CONFESSION, CONFIRMATION AND RESURRECTION: THE RESCUE OF INADMISSIBLE INFORMATION TO THE POLICE

There is, at common law, a doctrine "as old as the modern confession rule itself",[1] which Wigmore[2] called the doctrine of confirmation by subsequent facts and which Cowen and Carter said "might be more felicitously called the doctrine of confirmation by consequently discovered facts".[3] Whatever this doctrine may be called, the common law is admittedly confused and uncertain.[4] In the Evidence Acts of Singapore and Malaysia,[5] the doctrine is seemingly codified in section 27, but section 27 is not free from difficulty either. It is proposed in this article to examine the meaning and scope of the doctrine as expressed in this provision. It is the writer's contention that this provision, although often involved in cases where a statement to the police is excluded from evidence, is equally often misunderstood.

THE RATIONALE OF THE DOCTRINE

The classic notion was that the reason for the exclusion of confessions was their untrustworthiness. In the words of Wigmore, "The Doctrine was that where, in consequence of a confession otherwise inadmissible, *search is made and facts are discovered which confirm it* in material points, the possible influence which through caution had been attributed to the improper inducement is seen to have been nil, and the confession should be accepted".[6] Thus the confession (or at least so much of it as is confirmed) is made admissible because of its trustworthiness (or reliability). This rationale however, admittedly loses much of its force in the light of more modern rationales for the exclusion of confessions — primarily, deterrence of official misconduct in obtaining confessions (the 'disciplinary' principle) and respect for the individual's constitutional and other rights (such as the privilege against self-incrimination and inviolability of one's person or property). These are all facets of the so-called 'protective' principle.

Sections 25 and 26 of the Indian Evidence Act, (from which Singapore's and Malaysia's Acts are derived) appear to be clearly founded on the 'disciplinary' principle, and not on unreliability, on which, rather, section 24 seems to be founded. Section 24 embodied the 'voluntariness' principle as such. However, sections 25 and 26

1 Z. Cowen and P.B. Carter, *Essays on the Law of Evidence* (1956) Chapter II (Confessions and the Doctrine of Confirmation by Subsequent Facts), p. 62.
2 Wigmore, *Evidence in Trials at Common Law* (Chadbourn Revision, 1970), Vol. III, s. 856.
3 *Op. cit*., p. 62.
4 *Ibid*., at p. 63.
5 Evidence Act, Cap. 5 (Singapore Statutes, Revised ed. 1970); and Evidence Act, 1950 (Laws of Malaysia, Act 56 (Revised 1971)).
6 Wigmore *(supra),* Vol. III, s. 856, p. 550. (Italics are Wigmore's).

(as well as section 27) were in fact lifted out of the existing Indian Code of Criminal Procedure, Act XXV of 1861 (as amended by Act 8 of 1969) and transferred, almost *verbatim,* to the Evidence Act. Sir James Fitzjames Stephen, the Indian Evidence Act's draftsman, states in his *Introduction* to the Act that "these provisions were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody".[7] Section 27 appeared to be a proviso to either section 26 alone or to both sections 25 and 26, or possibly (although probably not so intended by the draftsman) to all three of sections 24 to 26.

What then is the rationale of section 27? Is it to admit otherwise inadmissible parts of statements by the accused on the basis of their trustworthiness or on the basis that their admission is necessary to the intelligibility of any evidence of "facts discovered" in consequence of the statement being made? If. as has been supposed, the practice of torture by the police was widespread in India and *all* statements to the police should thereafter be regarded as inadmissible because of the likelihood that they were coerced and therefore unreliable, then section 27 can justly be regarded as an exception to the normal rule of exclusion because of untrustworthiness, and all evidence admitted under section 27 is reliable. How then does it become reliable? The answer can only be that it is reliable because it has been to that extent confirmed by the subsequent discovery of certain facts. It is this writer's contention that the words "relates distinctly to" in section 27 could easily be substituted by the words "is confirmed by" not because these two phrases are synonymous, but because there can be no logical reason *why* any information (which would otherwise be inadmissible) should be admissible only because such information (or part of it) "relates distinctly" to a fact thereby discovered, unless the information is to be treated as *reliable* on the basis that it has been confirmed by the discovery of that fact. Stephen presumably based *Article 23* of his *Digest of the Law of Evidence*[8] on Taylor. The first edition of Taylor[9] contains these words:

> "… the sounder doctrine seems to be, that so much of the confession as relates *distinctly* to the fact discovered by it may be given in evidence, *as this part at least of the statement is proved to have been true".*

The striking similarity of these words to the wording of section 27, except for the omission in the latter of the words italicised, may be noted. It is submitted that these omitted words contain the rationale

[7] James Fitzjames Stephen, *The Principles of Judicial Evidence (being an Introduction to the Indian Evidence Act),* Chapter III ("Irrelevant Facts"). Whitley Stokes, editor of *The Anglo-Indian Codes* (Vol. II, 1888) states in the introduction to his annotated Indian Evidence Act, that sections 25 and 26 were included in the Evidence Act because in India it was "necessary to prevent the police from torturing persons in their custody for the purpose of extracting confession" (p. 827). At p. 839, he adds that the Indian police were "far more corruptible" than the English police and were moreover "inclined to extract confessions by means of torture."

