjok v Public Prosecutor*.[29] At the trial, the prosecution was allowed to adduce evidence of a statement taken from the accused by an officer from the Corrupt Practices Investigation Bureau. The statement was given after the officer had confronted the accused with proof that he had lied to him on his whereabouts. The accused then asked for leniency in exchange for telling "everything" and he was told that he should tell the truth. On appeal, the High Court held that the trial judge had wrongly admitted his incriminating statement. Given the circumstances in which it was taken, the statement could not be said to be a voluntary one. According to the High Court, "[i]t is settled law that [the] words 'you had better tell the truth' or equivalent expressions have always been held to import a threat or inducement."[30]

Subsequent developments beginning in the 1990s show a distinct and pronounced shift in judicial attitude.[31] In the 1995 case of *Osman bin Din v Public Prosecutor*,[32] the accused was convicted of the offence of trafficking in a controlled drug under the *Misuse of Drugs Act*[33]. On appeal, it was argued that the trial judge had erred in allowing the prosecution to admit two statements recorded by an officer from the Central Narcotics Bureau. The accused alleged, among other things, that he "was warned to tell the truth, otherwise he would be beaten up and sent to the gallows."[34] This was disputed by the investigating officer and interpreter. The trial judge disbelieved the accused and found that no such threats or inducements were

---

27 Under certain circumstances, the interpreter assisting in the questioning is also a person in authority: *Public Prosecutor v Lim Boon Hiong* [2010] 4 SLR 696 (HC).

28 That the test of voluntariness was formulated in the late nineteenth century explains the archaic language of the section. There is a further requirement that both the inducement, threat and promise and the advantage or evil must have reference to the charge. But the courts have not insisted strictly on this requirement: see *Poh Kay Keong v Public Prosecutor* [1995] 3 SLR (R) 887 (CA); *cf Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR (R) 619 at para 55 (CA) (a promise to let the accused call his wife was held not to have "reference to the charge").

29 [1977-1978] SLR (R) 403 (HC) [*Lim Kim Tjok*].

30 *Ibid* at para 6.

31 *Lim Thian Lai v Public Prosecutor* [2006] 1 SLR (R) 319 at para 18 (CA): "[j]udicial attitudes towards the legal effect of words 'you had better tell the truth' or any equivalent expressions have shifted over the years."

32 [1995] 1 SLR (R) 419 (CA) [*Osman bin Din*].

33 Cap 185, 2001 Rev Ed Sing [*MDA*].

34 *Osman bin Din*, *supra* note 32 at para 32.

made. The Court of Appeal declined to disturb this finding of fact. Significantly, in a departure from the position adopted in *Lim Kim Tjok*, it added:[35]

> [*E*]*ven if the allegation in the present case was true*, we do not see how the expression ["you had better tell the truth"] could amount to a threat or inducement in the circumstances. Although those words were coupled with further statements to the effect that the appellant would be beaten up and sent to the gallows and verbal abuses which supposedly caused the appellant to shed tears, we are of the view that it was not sufficient to [render the statements inadmissible].[36]

Osman bin Din was followed in the 1998 case of *Chai Chien Wei Kelvin v Public Prosecutor*[37] where the accused persons were convicted of capital offences under the *MDA*. On appeal, it was argued that the prosecution should not have been allowed to adduce in evidence certain statements made by the first accused because they had been obtained by threats. It was claimed that:

> [H]e had been told to "tell the truth" because [the investigating officer] could tell if he was lying merely by looking at his eyes. He was also told that if he did not tell the truth [the officer] would damage his face, and he was knocked on the head by [him] when he gave an answer which [he] was not satisfied with. . . It was also alleged that he had been told that "the rope was round his neck", and he testified that he thought that the officers would help take the rope off his neck, by which he meant that he thought he would face a lesser charge.[38]

The Court of Appeal held that the trial judge was right to have rejected these allegations. It added that *even if* certain of his allegations were true, the confession remained admissible. Agreeing with the trial judge, the Court of Appeal stated:

> [A] knock on the head in the manner described by the first accused did not constitute sufficient duress, nor could a call to co-operate be regarded as a threat or inducement even if it was accompanied, as in this case, by a remark that the first accused would be allowed to call his wife if he co-operated.[39]

Although the case of *Lim Kim Tjok* involved the offence of bribery which is less serious than the capital charges faced by the accused persons in *Osman bin Din* and *Chai Chien Wei Kelvin*, there was noticeably greater judicial tolerance of police pressure in the latter two cases than in the first.

---

35 The Court of Appeal agreed with earlier pronouncements of the High Court in *Public Prosecutor v Ramasamy a/l Sebastian* [1990] 2 SLR (R) 197 (HC). In the latter case, it was held, at para 18, that "the fact that a police officer reminds a witness that he should tell the truth and not tell lies cannot. . . constitute a threat or inducement."

36 *Osman bin Din, supra* note 32 at para 33 [emphasis added].

37 [1998] 3 SLR (R) 619 (CA) [*Chai Chien Wei Kelvin*].

38 *Ibid* at para 54.

39 *Ibid* at para 55.

2. *Doctrine of oppression*

At one time, bad treatment of a suspect in the course of obtaining his statement—at least where it falls short of torture[40]—was not considered capable, without a specific threat, inducement or promise, of rendering the statement inadmissible. For instance, in the 1988 case of *Public Prosecutor v Tsang Yuk Chung*,[41] the High Court recounted the allegations and expressed its views as follows:

> [T]he accused alleged that he had been stripped naked and left in that condition in his cell for about an hour before he was taken out of the cell for his statement to be taken. He also alleged that both his hands were handcuffed throughout the time he was giving his statement and that he gave it because he was frightened. He admitted that although he had not been threatened by anyone he felt frightened. We did not believe the accused's testimony... In any case... *these incidents, even if they occurred, did not detract from the voluntariness of his statement. The accused was not subject to any inducement, threat or promise when he gave his statement.*[42]

Oppression came later to be accepted as a ground for exclusion. It was treated as having been "subsumed" in the statutory voluntariness rule discussed in the preceding section.[43] English common law authorities on the definition of oppression were followed.[44] According to that definition, oppression "imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary."[45] The court will look at the full circumstances, including length of time of questioning, period of rest, the provision of refreshment and the character of the person being questioned. In 2011, oppression as a ground for exclusion received explicit statutory recognition with the introduction of Explanation 1 to s 258(3) of the *CPC*.[46] A High Court decision has clarified that oppressive treatment will render the accused's statement inadmissible even in the absence of an "overt act from a person in authority such as a specific threat, inducement or promise".[47]

However, bad treatment by the police must be egregious for the doctrine of oppression to apply. In *Public Prosecutor v Tan Boon Tat*,[48] the accused was tried before the

---

40 In *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 (CA), the Court of Appeal, in an *obiter dictum*, stated, at para 64, that "[t]orture... (where it is used to extract evidence to be used as proof in judicial proceedings) would violate the fundamental rules of natural justice; to convict a person based on evidence procured by torture strikes at the very heart of a fair trial." The Court of Appeal was influenced by the House of Lords' judgment in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 (HL).

41 [1988] 2 SLR (R) 219 (HC). On appeal, "[c]ounsel for the appellant conceded that the statement was made voluntarily, and without any inducement, threat or promise": *Tsang Yuk Chung*, *supra* note 17 at para 4.

42 *Ibid* at para 15 [emphasis added].

43 *Gulam bin Notan Mohd Shariff Jamalddin v Public Prosecutor* [1999] 1 SLR (R) 498 at para 53 (CA) [*Gulam bin Notan*].

44 See *eg*, *Gulam bin Notan*, *ibid*; *Chai Chien Wei Kelvin*, *supra* note 37 at paras 56-59.

45 *R v Priestley* (1967) 51 Cr App R 1 at 1; *R v Prager* [1972] 1 WLR 260 at 266 (CA).

46 See Chin Tet Yung, "Criminal Procedure Code 2010: Confessions and Statements by Accused Persons Revisited" (2012) 24 Sing Ac LJ 60 at 78-84.

47 *Tey Tsun Hang v Public Prosecutor* [2014] 2 SLR 1189 at para 91 (HC) [*Tey Tsun Hang*].

48 [1990] 1 SLR (R) 287 (HC) [*Tan Boon Tat*].