[8] The last paragraph of Article 23 reads:

> Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.

(Sir James Fitjames Stephen, *A Digest of the Law of Evidence* (12th ed revised), Chapter IV, p. 37).

[9] J.P. Taylor, *Treatise on the Law of Evidence* (First ed., 1848) s. 654, p. 612. (Italics in latter part of passage, mine).

of section 27 itself. What else can the rationale be? (The writer will return to the discussion of this "sounder" doctrine at a later stage in this paper).

The rationale of the doctrine of confirmation by subsequent facts is rooted in history. Sections 25-27 of the Evidence Act were, as was earlier stated, originally rules of criminal procedure in India governing the actions of police officers. However, no such rules existed in English Law.[10] At common law, confessions were governed by the voluntariness principle and by the caution (even before the advent of the so-called Judges' Rules), but were admissible otherwise. (The fact that they were made to police officers or were made whilst in police custody, was irrelevant to admissibility). Even if no caution had been given, a confession was still admissible if free and voluntary. Thus, the doctrine of confirmation was required only to admit parts of the *involuntary* confessions, as all other types of confessions were admissible.

It would appear, therefore, that in Evidence Act jurisdictions, section 27 was required to admit parts of *other* types of confessions as well, namely all those made to police officers or whilst in the custody of police officers (and not in the presence of a magistrate). There is even some authority[11] for the view that section 27 is *not* to be used to save any portion of an involuntary confession which is inadmissible under section 24, and should only be used as an exception to section 26, or to both sections 25 and 26. Be that as it may, there is no logical reason to maintain that the rationale of section 27 is appreciably different from the rationale of the classic doctrine of confirmation. Judicial statements in several cases on section 27, with regard to its rationale, are instructive.

It may be appropriate to begin with an early and rather curious case from the Federated Malay States (F.M.S.). In *P.P.* v. *John Alias Arulappan & Anor.*,[12] Cussen J., in the High Court at Selangor recorded his disagreement with the view stated in a learned Indian commentary on Evidence that the reason for admission under section 27 of the information or statement was that the discovery of the fact was a guarantee of the truth of the statement. Instead, he said:

> "In my opinion the principle, the reason for admissibility under that section is that the discovery of the fact is a sufficient guarantee or assurance of the *voluntary character* of the statement."

He thought that that was evident from an examination of the preceding sections (24, 25 and 26); and proceeded to admit that part of the statement of the second accused which related distinctly to the fact discovered as "a true and voluntary statement".[13]

Less than a decade later, however, the Judicial Committee of the Privy Council in a landmark case, on appeal from the Madras High Court, namely, *Pulukuri Kotayya & Others* v. *King-Emperor*[14] stated authoritatively that section 27 "seems to be based on the view

10 See Wigmore *(supra),* Vol. III, s. 847, fn. 10.
11 See first footnotes 23, 24 and 27, *infra.*
12 (1939) 8 M.L.J. 291.
13 *Ibid.*
14 (1947) 74 I.A. 65, at p.76 *(per* Sir John Beaumont).

that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowered to be given in evidence...." Another Privy Council case, an appeal from the Court of Criminal Appeal, Ceylon (now Sri Lanka) has put the issue beyond doubt. In *R.* v. *Murugan Ramasamy*,[15] Viscount Radcliffe, delivering the advice of their Lordships, said:

> "It is worthwhile to make the observation that the reason given for allowing it to be proved that an accused person gave information that led to the discovery of a relevant fact is not related in any special way to the making of a confession. It qualifies for admission any such statement or information that might otherwise be suspect on the ground of a general objection to the reliability of evidence of that type".

According to Viscount Radcliffe, section 27 envisages a situation in which the circumstances themselves vouch for the truth of certain statements made by an accused person even though they are made in conditions that would otherwise justify suspicion. What may be even more pertinent is His Lordship's acceptance of the explanation of the principle of section 27 as one "derived from the English common law and imported into the criminal law of British India by the legislators of the mid-nineteenth century".[16]

The reasoning in *Murugan Ramasamy* was fully endorsed by Raja Azlan Shah J. (as he then was) in *P.P.* v. *Er Ah Kiat*[17] and (by him again) in *Chandrasekaran & Ors.* v. *P.P.*[18] He was joined in this endorsement by Hashim Yeop A. Sani J. in *P.P.* v. *Toh Ah* Keat,[19] a recent (1977) decision.

In *Toh Ah Keat's* case, Hashim Yeop A. Sani J. took the opportunity also to disagree with the rationale of section 27 given by Cussen J. in *P.P.* v. *John Alias Arulappan & Anor.*[20] He affirmed that:

> "... if we look at the logic of the limitations prescribed under section 27 of the Evidence Act, it can be seen that the statement is admissible because the fact of discovery *rebuts the presumption of falsity* arising from the probability of it being made as a result of inducement or pressure. The discovery proves that not the whole but some portion of the statement given is true namely so much of the information as led directly and immediately to, or [SIC] the proximate cause of the discovery. Only such portion of the information is guaranteed by discovery and hence, only such portion of the information is admissible".[21]

We may therefore take it as settled that the rationale of section 27 is no different from that of the common law doctrine of confirmation by subsequent facts — namely, the trustworthiness of that part of the information that is confirmed by any facts discovered in consequence of the information. We may also add that section 27 is a departure from the common law[21a] insofar as it specifically permits the admission

[15] [1965] A.C. 1, at p. 15.
[16] *Ibid.*, at p. 14.
[17] [1966] 1 M.L.J. 9.
[18] [1971] 1 M.L.J. 153.
[19] [1977] 2 M.L.J. 87.
[20] (1939) 8 M.LJ. 291.
[21] *P.P.* v. *Toh Ah Keat,* [1977] 2 M.L.J. 87 at p. 89.
[21a] See *Tham Fatt* v. *R.* (1954) 20 M.L.J. 172, 173 where the Singapore High Court said that the practice of the witness stating that a discovery was made as a consequence of something the accused said, was "all wrong". But this is apparently the English practice: *U.K. Criminal Law Revision Committee, Eleventh Report* (1972), Cmnd. 4991, para. 69.

of a part of any statement or other information given to the police whilst in police custody by way of exception to sections 25 and 26, which appear to be based on a 'disciplinary' rather than a reliability principle; and that since the basis of section 27 admissibility must only be reliability, sections 25 and 26 are themselves based partly on the reliability principle (albeit couched in wording suggesting a disciplinary principle) owing to the peculiar circumstances found to prevail in the Indian police forces at the time. Malaysia and Singapore have more recently seen fit not to share the same suspicions of their police forces as the legislators of British India did and have modified their laws to make the admission of statements to the police the rule, provided that certain conditions, such as voluntariness or the giving of a caution, have been met.[22]

THE RELATIONSHIP BETWEEN SECTION 27 AND OTHER STATUTORY PROVISIONS

(a) *Section 27 and Sections 24-26 of the Evidence Act*

The original section 27 in the Indian Evidence Act 1872 was (and still is) couched as a *proviso* immediately after section 26. It began "*Provided that,* when any fact...." This gave rise in India to no less than *three* judicial views, and it would require some courage to say that the matter is now settled in India. One view is that section 27 is an exception to section 26 alone.[23] A stronger view is that section 27 is an exception to both sections 25 and 26.[24] The third view is that section 27 is an exception to all three preceding sections, namely sections 24 to 26.[25] A final view, albeit not a judicial one, is that section 27 applies to sections 25 and 26, but *not* section 24; so that if the original statement was involuntary, no part of it can, under any circumstances, be saved by the operation of section 27. Section 27, in other words, cannot be utilised to override section 24. Although there is strong Privy Council authority[26] for the first view, the Indian Law Commission[27] was of the view that the last approach was the best one to take, as a matter of policy. Perhaps this view is supportable since sections 25 to 27 all came from the older Indian Criminal Procedure Code of 1861's sections 148-50. Section 24, however, was a new provision.

In Sri Lanka, it appears that the question is not settled either. There, the wording of section 27 is in the form of a proviso, as with

22 For Malaysia, see Criminal Procedure Code, F.M.S. Cap. 6, (Reprint No. 1 of 1971, as amended and extended by Act A324, Schedule), s. 113(1) (as substituted by Act 324 in 1976) (voluntariness *and* caution required). For Singapore, see the Criminal Procedure Code, Cap. 113, (Reprint, 1980), s. 121, sub-ss. (1), (5). (voluntariness only).
Ss. 25 and 26 in both jurisdictions' Evidence Acts have been amended where necessary to bring them into line with the Criminal Procedure Code provisions cited. Ss. 25 and 26 are now virtually superseded by the Code provisions, if not completely otiose.