High Court for an offence of drug trafficking. An issue arose as to the admissibility of a statement taken from him by narcotics officers. The accused claimed that he "was... very tired and hungry and was in a daze and a state of confusion when the statement was given."[49] Here is the High Court's description of his treatment:

> [The accused] said that when he was first brought back to the CNB [Central Narcotics Bureau] he was handcuffed and was made to squat at the car porch for a long time. Later, he was taken up to [a] room, and there again he was handcuffed, that is, one of his hands was handcuffed to the chair. All throughout, since the time of his arrest at about 3.30 to 4 o'clock in the afternoon to about 1.00 am the following morning, he was not given any food or drink at all... It was not disputed that at the CNB premises, except during the short interval when the statement was recorded, the accused was at all times handcuffed and he was required to wait at the car porch for quite some time. It was also not disputed that no food or drink was given to the accused throughout this period. *That was highly inconsiderate of the officers concerned.*[50]

To describe the conduct of the officers as inconsiderate is an understatement. The accused was arrested sometime between 3.30 pm and 4 pm. He was not given any food or drink until 1 am the next day. His statement was taken at 12.05 am. Supposing he had lunch at the typical meal time, say at around 1 pm, on the day he was arrested, he would have been without food or drink for about 11 hours when his statement was recorded. That he was handcuffed for many hours must have added considerably to his stress and discomfort. He was also deprived of sleep. It emerged from the evidence that he had been up gambling and not slept the night before his arrest.[51] The High Court decided nevertheless to admit the statement in evidence.[52] It reasoned thus:

> We accept that the accused at the material time was tired, hungry and thirsty. He was also under great stress, having regard to the fact that he was in custody and confronted with a charge of having trafficked in a substantial quantity of what was believed to be controlled drugs. But we do not think that the accused was in *such a state of shock, exhaustion or fatigue that he had no will to resist* making any statement which he did not wish to make. [The doctor], who saw him before and after the statement was taken, said that the accused was alert. [The interpreter] said that he looked normal.[53]

---

[49] *Ibid* at para 31.

[50] *Ibid* [emphasis added].

[51] That deprivation of sleep compromises the reliability of a confession, see Steven J Frenda *et al*, "Sleep Deprivation and False Confessions" (2016) 113 Proceedings of the National Academy of Sciences 2047.

[52] The ruling was upheld when the case went on appeal: *Tan Boon Tat v Public Prosecutor* [1992] 1 SLR (R) 698 (CA). *Cf Tan Choon Huat v Public Prosecutor* [1991] 1 SLR (R) 863 at para 9 (HC):

> [T]he 18-year-old appellant was interrogated without rest or respite from 10.48am and was given no lunch even till 4.50pm on that date when he was supposed to have given a statement... The denial of lunch to the appellant is all the more troubling particularly when his interrogators knew that he did not consume his breakfast...

For this and other reasons, the High Court held, at para 12, that the statement should not have been admitted at the trial.

[53] *Tan Boon Tat*, *ibid* at para 31 [emphasis added].

The reference to "a state of shock, exhaustion or fatigue" resulting in the suspect having "no will to resist" suggests that the maltreatment must be severe before the court will exclude the statement.[54] There are only three reported judgments in which the doctrine of oppression was applied, and in one of them, the Court of Appeal took issue (in *obiter dicta*) with the approach taken by the trial judge. To these three cases we now turn.

In *Fung Yuk Shing v Public Prosecutor*,[55] the suspect had been deprived of food and drink for about seven hours when his statement was taken. The trial judge held that this amounted to oppression. On appeal, the Court of Appeal expressed disagreement. Whether deprivation of sustenance is sufficiently serious to justify exclusion of the evidence will depend on the circumstances of the case. It noted:

> An accused might be continually grilled for days on end without being given food and drink or he might go without such sustenance for a few hours. The failure to offer sustenance might be a deliberate ploy to weaken the accused's will or it might be a genuine oversight amidst the flurry of investigative activity. The point is, it does not appear to us to be realistic to take the sweeping stand that every failure to offer an accused sustenance constitutes a "threat" or an "inducement" of such gravity as to automatically render any statement he makes involuntary. . . In the present case. . . [a]t no point during the interrogation. . . did [the appellant] ask for a meal or complain of hunger pangs. He was medically examined twice. . .: neither medical report made any mention of his having been *in a state of collapse or even in a physically weakened state due to hunger and thirst*. With the greatest respect to [the trial judge], it did not appear to us that the omission to offer the appellant sustenance. . . was so serious and engendered such grave consequences that the appellant's *will* might have been *completely overborne*.[56]

Two observations may be made about this passage. First, the position in Singapore is very different from that in England and Wales where the police are required by a code of practice to offer the suspect at least two light meals and one main meal in any 24-hour period.[57] The code is in the public domain and it contains many other detailed rules on how suspects detained for questioning are to be treated. Similar transparency and regulatory control are lacking in Singapore. This has been a source of concern for the criminal bar. For example, in his speech at the opening of the legal year in 2008, the President of the Singapore Law Society, Mr Michael Hwang, reported "a longstanding and widespread feeling at the Bar that legislation (or at

---

[54] A similarly high threshold is set in relation to statements taken while the suspect is suffering from the effects of drugs or from symptoms of drug withdrawal. In *Garnam Singh v Public Prosecutor* [1994] 1 SLR (R) 1044 at para 31 (CA), the Court of Appeal held that "in order for the effects of withdrawal from drugs to affect the drug user's medical and psychological condition to render any statement he makes to be involuntary, he must be in a *state of near delirium*, that is to say, that his mind did not go with the statements he was making" [emphasis added].

[55] [1993] 2 SLR (R) 92 (HC); *Fung Yuk Shing v Public Prosecutor* [1993] 2 SLR (R) 771 (CA) [*Fung Yuk Shing (CA)*].

[56] *Fung Yuk Shing (CA)*, *ibid* at para 17 [emphasis added].

[57] Para 8.6 of Code C to the *Police and Criminal Evidence Act 1984* of England and Wales ("Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers") dated 10 July 2012, online: Gov.uk <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117589/pace-code-c-2012.pdf>.

least a protocol) is needed to prescribe how... statements... are recorded" by the police.[58] Similarly, Mr Sant Singh SC, a defence lawyer who has considerable experience as a former police inspector and deputy public prosecutor, has urged that "provisions... be enacted to put in place a protocol for the recording of statements from accused persons".[59] Secondly, the references to "state of collapse", "physically weakened state" and the accused's 'will' being "completely overborne" indicate that the deprivation of sustenance will only exceptionally lead to the exclusion of his statement.

Given the high threshold of oppression that has been set, it is unsurprising that the defence seldom succeeds in relying on this doctrine. A sense of how serious the police mistreatment must be for the court to exercise its power of exclusion can be derived from the remaining two cases. In *Public Prosecutor v Oh Laye Koh*,[60] the trial judge excluded three statements allegedly made by the accused to the police on a number of grounds.[61] According to the accused, he had been assaulted by the police and threatened with assaults while under their custody. It was held on the basis of evidence adduced in court, which included medical evidence, that the prosecution had failed to discharge their burden of proving beyond reasonable doubt that the abrasion and other injuries found on the accused were self-inflicted. The trial judge justified exclusion on a further ground by relying on an *obiter dictum* of the Court of Appeal in *Sim Ah Cheoh v Public Prosecutor*,[62] according to which, a statement is inadmissible if it was obtained by questioning that was "so vigorous or prolonged that it becomes oppressive". The accused was treated in a highly disconcerting manner in the periods leading to the days when the alleged statements were obtained. Judicial disquiet is evident in the detailed nature and tone of the court's narration of the police interrogation:

> [T]he Accused was interrogated non-stop by relays of police teams at the [Criminal Investigation Department] between 14th October 1989 (3.30am) and 16th October 1989 (5.00am) save for a brief field trip at midmorning on 15th October 1989. The questioning continued through the night past midnight of the 15th and 16th without respite the days merging into nights. It is clear from the evidence of the various officers that they were dissatisfied with the Accused's answers to their questions and rejected his many explanation[s] which they found contradictory. The Accused stated that he became tired, sleepy and dazed... It is reasonably obvious from the scheme employed to question the Accused i.e. the non-stop

---

58 See also Michael Hwang, "A Protocol for Police Interviews of Witnesses and Suspects?" *Singapore Law Gazette* (June 2010), online: Singapore Law Gazette <http://www.lawgazette.com.sg/2010-06/president.htm>.

59 Interview published in *Inter Se*, January 2009 at 10, 11. A similar call was made by Judicial Commissioner Amarjeet Singh: "Code of practice needed for police questioning—JC", *The Straits Times* (5 November 1995). See also the observations and recommendations of The Law Society of Singapore in the "Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009" (17 February 2009), paras 3.7-3.9, online: Law Society of Singapore <http://www.lawsociety.org.sg/Portals/0/ResourceCentre/FeedbackinPublicConsultations/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf>.

60 [1994] SGHC 20 [*Oh Laye Koh (HC)*].

61 An appeal by the prosecution against the exclusion of the first two statements was dismissed by the Court of Appeal in *Public Prosecutor v Oh Laye Koh* [1994] 2 SLR (R) 120 (CA).