23 *Pakala Narayana Swamy* v. *King-Emperor* A.I.R. 1939 P.C. 47, 52.

24 *Pulukuri Kotayya* v. *King-Emperor* (1947) 74 I.A. 65; *K. Chinnaswamy Reddy* v. *State of A.P.* A.I.R. 1962 S.C. 1788.

25 *State of U.P.* v. *Deoman Upadhyaya* A.I.R. 1960 S.C. 1125 (*per* Hidayatullah J. at p. 1145); *State of A.P.* v. *Nagesu* A.I.R. 1966 S.C. 119 at p. 123. See, further, *Sarkar on Evidence,* (12th ed.), p. 287 and cases cited therein.

26 *Pulukuri Kotayya* v. *King-Emperor, supra,* fn. 24.

27 Law Commission of India: *Report No. 69* (May 1977) on the Indian Evidence Act, 1872, pp. 215-6.

the Indian Evidence Act. H.N.G. Fernando C.J., in the Court of Criminal Appeal of Ceylon (as it was then called) thought that section 27 was a proviso to both sections 25 and 26.[28] However, the Judicial Committee of the Privy Council in *Murugan Ramasamy*,[29] although not expressing an opinion on the point, gave section 27 a wide interpretation by saying "It qualifies for admission any such statement or information that might otherwise be suspect on the ground of a general objection to the reliability of evidence of that type".[30] This would be wide enough to cover section 24 of the Evidence Act and possibly any statements made under other statutes such as the Criminal Procedure Code. As Viscount Radcliffe also said that the principle of section 27 was "derived from the English common law", he could be taken to mean that section 27 could be used to save a part of an involuntary statement. This would be logical since at common law confirmation by discovery of subsequent facts was based on the reliability of part of the confession in question, and the doctrine was used to save parts of involuntary statements.

The Evidence Acts of Singapore and of Malaysia are both based on the Evidence Ordinance promulgated for the Straits Settlements and which came into force on 1st July 1893.[31] The predecessor of the present Evidence Act applicable in Malaysia — Act 56, Laws of Malaysia — was the Evidence Ordinance, No. 11 of 1950, Federation of Malaya, which was itself none other than the Straits Settlements' Evidence Ordinance as *adopted* in 1909 in the Federated Malay States.[32]

A look at the present Evidence Acts of Malaysia and Singapore reveals that the opening words of section 27 are *not* "Provided that...." These words have been omitted from the Acts of these two countries and, in fact, were omitted in the Straits Settlements' Evidence Ordinance when it was published in a revised edition in 1920.[33] However, the words of proviso had been included in the original Straits Settlements' Evidence Ordinance which was passed in 1893.[34] One can only surmise that these words were regarded as over-restrictive or otiose and were wisely dropped on the revision of the Ordinance in 1920.

What is the correct view on the scope of section 27 in Malaysia or in Singapore? We may first pray in aid the proposition that the Privy Council decisions of *Pulukuri Kotayya*[35] and *Murugan Ramasamy* [36] are binding in both Malaysia and Singapore although they were appeals from India and Ceylon respectively, in view of the case

28 *R.* v. *Sugathapala* (1967) 69 N.L.R. 457.
29 *R.* v. *Murugan Ramasamy* [1965] A.C. 1.
30 *Ibid*., at p. 15.
31 The Evidence Ordinance 1893 (Ordinance No. III of 1893). See Straits Settlements Government Gazette, Vol. XXVII, No. 14, March 30, 1893, pp. 502, 555.
32 The Penal Code and Evidence Enactment, 1909 (F.M.S.) was intituled "An Enactment to provide for the Adoption of the Penal Code and the Evidence Ordinance of the Straits Settlements", and was enacted by the Sultan-in-Council. (See Vol. I, *The Laws of the Federated Malay States, 1877-1920* (published, 1921)).
33 Evidence (Ordinance No. 53), Laws of the Straits Settlements (Revised ed. 1920), Vol. I (1835-1900), p. 624, at p. 639.
34 See Straits Settlements Government Gazette, March 30, 1893, *(supra,* fn. 31), p. 519, for the text of the original section.
35 *Pulukuri Kotayya* v. *King-Emperor* (1947) 74 I.A. 65.
36 *R.* v. *Murugan Ramasamy* [1965] A.C. 1.

of *Khalid Panjang and Ors.* v. *P.P. (No. 2)*[37] which held in effect that all inferior Malaysian courts were bound by a Privy Council decision on appeal from another territory if it discussed a provision in a statute of that territory that was in *pari materia* with a corresponding provision in a local statute. *Pulukuri Kotayya* clearly treated section 27 as an exception to sections 25 and 26, and this view will naturally be preferable to any contrary views of Indian State High Courts or even the Indian Supreme Court. *Murugan Ramasamy* hints at a wider view still of section 27. It is submitted that the wider view of section 27 is apt, and would be justified even to the extent of treating section 27 as an exception to section 24. This is because we in Malaysia and Singapore do *not* have the limiting words of proviso in section 27. Thus, the *dictum*[37a] in *Murugan Ramasamy* must necessarily apply with even more force in our territories. It is also possible to argue that the omission of the words of proviso mean that we should not regard ourselves as bound by the Privy Council decisions from India or Ceylon on the scope of section 27 as our provision is not, to that extent, in *pan materia* with that of India or Ceylon. Our courts are free to venture freely and break new ground.