62 [1991] 1 SLR (R) 961 at para 41 (CA).

> interrogation admittedly lasting some 38 hours on these dates that [the] officers would only be content to hear the truth as they would perceive it to be so. Nothing was recorded during these interrogations. The interrogation continued on the 19th of October 1989 for another four hours and again on the 20th of October 1989 on which dates no statements were again recorded from the Accused. In almost straight long sessions between the 14th to the 16th, the 19th and 20th October 1989, the Accused had been interrogated for some fifty-two hours without result. Eventually on the 21st of October 1989 he made a brief oral statement at 10.10am and another at 10.20am. . . and gave the long statement. . . on the 23rd of October 1989.[63]

Extremely taxing interrogation was also the trigger for the oppression doctrine in *Public Prosecutor v Lim Kian Tat*.[64] The High Court excluded statements allegedly made by the accused to the police and acquitted him of murder. One of the statements was "taken during an 18-hour interrogation with an hour's break. It was taken during the fourth night in a row in which the accused did not have any adequate sleep." The High Court was "satisfied that the accused had spoken, after the police had rejected his earlier versions, and had spoken when he would not have otherwise" and concluded that the statement was "made in circumstances where there was oppression."[65]

3. *Burden of proof*

When admissibility is contested, it is for the prosecution to prove beyond reasonable doubt that the accused gave his statement voluntarily and without oppression. It has been observed that the burden of proof is not as difficult to discharge as it may seem. Anecdotal experience suggests that police statements are rarely—or at least not commonly—excluded in Singapore.[66] An experienced criminal lawyer has said in Parliament that:

> [T]he courts admit almost all the statements. The courts find it difficult to believe that police officers would resort to the conduct [of ill-treating suspects for the purpose of extracting a confession]. And the unfortunate part of it is that the man who is in custody has no way of proving his case apart from giving evidence himself. He cannot call any witnesses. . . whereas the Police of course have all the officers parading into the court and saying, "Oh, no. We never touched him. It is all voluntary. He acted of his own accord in giving the statement."[67]

---

63 *Oh Laye Koh (HC)*, *supra* note 60.

64 [1990] 1 SLR (R) 273 (HC) [*Lim Kian Tat*].

65 *Ibid* at para 29.

66 See *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR (R) 1165 at para 17 (HC): "[t]aking the example of confessions, the Prosecution submitted that such statements. . . are rarely excluded in Singapore courts unless the voluntariness of the statement had been disproved."

67 *Parliamentary Debates Singapore: Official Report*, vol 69 at cols 86, 87 (1 June 1998). Similarly, Mr Lim Biow Chuan noted during the second reading of the *CPC* Bill on 19 May 2010 that when it comes to challenging the admissibility of his statement, it often boils down to the word of the accused against the word of the investigating officer. "Unfortunately, the Courts would invariably believe the Investigating Officer. The odds are usually stacked against the accused person": *Parliamentary Debates Singapore: Official Report*, vol 87 at cols 86, 87, 549 (19 May 2010).

The courts have on occasions emphasised that the standard of proof must be consonant with, for want of a better phrase, investigative pragmatism. In *Panya Martmontree v Public Prosecutor*,[68] the Court of Appeal, while acknowledging that the accused need not do more than raise a reasonable doubt as to the voluntariness of his statement, also stressed that this did not mean that "the slightest suspicion of an inducement, threat or promise or of an assault [was] sufficient to rule out a statement".[69] It was sensitive to the fact that "[t]he police work in difficult circumstances. If they are required to remove all doubt of influence or fear, they would never be able to achieve anything."[70] This message was reiterated in *Yeo See How v Public Prosecutor*[71] where the Court of Appeal took the position that "there is no necessity. . . for interrogators to remove all discomfort. Some discomfort has to be expected—the issue is whether such discomfort is of such a great extent that it causes the making of an involuntary statement".

In contrast to the above sentiments, the relatively recent Court of Appeal judgment in *Azman bin Mohamed Sanwan v Public Prosecutor*[72] displayed exceptional vigilance in holding the prosecution to its burden of proving voluntariness. The accused was charged with the capital offence of trafficking in cannabis. After investigation into the charges on which he was eventually tried should have concluded, the accused was transferred to a remand prison. The investigating officer ("IO"), together with an interpreter, visited the accused twice without notifying the accused's counsel and obtained incriminating statements from him at the prison. The accused alleged that his statements were not given voluntarily; in particular, he alleged that the IO had told him that if he did not co-operate, action would be taken against his wife and that if he co-operated, he would be spared the death penalty. The IO denied having said these things. The trial judge believed the IO and admitted the statements.

On appeal, it was held that the trial judge had erred. The circumstances surrounding the two visits to the remand prison were highly suspicious. The IO explained that the purpose of the first visit was to serve the accused with an additional ecstasy charge. And the reason for the second visit was to seek clarification regarding a DNA report. The Court of Appeal found both reasons to be unpersuasive. The accused was already facing a capital offence of trafficking in cannabis. There was no sense in adding on an additional ecstasy charge, which was a non-capital offence, and to do this at such a late stage. If the reason for the second visit was to seek clarification on a DNA report, it was inexplicable that there was no mention of this in the statement taken from the accused. It was held that there was reasonable doubt as to the voluntariness of the statements and that the trial judge ought to have excluded them.

4. *Safeguards*

One way of ensuring that the suspect is not forced into confessing and that any confession he wishes to make is accurately recorded is to allow him access to legal

---

68 [1995] 2 SLR (R) 806 (CA) [*Panya Martmontree*].

69 *Ibid* at para 32.

70 *Ibid* at para 29.

71 [1996] 2 SLR (R) 277 at para 40 (CA). See also *eg*, *Public Prosecutor v Ng Pen Tine* [2009] SGHC 230 at para 20; *Tey Tsun Hang*, *supra* note 47 at para 114.

72 [2012] 2 SLR 733 (CA) [*Azman bin Mohamed Sanwan*].

advice before he is questioned or better yet to have a lawyer present when his statement is being taken. However, the right to counsel in art 9(3) of the *Constitution of the Republic of Singapore*[73] has been interpreted narrowly.[74] It has been held that the police are not required to give the accused access to legal advice immediately upon arrest. The police do not have to wait for him to receive legal advice before they start to take a statement from him, and the lawyer does not need to be and is not present during the questioning.[75] What drives the curtailment of the right to counsel is "the public interest in enabling the police to discharge their duty and carry out investigations effectively and expeditiously".[76] It is not explained how allowing early access to counsel will be detrimental to this interest. The inability to get early access to their clients has long been a major concern for defence lawyers.[77]

A recent and alleviating development is the Appropriate Adult Scheme which was launched in 2015.[78] This scheme allows a neutral third party who is a trained volunteer to be present when a person with mental or intellectual disability is being questioned by the police. At present, this scheme does not extend to minors. This is going to be reviewed following the apparent suicide of a fourteen-year-old boy a few hours after his release by the police.[79] He had been picked up from his school

---

73 1999 Rev Ed.

74 See *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 3 SLR 750 (CA) [*James Raj s/o Arokiasamy*]; Ho Hock Lai, "Recent (Non-)Developments in an Arrested Person's Right to Counsel" [2014] Sing JLS 267 [Ho, "Recent (Non-)Developments"].

75 See *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at para 57 (CA) [*Muhammad bin Kadar*]: "Even after the accused engages counsel (assuming he does), there is no legal rule requiring the police to let counsel be present during subsequent interviews with the accused while investigations are being carried out." But the situation appears to be different after the completion of investigation. In *Azman bin Mohamed Sanwan*, *supra* note 72 at paras 18, 20, the investigating officer visited the accused in prison and took further statements from him. These visits were made without informing, and in the absence of, counsel appointed by the accused. The Court of Appeal and the Deputy Public Prosecutor himself were of the view that the conduct of the investigating officer was improper.

76 *James Raj s/o Arokiasamy*, *supra* note 74 at para 31. See also *Parliamentary Debates Singapore: Official Report*, vol 69 at col 99 (1 June 1998) (Minister of State for Home Affairs, Associate Professor Ho Peng Kee):

> In Singapore, we see it right to balance the rights of an accused to be given a fair trial with the right of the State to devise rules to ensure that those who are guilty will not take advantage of the law and get away scot-free. Hence, under our approach, a suspect has no inherent right to have his lawyer present when the Police questions him.

77 This concern has been aired many times and most recently by Mr Thio Shen Yi in his speech as the President of the Law Society at the Opening of the Legal Year 2016 on 11 January 2016, reproduced in *Singapore Law Gazette* (January 2016), online: Singapore Law Gazette <http://www.lawgazette.com.sg/2016-01/1505.htm> at paras 13-15, and in a separate opinion piece, "Vulnerable Suspects and Access to Counsel", *supra* note 7. In the latest response on the issue in Parliament, the Minister for Home Affairs stated: "On early access to counsel, there are reasonable arguments both ways. Our position on early access to counsel has been made clear previously. We had arrived at this position after thoroughly considering the matter and taking into account all the relevant factors." (*Parliamentary Debates Singapore: Official Report*, vol 94 (1 March 2016).)

78 Amir Hussain, "Help for Suspects with Special Needs", *The Straits Times* (1 April 2015). The launch was preceded by a pilot run in 2013.

79 See *Parliamentary Debates Singapore: Official Report*, vol 94 (1 March 2016) (Minister for Home Affairs). See also "Police to review the way youth are questioned", *The Straits Times* (2 February 2016); "Death of 14-year-old: Experts welcome police review on procedures for questioning youth", *The Straits Times* (3 February 2016); "Law Society sets up panel to study investigation protocols for young suspects", *The Straits Times* (16 February 2016); "Police review to consider three points", *The Straits Times* (2 March 2016).

and questioned alone at a police station.[80] The role of the appropriate adult is not to give legal advice but to prevent miscommunication and enhance accuracy in the recording of statements.[81]

Another way to protect the voluntariness of statements is to have police interrogations video-recorded. After a long period of resistance, the government finally agreed to launch a pilot project in 2015. This project is preceded by a history of unsuccessful attempts to bring about reform in this area. The government had in the past rejected repeated calls to implement a system of recording.[82] During a parliamentary debate in 2008, the Senior Minister of State for Law defended the rejection in these terms:

> [E]specially for criminal law and processes, we must find our own path – strike the right balance between protection of the public interest and protection of the rights of accused persons. . . [I]n other countries, videotaping has been introduced for different reasons, one of which is loss of public confidence in the police. . . So the crux of the matter lies in whether Singaporeans have trust and confidence in our legal system and our Police Force. On both counts, this is the case. Our criminal justice system is reputed for its clean administration, impartiality and efficiency and the public has trust and confidence in our Police Force. So taken as a whole, I would say that there is no need to implement videotaping of police interviews. Ultimately, the bottom-line is for the suspect to "tell the truth, the whole truth and nothing but the truth". He should do so even without any videotaping.[83]

These reasons failed to persuade everyone. In the following year, the Law Society included in its feedback on the revision of the *CPC* a recommendation that police interviews be tape-recorded.[84] This recommendation was not accepted. A Member of Parliament raised this matter yet again during the budget debate in 2015.[85] While

---

80 The government strongly denied in Parliament that there was any police mistreatment: *Parliamentary Debates Singapore: Official Report*, vol 94, sitting no 8 (1 March 2016) (Minister for Home Affairs), *ibid*. See also "No basis for hasty conclusion on boy's death: Shanmugam", *The Straits Times* (2 March 2016). The matter is currently the subject of a coroner's inquiry.

81 The lawyer of the suspect cannot serve as an Appropriate Adult under this scheme. See Lok Vi Ming SC, "When the Incredible Lawyer isn't an Appropriate Adult" *Singapore Law Gazette* (March 2013), online: Singapore Law Gazette <http://www.lawgazette.com.sg/2013-03/694.htm>.

82 See *eg*, Sant Singh, "Treatment of Out-of-Court Statements in the Judicial Process" in Teo Keang Sood, ed, *Singapore Academy of Law Conference 2006—Developments in Singapore Law between 2001 and 2005* (Singapore: Singapore Academy of Law, 2006).

83 *Parliamentary Debates Singapore: Official Report*, vol 84 at col 1092 (27 February 2008). This issue has been raised on other occasions, *eg*, *Parliamentary Debates Singapore: Official Report*, vol 63 at cols 381, 384, 385 (25 August 1994); *Parliamentary Debates Singapore: Official Report*, vol 69 at cols 78, 99 (1 June 1998) (Mr JB Jeyaretnam, Associate Professor Ho Peng Kee); *Parliamentary Debates Singapore: Official Report*, vol 90 (8 March 2013) (Mr Hri Kumar Nair, Ms Sylvia Lim).

84 "Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009", *supra* note 59 at 5, 29.

85 In a parliamentary sitting on 6 March 2015, a Member of Parliament argued that video-recording "not only protects integrity of the statement recording process during investigation, and protects the accused to make sure the statement is accurate, it also, very importantly, protects the Police against frivolous allegations of abuse or accusations of malpractice": *Parliamentary Debates Singapore: Official Report*, vol 93 (6 March 2015) (Ms Sylvia Lim).

the government had previously ruled out legislative reform, it seemed open to the idea on this occasion.[86] Assurance was given that the matter was "being studied" and that an "update" would be given "in due course".[87]

In the meantime and in other respects, the government has been keen to exploit technology to enhance investigative capabilities. Officers on patrol have started to use body-worn cameras and frontline police vehicles are now equipped with In-Vehicle Video Recording System.[88] The deployment of body-worn cameras at Neighbourhood Police Centres started in January 2015. This is being done in phrases and will extend to all Neighbourhood Police Centres by June 2016. The cameras are worn by frontline police officers and can capture both audio and video recordings. According to the Deputy Commissioner of Police (Operations), "[t]he body-worn camera will facilitate Police investigations and the gathering of evidence. It will complement existing forensic methods to allow the Police to piece together what actually happened at an incident."[89] Commenting on these developments, Professor Chesterman makes the point that "as we prepare for the deployment of yet more surveillance technology, it will be important to ensure that those cameras keep an eye on the state as well as on us."[90] The recent technological innovations made it incongruous not to extend video-recording to police-questioning.

In July 2015, the government finally agreed to launch a pilot programme of video recording of interviews ("VRI") starting in the first quarter of 2016.[91] The rationale for this development was explained thus in a press release by the government:

> The implementation of VRI will provide the Courts with a video recording of the interview. This will allow the Courts to take the interviewee's demeanour into account in determining the admissibility or weight to be accorded to the interviewee's statement. It will also provide an objective contemporaneous account of the interview process and allow the Courts to decide on allegations that may be made about the interview.[92]

---

86 See *Parliamentary Debates Singapore: Official Report*, vol 87 at col 457 (18 May 2010); *Parliamentary Debates Singapore: Official Report*, vol 87 at col 558 (19 May 2010).

87 *Parliamentary Debates Singapore: Official Report*, vol 93 (6 March 2015) (Mr S Iswaran, Second Minister for Home Affairs).

88 See "Police tap technology to fight crime", *The Straits Times* (7 May 2014); "Police to get more 'eyes' with video feeds from cars", *The Straits Times* (14 January 2015); *Parliamentary Debates Singapore: Official Report*, vol 93 (6 March 2015) (Second Minister for Home Affairs, Mr S Iswaran).

89 News Release, Annual Crime Brief 2014 (updated on 18 September 2015) at 7, online: <https://www.police.gov.sg/~/media/spf/files/statistics/crimebrief2014.pdf>.

90 Simon Chesterman, "Body-worn cameras to monitor citizens and the surveillance state", *The Straits Times* (6 May 2015).

91 This pilot programme will involve the police and the Central Narcotics Bureau but not the Corruption Practices Investigation Bureau. See "Police to try out videotaping interviews with suspects", *The Straits Times* (23 July 2015) and press release by the government, "SPF and CNB to Conduct Consultations Leading to a Pilot on Video Recording of Interviews During Investigations" (22 July 2015), online: Ministry of Home Affairs <https://www.mha.gov.sg/Newsroom/press-releases/Pages/SPF-and-CNB-to-Conduct-Consultations-Leading-to-a-Pilot-on-Video-Recording-of-Interviews-During-Investigations.aspx>.

92 See press release of 22 July 2015, *ibid* at para 4.

This pilot project has been welcomed by the legal profession.[93] It remains to be seen how it will pan out.[94]

C. *The Discretion to Exclude Improperly Obtained Statements*

A statement obtained by means of a threat, an inducement or a promise, or by oppression, is inadmissible under the legal rules discussed above. It must be excluded.[95] Even in the absence of any of these vitiating factors, and even when there is no rule of law that renders the statement strictly inadmissible, the court has discretion to exclude it in exceptional circumstances.

It is important to put the matter in context. Statements are taken by the police with a view to using them as evidence at the trial. Admission of these statements is a serious departure from fundamental norms of a common law adversarial system. The general rule is that evidence must be given orally in court and directly by the relevant person. At a trial, great care is taken to ensure that the evidence is obtained and recorded in a fair, open and accurate manner. For example, during an examination-in-chief, no leading question is permitted. This is so that counsel cannot try to put words into the witness's mouth. And the evidence is recorded before a judge who can be trusted to be an unbiased official. Further, the trial is open to the public.