In fact, Malaysian courts have in some measure, already done this. In a few Malaysian decisions, section 27 was in fact applied to admit some information that had been ruled inadmissible because it had been given *involuntarily*.[38] Thus, in *Chandrasekaran* v. *P.P.*,[39] a magistrate's criminal appeal, Raja Azlan Shah J. (as he then was) was prepared to hold that so much of the appellant's information as distinctly led to the discovery of a typewriter (used for a forgery) in another's house was admissible under section 27 even though the rest of the appellant's two cautioned statements had been rejected at the trial on the ground that they had been obtained by compulsion. Raja Azlan Shah J. said:

> "Section 27 is a concession to the prosecution. It is the express intention of the legislative that, even though such a statement is otherwise hit by the three preceding sections, viz. sections 24-26 of the Evidence Ordinance, any portion thereof is nevertheless admissible in evidence if it leads to the discovery of a relevant fact."[40]

(b) *Section 27 and its Relationship to the Admissibility of Statements to the Police under the Criminal Procedure Code*

It is necessary to see whether the application of section 27 is in any way affected in Singapore by section 121 of the Criminal Procedure Code[41] or, in Malaysia, by its equivalent, section 113 of the Criminal Procedure Code.[42]

37 (1964) 30 M.L.J. 108.

37a See text above n. 30, *supra.*

38 *Chandrasekaran & Ors.* v. *P.P.* [1971] 1 M.L.J. 153; *P.P.* v. *John Alias Arulappan & Anor.* (1939) 8 M.L.J. 291; *P.P.* v. *Er Ah Kiat* [1966] 1 M.L.J 9, 10 *(dictum)*; *Lim Ah Oh & Anor.* v. *R.* (1950) 16 M.L.J. 269, 270 *(dictum)*; *R.* v. *Mong Pahn* (1908) 10 S.S.L.R. 96. The last case, however, is admittedly weak authority as the Singapore Court of the Straits Settlements was hearing a question of law reserved by the Judge of H.B.M.'s Court for Siam in accordance with a Siam order in Council, and only purported to answer the question according to English Law. (S. 27 was not cited, nor was it applicable in that case as the facts in issue occurred in Siam).

39 [1971] 1 M.L.J. 153.

40 *Ibid.*, at p. 158.

41 Singapore Statutes (Revised ed. 1970), Cap. 113 (Reprint, 1980).

42 F.M.S. Cap. 6, Reprint No. 1 of 1971 as amended and extended by Act A324, 1976.

(i) *Singapore*: *Section 121, Criminal Procedure Code*

Section 121 provides that, "save as herein provided" no statement made to a police officer in the course of a police investigation made under Chapter XII of the Code shall be used in evidence, and sub-section (5) goes on to allow any statement made by an accused person, whether oral or in writing, made at any time to be admissible in evidence at his trial if made to or in the hearing of a police officer of or above the rank of sergeant, provided that it shall be excluded if it appears to have been involuntarily made.

This provision (sub-section (5)) is thus wide enough to supersede and render otiose, sections 25 and 26 of the Evidence Act.[43] However, sub-section (3) clearly states that "Nothing in this section shall be deemed to apply to any statement... falling within [section 27]... of the Evidence Act." It is not disputed therefore, that section 27 would still be applicable to render admissible any information or part of a statement that would otherwise be inadmissible under section 121 of the Criminal Procedure Code.[44] Such a statement may otherwise be ruled wholly inadmissible on the ground that (a) it was made to or in the hearing of a police officer below the rank of sergeant; or alternatively that (b) it was not voluntarily made. Until 1976,[45] a statement to the police could have been ruled inadmissible on a third ground, namely that there had been a failure to substantially comply with any one of the "Rules" pertaining to statements taken from accused persons and appended to the Code in Schedule E.[46]

In a Singapore High Court decision of 1966, *P.P.* v. *Ibrahim bin Mastari*,[47] however, Choor Singh J. in holding a statement to be inadmissible because the 'caution' had been incorrectly stated to the accused, felt that "section 27 of the Evidence Ordinance must be read subject to section 121(5) of the Criminal Procedure Code", and thus the prosecution, if seeking to invoke section 27 must satisfy the court that the information received from the accused which is tendered under section 27 was received after the caution had been duly administered. He thus went on to rule that in view of the improper cautioning, the statement by the accused that he had buried explosives in the compound of his house, was inadmissible on the charge of possession of those explosives. The writer respectfully disagrees with this view of the application of section 27, just as strongly as if His Lordship had said that section 27 could only be used to admit a statement that was otherwise voluntary or made to a police officer of the statutorily appropriate rank. If this were so, section 27 would be purposeless. As an oral judgment in an unreported decision, perhaps it should not be accorded undue weight in this respect? Sub-section (3) of section

43 These provisions (as they then stood) had been commented upon by Mr. Harbajan Singh, *Anomalies in the Law on Confession,* [1974] 2 M.L.J. xlv.

44 See *P.P.* v. *Salamah binte Abdullah* (1947) 13 M.L.J. 178, 179.

45 In 1976, the Criminal Procedure Code (Amendment) Act (No. 10 of 1976) was passed (coming into force on 1 January 1977). S. 5 of this Act amended s.121(5) of the Code by deleting its proviso and substituting the present one.

46 *P.P.* v. *Ibrahim bin Mastari,* note in [1980] 2 M.L.J. 188 appended to *Tan Too Kia* v. *P.P.* (This case was previously unreported although judgment was delivered in 1966).
Schedule E to the Criminal Procedure Code was repealed by s. 27 of the Amendment Act of 1976 *(supra,* n. 45).

47 (Appendix to *Tan Too Kia* v. *P.P.*) [1980] 2 M.L.J. 188.

121 is clear in its wording and makes section 27 of the Evidence Act an *exception* to section 121 of the Criminal Procedure Code.[48]

(ii) *The Federation of Malaysia*:
Section 113, Criminal Procedure Code

Before 1976, section 113 had a sub-section (iii) that made a saving of section 27 of the Evidence Act much like Singapore's present section 121(3). Thus the issue of possible conflict between the two provisions was beyond doubt.[49] However, an Act of 1976 repealed section 113 *in toto* and substituted a new section 113 that reads very much like Singapore's section 121(5) (with proviso) before Singapore's own amendment of that provision in 1976.[50] There has been, since January 1976, *no* saving clause.

Several Malaysian decisions have thus been spawned, and judges forced to reflect on the significance of this change. They have chosen to draw from the experience of the Ceylon courts in *R.* v. *Murugan Ramasamy*[51] and of the Indian courts — in decisions spanning the period 1896 to 1941 during which, strangely, the existing express saving of section 27 was removed before its restoration in 1941 — from whose experience *Murugan Ramasamy* itself drew.

For the sake of brevity, the main arguments accepted by the Malaysian courts for regarding section 27 of the Evidence Act as an exception to section 113 of the Criminal Procedure Code, so that any possible conflict between them may be avoided, may be summarised (noting however that they are not necessarily mutually exclusive arguments):

(1) The maxim *"Generalia specialibus non derogant"* (i.e. general words or provisions do not affect special words or provisions) is applicable to prevent implied repeal of the earlier law (section 27, Evidence Act) by the later law (the new section 113, Criminal Procedure Code). The new section 113 is a provision of the Criminal Procedure Code which is a law regulating procedure in criminal trials of general application to all criminal proceedings, whereas section 27 is a special provision in the Evidence Act which is a special law on evidence applicable to both civil and criminal proceedings.[52]

(2) The intention of the Legislature in passing the new section 113 of the Criminal Procedure Code was to extend and supplement the existing powers of investigation towards the procurement of evidence to be used in court; to construe therefore that the absence of a saving provision for section 27 of the Evidence Act in the

48 S. 27 was first excepted from the main body of s. 121 when the Criminal Procedure Code 1900 (of the Straits Settlements) was revised in 1910 and formed part of the revised edition, *Laws of the Straits Settlements, 1920.*
49 *P.P.* v. *Salamah binte Abdullah* (1947) 13 M.L.J. 178.
50 The Criminal Procedure Code (Amendment and Extension) Act, 1976 (Act A324 of Malaysia), Schedule. This came into force on 10 January 1976.
51 [1965] A.C. 1.
52 *P.P.* v. *Toh Ah Keat* [1977] 2 M.L.J. 87, at p. 88. Note, however, *R.* v. *Murugan Ramasamy (supra,* fn. 51 at p. 27) where the maxim was applied differently.

new section 113 causes section 27 to be impliedly repealed or "overridden" would defeat the object of the Legislature.[53]

(3) The two provisions, according to Hashim Yeop Sani J. in *P.P.* v. *Toh Ah Keat,* "are separate and distinct provisions and are complementary to one another and each should be given its full effect;"[54] as "these two provisions cover quite different areas of evidence."[55] In *P.P.* v. *Birch,* Arulanandom J. said that "both sections stand independently of each other and are valid in law".[56] It is also clear that no significance is to be attached to the mere fact that one provision was enacted at a later date than the other.[57]

THE ELEMENTS OF SECTION 27 OF THE EVIDENCE ACT

Section 27 of the Evidence Act, Singapore reads:

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved".