None of these and other safeguards exist when the prosecution seeks to admit in evidence a written statement obtained by the police. The process by which the statement was obtained is not open to public scrutiny, supervised by a judge or conducted in the presence of a lawyer, and police interrogation does not proceed in the fair and controlled way that examination of witnesses is conducted at a trial.[96] The incriminating statement recorded by the police is produced in court as pre-constituted evidence. It is brought ready-made before the judge. To stretch an analogy with civil litigation, the situation is akin to giving one side the power to question the opposing litigant secretly and in the absence of his lawyer, and to have his answers put in written form—almost serving as the criminal equivalent of an affidavit of evidence-in-chief—and it is then used against him at the trial as substantive evidence of guilt.

---

93 However, the exclusion from the programme of the Corruption Practices Investigation Bureau ("CPIB") has been criticised: "Lawyers want CPIB included in video-recording pilot programme", *The Business Times* (20 August 2015).

94 See speech by the Attorney-General, Mr V K Rajah, SC, at the Opening of the Legal Year 2016 (11 January 2016) at 15, online: Attorney-General's Chambers <https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/AG's%20OLY%20Speech%202016%20(As%20Delivered)%20(4).pdf>:

> My prosecutors have started work with police and narcotics officers on a pilot scheme to video record the statements given by accused persons. Video recording has the potential to improve the accuracy and reliability of an accused person's statements when they are eventually produced in court. The experience we gain on this pilot will help policymakers to set the future direction in this area.

95 *Public Prosecutor v Ismil bin Kadar* [2009] SGHC 84 at para 19.

96 Previously, for a statement to be admissible, it had to be taken before a magistrate. The provision empowering the magistrate to record a statement still exists (see s 280, *CPC*, *supra* note 2) but is practically redundant. This change is welcomed by some (*eg*, Chan, "Justice to Crime Control", *supra* note 20 at 14) and criticised by others (*eg*, K S Rajah, "Down Memory Lane", *Singapore Law Gazette* (October 2007) at 34, 35; Harpreet Kaur Dhillon, "Interview with Criminal Lawyer, Mr Subhas Anandan", *Juris Illuminae* (April 2008), vol 4, issue 5 at 4).

A further contextual consideration is that the courts tend to give confession evidence a lot of weight.[97] In the United States, Professor Leo and his colleagues have observed that:

> [T]he police, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt. Juries tend to discount the possibility of false confessions as unthinkable, if not impossible. False confessions are viewed as contrary to common sense, irrational, and self-destructive.[98]

Studies have shown that innocent persons do confess to crimes which they did not commit.[99] As a professor of law and psychology puts it, the "potential of interrogations to generate false confessions is now indisputable."[100] Judges may be overly influenced by confession evidence if they are not adequately aware of the many possible causes of false confessions.

For all of these reasons, it is important to regulate the police recording of statements. Rules should be put in place to offer some assurance that the statements are accurate and fairly obtained. Currently, only a minimal set of procedure is spelt out in the *CPC*. The law requires that the police put the statement in writing and read it over to the suspect. If he does not understand English, the police must get it interpreted for him in a language that he understands. They must also get the statement signed

---

97 *Cf Lee Chez Kee v Public Prosecutor* [2008] 3 SLR (R) 447 at para 102 (CA): "[the] admissibility [of a confession] is premised on the fact that it is a statement made against the interest of its maker and hence inherently more reliable." See also *Oh Laye Koh (HC)*, *supra* note 60: "[t]he grounds for the reception of a confession or admission is that if a man says voluntarily what is against his interest, it is likely to be true".

98 Richard A Leo *et al*, "Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century" (2006) Wis L Rev 479 at 485.

99 See *eg*, Saul M Kassin and Gisli H Gudjonsson, "True Crimes, False Confessions: Why Do Innocent People Confess to Crimes They Did Not Commit?" (2005) 24 Scientific American Mind 32. In *Muhammad bin Kadar*, *supra* note 75, the Court of Appeal set aside the conviction of one of the accused persons. The conviction had been based on incriminating statements that were of doubtful reliability. For another high profile example of a confession which turned out to be false and which resulted in the withdrawal of a murder charge against a person who, by then, had already spent two and a half years in remand, see "Court frees innocent man after 2 ½ years' jail", *The Straits Times* (18 March 1993); "Some questions about Samat's case", *The Straits Times* (24 March 1993); "Prosecutor notified of alibi 23 months after Samat's arrest", *The Straits Times* (30 March 1993); *Parliamentary Debates Singapore: Official Report*, vol 61 at cols 14, 15 (12 April 1993). When asked why he had confessed, the accused told the press: "I was scared. It's easy for people to ask why but I am the one who suffered in the CID [Criminal Investigation Department]." In declining to elaborate on how he suffered, he stated: "You never know what you are going to face in the CID." ("Confession based on crimewatch", *The Straits Times* (18 March 1993)). During the second reading of the *Criminal Procedure Code Bill* in 2010, Mr Hri Kumar Nair, a lawyer by profession, stated (*Parliamentary Debates Singapore: Official Report*, vol 87 at col 456 (18 May 2010)):

> [B]eing hauled up by the Police is a harrowing experience. The individual is subject to an alien, hostile environment. It would be naïve to assume that innocent people will not make mistakes after hours or days of questioning... There are those who may say anything to make the unpleasant experience end, and to return to their families, or may simply be confused. Indeed, I have spoken to highly educated people who tell me that... they cannot remember what they told the Police, or what is in the statement they signed, even within hours of being released.

100 Dan Simon, *In Doubt—The Psychology of the Criminal Justice Process* (Cambridge: Harvard University Press, 2012) at 121.

by him.[101] Compliance with these requirements is by no means onerous. The aim is to ensure that no word is put into the suspect's mouth, that his words are not twisted against him, that he has an opportunity to vet and correct the recorded statement, and so forth. This set of procedural requirements is a poor substitute for the slew of safeguards that exist when evidence is taken at the trial itself. It is the only safeguard that exists (apart from the current experimentation with video-recording) to protect the integrity, fairness and reliability of the statement-taking process.

The courts have not demanded strict adherence to the legally prescribed procedure as a condition of admissibility. For example, in *Panya Martmontree v Public Prosecutor*,[102] the Court of Appeal held that even though the disputed statement (which was taken by the police under the precursor of the current s 22 of the *CPC*) was not read back to the accused or signed by him, it remained admissible. Since 2011, this general approach of not letting procedural lapses affect admissibility has been statutorily endorsed. Explanation 2(e) to s 258(3) of the *CPC* now provides:

> If a statement is otherwise admissible, it will not be rendered inadmissible *merely* because it was made in any of the following circumstances... (*e*) where the recording officer or the interpreter of an accused's statement recorded under section 22 or 23 *did not fully comply* with that section.[103]

It is arguable from the words emphasised above and from certain remarks made in Parliament when this provision was debated that Explanation 2(e) should be confined to *merely* minor or technical breaches. While admissibility is not affected where the police did not "*fully comply*" with the prescribed procedure, the conclusion may be different if the police did not bother to comply with the procedure *at all* or where the procedural non-compliance was grave.[104]

In exceptional circumstances, procedural breaches have led to the accused's statement being excluded. In *Public Prosecutor v Lim Kian Tat*,[105] the prosecution sought to rely on a written statement containing the "gist" of what the accused had allegedly told a police officer almost three years earlier. No contemporaneous record of the statement was kept. The officer relied entirely on his memory in recounting what was said. The High Court was not satisfied beyond reasonable doubt that the accused had made the statement attributed to him and accordingly excluded the evidence.

---

[101] *CPC*, *supra* note 2, ss 22(3) and 23(3).

[102] *Supra* note 68 at para 6. The Court of Appeal cited an earlier unreported judgment of the Court of Appeal in *Vasavan Sathiadew v Public Prosecutor* [1992] SGCA 26. See also *Tsang Yuk Chung*, *supra* note 17 at paras 13-17 (a statement obtained under the precursor of s 23 of the *CPC* was held to be admissible even though the prescribed notice containing the charge was not explained to the accused).

[103] *Supra* note 2 [emphasis added].

[104] Some support for this interpretation can be derived from the parliamentary debates on the amendments to the *CPC* in 2010. The Minister of Law, when challenged on the desirability of Explanation 2 to s 258(3), explained (*Parliamentary Debates Singapore: Official Report*, vol 87 at cols 555, 556 (19 May 2010)):

> [Explanation 2(e)] covers the situation where the recording officer fails to observe technical requirements during the questioning. Mere technical flaws will not render the statements obtained inadmissible if, on the other hand, as a result of improper or recording, the accused contends the statement is not his, or that the statement is not voluntarily.