The equivalent provision in Malaysia's Evidence Act, section 27 thereof is identical, except that it reads "... so much of *that* information" instead of "so much of *such* information...". This variation in wording is not significant.

It is proposed to examine closely, the different elements making up section 27, bearing in mind the observation that section 27 "is not artistically worded".[58]

A. *Facts Discovered*

What is meant by "any fact... discovered"? The question arose in the Privy Council in an appeal from India in the celebrated case of *Pulukuri Kotayya* v. *King-Emperor*.[59] The Crown argued that in a situation where a person in police custody produced from some place of concealment some object such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant was accused, the "fact discovered" was the physical object produced, and any information which related distinctly to that object could be proved. However, Sir John Beaumont, delivering the advice of the Judicial Committee, said:

> "In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery

53 *P.P.* v. *Toh Ah Keat* [1977] 2 M.L.J. 87 at p. 90.
54 *Ibid.*, at p. 90.
55 *Ibid.*, at p. 89.
56 [1977] 1 M.L.I. 129, at p. 130.
57 See *R.* v. *Murugan Ramasamy* [1965] A.C. 1 at p. 26.
58 *Pulukuri Kotayya* v. *King-Emperor* (1947) 74 I.A. 65, at p. 76.
59 (1947) 74 I.A. 65.

> of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant".[60]

This classic statement has been either applied or quoted with approval in Malaysia and Singapore in numerous cases,[61] and can be said to have settled the position on this matter in these jurisdictions as well as in India.[62] Thus, the fact discovered embraces the *place* from which the object in question is produced and the *knowledge* of the accused as to the whereabouts of the object. However, it is necessary to consider a few decisions which may be regarded as "aberrations" from the norm.

First, there is *P.P.* v. *Salamah bte Abdullah*,[63] decided only a few months after *Pulukuri Kotayya,* which is probably why the latter was not cited in *Salamah.* In this Malayan case, the appellant had been charged with dishonestly receiving some stolen cloth. Taylor J. held that a statement she had made to the police that she kept the cloth under a coconut shell so that it would not be stolen, was admissible, whilst another statement that the cloth was given to her by one Nayan was not, as it related exclusively to the previous history of the cloth and was not related to the finding by the police of it. He said:

> "In this case the fact discovered was that the cloth was hidden under the coconut shell. The section does not say, or mean, that where any object is found, so much of the statement of the accused as related to that object, can be repeated in evidence. The exception is limited to so much of the statement as related to the fact discovered — that is to the fact of the finding. It does not extend to the other facts relating to the articles found".[64]

Insofar as Taylor J. stated that the "fact" was not the *object* found, and that the previous history of the object found was not admissible, his reasoning was consistent with *Pulukuri Kotayya.* However, he injected a different element into the discussion of section 27 by saying that the fact discovered was the fact of the *finding* of the object connected with the crime.

In *P.P.* v. *Er Ah Kiat*,[65] the accused was charged with a security offence — having under his control ammunition (a hand-grenade) without lawful excuse. The accused led a police party to a spot beside a coconut tree stump where he said he had buried a hand-grenade, which was then unearthed. Although the place was admittedly one

[60] *Ibid*., at p. 77.
[61] *Tan Hung Song* v. *R.* (1951) 17 M.L.J. 181 (Singapore). The Malaysian cases are: *Hashim & Anor.* v. *P.P.* (1956) 22 M.L.J. 233; *Chandrasekaran & Ors.* v. *P.P.* [1971] 1 M.L.J. 153; *Yee Ya Mang* v. *P.P.* [1972] 1 M.L.J. 120; *P.P.* v. *Birch* [1977] 1 M.L.J. 129; *Chong Soon Koy* v. *P.P.* [1977] 2 M.L.J. 78; *Birch* v. *P.P.* [1978] 1 M.L.J. 72 (But in the latter case only *Sarkar on Evidence* was cited quoting from *Pulukuri Kotayya.* This case was not itself cited); *P.P.* v. *Lim Woon Chong* [1978] 2 M.L.J. 204.
[62] See, e.g. *Mohd. Inayatullah* v. *State of Maharashtra* A.I.R. 1976 S.C. 483 (Sarkaria J.).
[63] (1947) 13 M.L.J. 178.
[64] *Ibid*., at p. 179.
[65] [1966] 1 M.L.J. 9.