[105] *Supra* note 64 at para 29, first oral statement.

Another instructive case is *Public Prosecutor v Dahalan bin Ladaewa*.[106] The accused was charged with drug trafficking. He had little formal education, having left school at a young age and started work as a cleaner. The police sergeant interviewed the accused in English without getting the services of a translator. He claimed that the accused was sufficiently proficient in English when clearly he was not. The sergeant made notes of the interview on a piece of paper because he did not carry his police pocket book with him as he was required to do under police internal rules (which are known as Police General Orders or "PGO"). The relevant PGO required pocket books to be carefully maintained. These directions were disregarded.

It was about four hours after the interview that the sergeant entered an "expanded" version of the alleged statement in his police pocket book. He then destroyed the paper on which he had taken notes. The statement was not read back to the accused. He was not asked to confirm its accuracy, nor was he asked to sign it. The judge found that there was "a flagrant disregard" for the procedure set out in the *CPC*. This was not a case of a mere technical breach. It was also noted that the recorded statement contained "difficult" English words that the accused could not possibly have used, such as "sachets of powdery substance".[107]

According to Justice Rajendran, it did not follow from the absence of inducement, threat or promise that the court was bound to admit the recorded statement. The admissibility provision—then s 122(5) of the *CPC* which is now s 258(1)—stated that the statement "shall be *admissible*" and not that it "shall be *admitted*". "[T]he court was vested with a discretion to admit or reject such statements" even if there was no inducement, threat or promise by the police.[108] The judge was perturbed by the behaviour of the police sergeant and disapproved of the prosecutor's attempt to get the statement admitted. He excluded the evidence with this forceful message:

> There is... good reason why the Legislature has in s 121 [now s 22 of the *CPC*] spelt out the manner in which statements are to be recorded. Similarly, there is good reason why the Commissioner of Police... issued General Orders specifying in lucid detail the manner in which the pocket books are to be kept. The fact that s 122(5) [now s 258(1) of the *CPC*] provides that oral statements are admissible... should not be treated as licence for police officers to ignore the PGO and the provisions of s 121 and render these safeguards meaningless.
>
> Where, as in this case, the violation of these provisions was flagrant, it was incumbent on the Prosecution to either offer some reasonable explanation for such violation or desist from attempting to adduce statements taken in disregard of these provisions as evidence before the court... Failure to observe this principle results in very considerable time being unproductively taken up in conducting trials-within-trials. It would be far better if these energies were directed into a more thorough investigation of the case against the accused.[109]

---

[106] [1995] 2 SLR (R) 124 (HC) [*Dahalan*]. The High Court judgment was upheld on appeal to the Court of Appeal: *Public Prosecutor v Dahalan bin Ladaewa* [1995] SGCA 87. The Court of Appeal stated that it "agreed entirely" with Rajendran J and, on the basis that it could do no better, quoted extensively from his judgment. For this reason, our discussion will focus on the High Court's judgment.

[107] *Dahalan*, *ibid* at paras 15 and 79 respectively.

[108] *Ibid* at para 27.

[109] *Ibid* at paras 84, 85.

In exercising the exclusionary discretion, Justice Rajendran took into account a number of factors, including the absence of an interpreter and the irregularities in record-keeping.[110] On one interpretation of *Dahalan*, it stands for the principle that the court may, at its discretion, exclude a statement taken from the accused where it was obtained by the police in flagrant or wilful disregard of the relevant rules and procedure. However, later authorities have declined to read *Dahalan* as authority for such a broad principle and adopted the position that impropriety in the manner of obtaining a statement does not of itself give the judge discretion to exclude it.

The leading authority is *Muhammad bin Kadar v Public Prosecutor*.[111] Ismil was charged (together with his brother) with murder. He was arrested on the day the dead body was found. His arrest was not in connection with the murder but on suspicion of having stolen a mobile phone. The police discovered that he lived one floor below the deceased's flat. Curiously, this somehow prompted them to think that Ismil might have been responsible for the murder. Ismil allegedly confessed to the crime in a number of statements obtained by the police.

Two of his statements were taken under suspicious circumstances.[112] Ismil was brought to the crime scene in the morning of the day after his remand. The first statement was allegedly made to Senior Station Inspector Zainal ("Z") alone in the police car. Z had told his two colleagues to leave the car so that he could speak to Ismil alone. No reason was given for this and the Court of Appeal found Z's behaviour puzzling.[113] Z recorded Ismil's confession on a slip of paper. On this paper, he recorded Ismil as having said that he had "slashed" the victim. Z did not record this statement immediately in his field diary as he should have done. He did not carry the diary with him and this was in contravention of a PGO. His excuse was that he was "just assisting in the investigation". If this was true, it is difficult to see why he had asked his colleagues to leave and why he chose to question the suspect on his own. Z recorded the first statement in his field diary hours later, after he had lunch. In the field diary, he replaced the word "slashed" with the word "stabbed".

The second statement was made later on the same day at a police centre. Z interviewed Ismil alone from 11.30am to 11.50am. He did not immediately put down in writing what Ismil had allegedly said on this occasion. As with the first statement, it was only after he had lunch that Z recorded the second statement in his field diary. No "warning was administered to Ismil before [either of] these statements were recorded. Further, the statements were neither read back to him nor signed by him."[114] No acceptable explanation was offered for these lapses.[115] The Court of Appeal held that the statements should have been excluded by the trial judge in the exercise of his discretion.

The judgment contains a number of key rulings. First, it was held that the court has "a common law discretion to exclude voluntary statements that would otherwise

---

[110] *Ibid* at para 86. Another consideration was that the statement was taken when the effect of the erimin consumed by the accused was at its peak: *ibid* at para 74.

[111] *Muhammad bin Kadar*, *supra* note 75. On the evolution of the discretion, see Ho Hock Lai, "'National Values on Law and Order' and the Discretion to Exclude Wrongfully Obtained Evidence" [2012] J Commonwealth Crim L 232.

[112] These were his first and second "long" statements taken under s 22 of the *CPC*, *supra* note 2.

[113] *Muhammad bin Kadar*, *supra* note 75 at para 143.

[114] *Ibid* at para 16.

[115] *Ibid* at para 145.

be admissible... where the prejudicial effect of the evidence exceeds its probative value".[116] This discretion can be traced to the House of Lords' decision in *R v Sang*.[117] According to the Court of Appeal, "the discretion exercised by Rajendran J in *Dahalan* was none other than this exclusionary discretion."[118]

Secondly, the court should not exclude a statement in the exercise of this discretion merely because of the manner in which it was obtained. It is proper to exercise this discretion only where the procedural breach results in the evidence being more prejudicial than probative.[119] The Court of Appeal expressly disavowed any "disciplinary function" in the discretion. It stressed that the exclusion of evidence was not to "discipline the wrongful behaviour of police officers... or the Prosecution."[120]

The first two points are complementary. In grounding the exclusionary discretion on the prejudice that admitting the evidence will cause to the accused *at the trial*, the judiciary can claim that it is merely keeping its own house in order; and in disavowing any disciplinary function, the executive is assured that its turf is not being intruded upon. Nevertheless, the exclusion of evidence may have incidental effects going beyond the trial. Hope was expressed that the discretion would have these salutary consequences:

> [A] vigilant emphasis on the procedural requirements in the recording of statements can have a positive effect on the quality of such evidence generally. By making it clear that non-compliance with the required procedures could actually weaken the Prosecution's case against an accused person, we hope to remove the incentive for such non-compliance on the part of police officers. This will help ensure that all evidence in the form of written statements coming before the court will be as reliable as possible.[121]

Thirdly, the recording procedure prescribed in the *CPC* and the practices set out in PGOs serve as safeguards of reliability. A serious breach of these rules may undermine the reliability of the recorded statement, resulting in the evidence having low probative value.[122] At the same time, the prejudicial effect of the evidence may be high in the sense that admitting the statement will expose the accused to the risk of it being given more weight than it deserves. The risk comes from the general "aura of reliability" possessed by formal statements recorded by the police. This "aura of reliability" is misleading for a particular statement where it was not obtained, as it should have been done, "under a set of strict procedures strictly observed by a trustworthy officer well-trained in investigative techniques."[123]

Fourthly, if the prosecution seeks to admit in evidence a statement obtained by a police officer in violation of the relevant rules and procedure, the prosecution

---

116 This removed the uncertainty created by the High Court judgment in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR (R) 239 (HC) which came close to denying that there was any judicial discretion to exclude evidence.

117 [1980] AC 402 (HL).

118 *Muhammad bin Kadar*, *supra* note 75 at para 53.

119 But see the discussion on *ANB v ANC* [2015] 5 SLR 522 (CA) below.

120 *Muhammad bin Kadar*, *supra* note 75.

121 *Ibid*.

122 *Ibid* at para 56.

123 *Ibid* at para 58.

bears the burden of proving that the evidence is more probative than prejudicial. To show that the evidence is probative, the prosecution will have to offer some reasonable explanation for the procedural irregularity that is sufficient to re-establish confidence in the reliability of the statement.[124] The more deliberate or reckless the non-compliance, the more difficult it will be for the prosecution to offer a sufficiently cogent explanation.[125]

Applying these principles to the present case, the Court of Appeal expressed doubt as to the bona fide of Z and the accuracy of the statements recorded by him. His procedural non-compliance was deliberate and not due to carelessness or operational necessity. Z, who was a very experienced officer, failed to observe basic requirements.[126] No plausible explanation was given for the "manifest irregularities".[127] The prosecution failed to show that the probative value of the statements outweighed their prejudicial effect. The trial judge ought to have excluded both statements in the exercise of his discretion.

Professor Hor reads this decision and other developments as heralding "an impending spring" where we will see "the use of broader and more abstract values like fairness to effect subtle changes in judicial attitudes".[128] There is as yet no known judgment in which the court has cited *Muhammad bin Kadar* and exercised the discretion against the prosecution.

III. Conclusion

Official discourse on the criminal process in Singapore tends to draw on crime control ideology.[129] It is used for two purposes. The first is to justify erosion or weak enforcement of rights. The crime control ideology takes the suppression of crime as the dominant aim and is premised on an assumption about the impact of rights on crime control. To be strong on the suspect's rights is to be soft on crime, and, conversely, those rights needs to be weakened in order to be effective in crime control. This view is poignantly encapsulated in the following remark by a former Prime Minister: "In criminal law legislation, our priority is the security and well-being of law-abiding citizens rather than the rights of the criminal to be protected from incriminating evidence."[130]

The priority given to order and security has also been officially expressed on many other occasions. For example, in the National Report that Singapore submitted for the Universal Periodic Review in 2015,[131] it is stated that the "Government considers

---

[124] *Ibid* at para 61.

[125] *Ibid* at para 62.

[126] *Ibid* at para 140.

[127] *Ibid* at para 147.

[128] Michael Hor, "The Future of Singapore's Criminal Process" (2013) 25 Sing Ac LJ 847 at 849, 872.

[129] See Chan, "Singapore Model", *supra* note 1 at 438 ("If anything has been made clear in Singapore, it is that crime control has always been and is a high priority on the Government's action agenda"); Hor, "Singapore's Innovations", *supra* note 1 at 28 ("official justifications of Singapore's criminal justice system appeal to Packer's 'crime control' model").

[130] "Address by the Prime Minister, Mr Lee Kuan Yew" [1990] 2 Sing Ac LJ 155 at 155.

[131] United Nations Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* (28 October 2015), online: Official Document System of the United Nations <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/245/91/PDF/G1524591.pdf?OpenElement> ("2015 National Report").

the safety and security of the person to be a fundamental human right, without which other rights cannot genuinely be enjoyed"[132] and that the "cardinal objective of our criminal justice system is to deter crime and protect society from criminals."[133] The National Report submitted for the earlier cycle of the Universal Periodic Review in 2011 stressed the need to subject "individual rights. . . to legal limits in order to protect the rights of others, as well as to maintain public order and general welfare."[134] The fact that Singapore has a low crime rate,[135] and the sense of security that her residents enjoy, are often cited in vindication of encroachments on rights relating to criminal justice.[136]

The quotation above speaks of the "rights of the criminal"; to be accurate, the rights belong to the person suspected or accused of a crime. The claim that priority is not given in Singapore to "the rights of the [suspect or accused person] to be protected from incriminating evidence" is borne out by the study in Part II. As we saw, pressure is brought to bear on the suspect to incriminate himself by permitting an adverse inference to be drawn from his silence. He is denied access to counsel during police questioning and there is no duty to inform him of his rights. While the law requires exclusion of any statement that has been extracted from him "involuntarily" or under "oppression", it is for a variety of reasons difficult to succeed in a challenge on admissibility.

The desirability of order and security cannot be gainsaid. But it does not follow that we should therefore make it as easy as possible for the police to extract confessions from suspects. In the first place, the effectiveness of police investigation depends on the truth of the confessions and there have been instances where they have turned out to be false.[137] In any case, effectiveness in securing reliable evidence is not all that matters to us. Certain methods of obtaining incriminating statements are objectionable, independently of its efficacy in extracting the truth. In the recent incident where a fourteen-year-old boy apparently committed suicide a few hours after his release from police questioning, certain concerns were raised that were not about the truth of the confession that the police had gotten from him but about how he might have been treated by them.[138] This was a special case involving a minor. But there need also to be restrictions on how adult suspects may be treated. It is not anything goes for those who are factually guilty. Torture should never be

---

132 *Ibid* at para 100.

133 *Ibid* at para 101.

134 United Nations Human Rights Council, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1* (2 February 2011) at para 110, online: Official Document System of the United Nations <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/105/40/PDF/G1110540.pdf?OpenElement> ("2011 National Report").

135 The 2015 National Report, *supra* note 131 at para 100 cited the Economist Safe Cities Index 2015 which ranks Singapore as the world's second safest city after Tokyo. The 2011 National Report (*supra* note 134 at para 119) reported that "Singapore's crime rate is one of the lowest – 684 per 100,000 population in 2008, with 111 violent crimes per 100,000 population – despite a relatively small police force."

136 See *eg*, Minister for Law, K Shanmugam, "The Rule of Law in Singapore" [2012] Sing JLS 357 at 360-361; 2015 National Report, *supra* note 131 at para 100. See also the speech by Mr K Shanmugam, Minister for Law and Second Minister for Home Affairs, at the New York State Bar Association Rule of Law Plenary Session (28 Oct 2009), online: Ministry of Law <https://www.mlaw.gov.sg/news/speeches/speech-by-minister-for-law-k-shanmugam-at-the-new-york-state-bar-association-rule-of-law-plenary.html>; Chan, "Singapore Model", *supra* note 1 at 434.

137 *Supra* note 99.

138 See text accompanying notes 79 and 80 above.

employed, whether or not it will yield the truth. This is an extreme example. The line of acceptable methods of extracting statements should be—and is—drawn well short of torture.[139]

The value choices that we face are complex. It is not a zero-sum game between protecting the rights of the suspect and suppressing crime.[140] We certainly want security from crime. As officials are wont to remind us, we want to feel safe walking alone in the street at all times. But other matters are also important to us. Even if there is a basis for thinking that the enforcement of a right or a rule will make it less easy for the police to "secure... evidence bearing upon the commission of crime",[141] it may yet rest on legitimate grounds such as our interest in protecting "the individual... from illegal invasions of his liberties by the authorities",[142] "the public interest in promoting the obtaining of evidence by way of legally prescribed methods",[143] our interest in the reliability of statements recorded by the police, in preventing wrongful conviction of the innocent, in public accountability of officials, and, not least, in basic fairness and decency in the treatment of persons. Erosion or weakening of a suspect's right cannot therefore rest on the bare assertion that strict insistence on the right will hinder the police in getting incriminating statements out of the suspect.[144] It is "fanatical" to prioritise crime control over all other interests.[145]

There is a second purpose for which crime control ideology has been used. This is to justify judicial restraint from 'excessive' interference with the executive enforcement of the criminal law. Judges should not 'unduly' hamper the police in the execution of their job. On Packer's crime control model of the criminal process, trust is generally placed in the competence of the police and prosecutors. This results in a "presumption of guilt" where there is no pressing need for judicial intervention or oversight.[146]

Judicial restraint is discernible in decisions on what counts as a threat or inducement for the purposes of the voluntariness test, and in the high threshold that has been set for the doctrine of oppression to apply. Judicial restraint is also evident in restricting the exclusionary discretion to situations where admitting a statement will likely have a prejudicial effect at the trial. By limiting it in this way, the judiciary is grounding the discretion on an assessment of probative value, and if anything falls

---

[139] Alleged practices of mistreating persons detained for questioning by the Corrupt Practices Investigation Bureau were reported in "Ways to make you talk...", *The Straits Times* (8 April 2007) and "Interrogation techniques designed to inflict mental and physical torture and break the toughest minds", *The Straits Times* (22 April 2007).

[140] *Cf* John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989) at 159:

> Empirically, it would seem a nonsense to suggest that we must choose between a free society and a low-crime society... If it were the case that the successful delivery of punishment was the way to reduce crime, we would expect totalitarian states to have less crime because they can pursue punitive policies more aggressively. But we know that in fact more punishment is not the route to crime control.

[141] *Cheng Swee Tiang v Public Prosecutor* (1964) 30 MLJ 291 at 293.

[142] *Ibid*.

[143] *ANB v ANC* [2015] 5 SLR 522 at para 30 (CA).

[144] See Ho, "Recent (Non-)Developments", *supra* note 74.

[145] Packer, *supra* note 1 at 154.

[146] *Ibid* at 160.

within the judicial domain, it is the weighing of evidence. As we saw in *Muhammad bin Kadar*, the Court of Appeal stated that the wrongfulness of the method by which evidence was obtained is not in itself a ground for exercising the discretion to exclude. This may be seen as a disavowal of any intention to intrude into the executive sphere.

There are, however, recent and tentative signs in *ANB v ANC*[147] of greater willingness to exercise the discretion in civil disputes. This case involved an application for an interim injunction to restrain the applicant's wife from making use of information obtained allegedly in breach of confidence from his personal computer. The wife sought to adduce the information as evidence in their divorce proceedings. Rejecting the view taken by the judge below, the Court of Appeal held that the decision turned on the law of breach of confidence and not on the law of evidence. Nevertheless, it took the opportunity to acknowledge, in *obiter dicta*, that the inherent discretion to exclude evidence exists not only in criminal proceedings but also in civil disputes. It is doubtful that this extension of the discretion is supported by (English) common law.[148] Leaving this difficulty aside, the Court of Appeal suggested that "there are good reasons why [the discretion] may. . . be needed to be exercised more robustly. . . in civil proceedings".[149] This is due partly to "the public interest in promoting the obtaining of evidence by way of legally prescribed methods".[150] The Court of Appeal stressed that "the respecting of. . . rights and rules is something which is expected when one is living in a civilised society where the rule of law (and not of the jungle) must prevail."[151] Surely these considerations are just as applicable in the criminal context; indeed they should weigh even more heavily there given that, in the words of the Court of Appeal, "the life and liberty of the accused are at stake."[152] There is equal if not greater public interest in police officers respecting the law—and the rule of law—in procuring evidence.[153] Professor Pinsler believes that this case may "lay the ground for the extension of the scope of the discretion in the criminal field".[154] In a careful and detailed analysis, he argues that the principle of discretionary exclusion should not be limited to the prejudicial effect of evidence at the trial but should extend to situations where the manner of obtaining the evidence was so improper that reliance on it by a court would compromise the integrity of the judicial process. From the realist perspective, the development of the discretion in this direction will require something of an ideological shift in the criminal realm where the relation between state and individual is brought more immediately into focus than in a civil dispute.

Strands of crime control ideology have figured substantially in explanations of the need for judicial restraint in criminal cases. Indeed, in *ANB v ANC*, the Court

---

147 *ANB v ANC*, *supra* note 143.

148 See *Helliwell v Piggott-Sims* [1980] FSR 356 at 357; Rosemary Pattenden, "The Discretionary Exclusion of Relevant Evidence in English Civil Proceedings" (1997) 1 Int'l J Evidence & Proof 361.

149 *ANB v ANC*, *supra* note 143 at para 30.

150 *Ibid* at para 30.

151 *Ibid*.

152 *Ibid*.

153 Ho Hock Lai, "The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence" (2016) 10 Crim L & Philosophy 109.

154 Jeffrey Pinsler, "The Court's Discretion to Exclude Evidence in Civil Cases and Emerging Implications in the Criminal Sphere—The Violet Thread of Justice" (2016) 28 Sing Ac LJ 89 at 93.

of Appeal considered it a factor "which may weigh against the court excluding the evidence" that it would deprive the prosecution of "evidence that could [be] used to convict" the accused.[155] This consideration was stated more explicitly in *Fung Yuk Shing v Public Prosecutor* where the Court of Appeal delivered this caution:

> Whilst it is true that judges must be vigilant at all times as to any irregularity or impropriety committed in the recording of statements from accused persons which might render such statements involuntary, it should also be noted that not every instance of conflicting evidence points ineluctably to an irregularity suggesting involuntariness. . . *[A]n overly legalistic attitude on the part of the courts would ultimately form "a clog on the proper exercise by the police of their investigatory function, and indeed on the administration of justice itself". Our concern is that our courts should be mindful of the pitfalls of such an attitude*.[156]

In *Seow Choon Meng v Public Prosecutor*,[157] the Court of Appeal, while acknowledging that overly vigorous or prolonged questioning may be oppressive, accepted that "[r]obust interrogation is. . . an essential and integral aspect of police investigation." Coupled with the desire not to form a "clog" on police investigation and pragmatic endorsement of "robust interrogation" is judicial trust in police professionalism. In *Public Prosecutor v Sng Siew Ngoh*,[158] the High Court remarked:

> 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.[159]

All three of the immediately preceding cases were decided in the 1990s. Judicial views may differ and evolve. As we saw, there have been instances where the courts have not hesitated to exclude statements obtained by law enforcement officers under egregious circumstances. Cases that stood out in the earlier discussion were *Dahalan*,[160] and recently, *Azman bin Mohamed Sanwan*[161] and *Muhammad bin Kadar*.[162] These cases demonstrated the court's willingness to hold the executive to due process by excluding evidence that was obtained in serious violation of the governing rules and regulations; at least, this was arguably the effect of the decisions

---

155 *ANB v ANC*, *supra* note 143 at para 29.

156 [1993] 2 SLR (R) 771 at para 19 (CA) [emphasis added]. The quotation within this quotation is from the judgment of Lord Hailsham in *Director of Public Prosecutions v Ping Lin* [1975] 3 All ER 175 (PC).

157 [1994] 2 SLR (R) 338 at para 33 (CA).

158 [1995] 3 SLR (R) 755 at para 26 (HC).

159 Of the judge who made the above remark, a prominent criminal lawyer wrote in his last autobiography that (Subhas Anandan, *It's Easy to Cry* (Singapore: Marshall Cavendish, 2015) at 134):

> He gave the impression that all accused persons who stood before him were guilty; otherwise they wouldn't be there in the first place. He said many times from the Bench, 'The Police don't simply charge anyone for no reason. The [Deputy Public Prosecutor] doesn't come to court to prosecute for nothing. There must be some strong evidence against the accused person.'

160 *Supra* note 106.

161 *Supra* note 72.

162 *Supra* note 75.

even though the exclusion has been explained in terms of the evidence being more prejudicial than probative.

So far as there is a judicial inclination to keep out of the way of the police and not to lay down standards that will unduly tie their hands, it originates from trust in their professionalism. It also rests on the belief that allowing them leeway in the treatment of suspects increases investigative efficiency and contributes to the goal of suppressing crime. However, there is some circularity in this reasoning. As stressed by the Court of Appeal in *Muhammad bin Kadar,* what makes the police trustworthy—specifically, what gives the statements recorded by them the "aura of reliability"—is the fact that they are bound in the process by certain rules and standards. The exclusion of statements obtained in serious breach of those rules and standards have been motivated mainly by concerns about the unreliability of the evidence obtained by the police and their flagrant disregard of the governing procedure. Conduct evincing disrespect of the governing rules and procedure undermines trust and confidence in the police and the employment of unreliable methods of procuring evidence cannot advance the cause of apprehending criminals.

A more fundamental issue is the proper role of the judiciary within the constitutional framework of the separation of powers and a system of checks and balances.[163] On one conception of the role of the criminal court, it is "to stand between the state and its citizens" and protect them from being subjected to misuse of executive power.[164] We see this role most prominently in the presumption of innocence; it is a doctrine that requires the court to hold the executive to account and to acquit the accused unless and until it is proved beyond reasonable doubt and on admissible evidence that he is guilty as charged.[165] The same may be argued of the rules governing the admissibility of statements. Stated broadly, the prosecution is allowed to support its quest for a criminal conviction by relying on a self-incriminating statement of the accused only if it was not obtained by the police through wrongful means. It is contentious where the line is to be drawn between judicial over-reaching, involving undue incursions into the executive sphere, and the judicial duty to uphold legal rights and maintain the rule of law. A delicate balance has to be struck between keeping the police in line and staying out of their way. Informed debate is by-passed if we simply pledge uncritical allegiance to a simplistic ideology of crime control.

---

[163] See generally Ho Hock Lai, "The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence" (2016) 10 Crim L & Philosophy 109.

[164] *R v Looseley* [2001] WLR 2060 at para 19 (HL) (Lord Nicholls).

[165] See Ho Hock Lai, "The Presumption of Innocence as a Human Right" in Paul Roberts & Jill Hunter, eds, *Criminal Evidence and Human Rights—Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) at 259-281. The presumption of innocence was lauded as the "cornerstone of the criminal justice system" in *XP v Public Prosecutor* [2008] 4 SLR (R) 686 at para 90 (HC).