to which the public could also have access, Raja Azlan Shah J. (as he then was) held that as the grenade had been carefully buried by him and concealed from view, he must be deemed to have had control over the weapon. He referred to "the accused's statement leading to the fact of the discovery of the hand-grenade"[66] which suggests the view that the fact discovered was the hand-grenade itself. The writer is fortified in this conclusion as Raja Azlan Shah J. cited with approval a passage including these words of Park J. in *R.* v. *Thurtell and Hunt*:[67]

> "... though such a confession is not legal evidence, it is every day practice that if, in the course of such confession, the party states where stolen goods or a body may be found, and they are found accordingly, this is evidence, because the fact of finding proves the truth of the allegation...."

Nowhere in the course of the judgment did his Lordship cite *Pulukuri Kotayya,* or, for that matter, even section 27. He might therefore have been taking a rather dated common law view of the "fact discovered".

Lastly, the rather unusual decision of *Soh Ten Seng & Ors.* V. *P.P.*[68] must be considered. There, the appellants had been convicted of kidnapping a boy of nine for ransom. A police corporal, pretending to be the father of the boy, took a telephone call and engaged in a conversation with the first appellant, and passed information to an inspector as a result of which the first appellant was apprehended coming out of a telephone booth. The Federal Court of Malaysia upheld the admissibility of the telephone conversation (although it was a conversation to or in the hearing of a police officer below the rank of an inspector) on the ground that, under section 27, the conversation "was precisely information, in consequence of which a fact was discovered, namely, the identity of the 1st appellant". Again, *Pulukuri Kotayya* was not cited, or Ong J. (delivering the judgment of the Federal Court) may have realised the difficulty of fitting the fact of "identity" into the framework of "knowledge" and the "place" where the articles which were the subject of the offence were found. Nevertheless, there is no reason why identity cannot be a fact discovered and why Sir John Beaumont's statement as to what "facts discovered" are in *Pulukuri Kotayya* should be regarded as exhaustive.

Pulukuri Kotayya, however, does not stand alone in holding what "facts discovered" are. In 1949, the Ontario Courts settled the position for Canada on the proper principle pertaining to admissibility of information leading to the discovery of facts, in the well-reasoned decision of *R.* v. *St. Lawrence*.[69] After a review of the early English cases and of Taylor's view, (which he accepted), McRuer C.J.H.C. clearly differentiated between the finding of articles and the discovery of "facts". He also said:[70]

> "Anything done by the accused which indicates that he knew where the articles in question were is admissible to prove the fact that he knew the articles were there when that fact is confirmed by the finding of the articles; that is, the knowledge of the accused is a fact, the place where the articles were found is a fact. If he does or says something that

66 *Ibid*., at p. 11.
67 (1824) Notable British Trials, 144-5. Quoted in [1966] 1 M.L.J. 9 at p. 10.
68 (1964) 30 M.L.J. 380.
69 [1949] O.R. 215. Approved in *R.* v. *Wray* [1971] S.C.R. 272.
70 [1949] O.R. 215 at pp. 228-9.

> indicates his knowledge of where the articles are located, and that is confirmed by the finding of the articles, then the fact of his knowledge is established".

As for the fact of knowledge, it cannot be too clearly emphasized that this does not indicate that the accused put the articles in the place where they were found or that he was in possession of them. Unless he has been proved to have had exclusive control of the place in question, (where only one inference is then possible) his knowledge is ordinarily consistent with any of *three* inferences of fact: (i) that he put them there or was in sole possession of the articles (i.e. guilt); (ii) that he had seen someone else put them there; or (iii) that he had been told by someone else where to find them.[71] The use, therefore, to which the prosecution can put this fact of knowledge is limited and will depend on other circumstances in the particular case.

B. *The "Custody" Requirement*

It is apparently a condition precedent to the operation of section 27 that the information leading to the discovery of any fact must be received from the accused when he is in the custody of a police officer.

Before the question as to whether there is any such requirement is considered, it must first be resolved when a person is to be regarded as being "in custody". It is not disputed that a person is "in custody" when he has been formally arrested. The matter is more difficult if a person is not under arrest but is either in the presence of the police or is being questioned or detained for questioning.

In *Sambu* v. *R.*,[72] Sambu had been chased and detained by the police on being found behaving suspiciously carrying a bundle, in a protected area. Brown J. said:

> "A person is in custody when he is in a state of being guarded and watched to prevent his escape. In order to answer the question of whether the appellant was in custody at the time when he is alleged to have made the statement, it is only necessary to consider what would have happened if, at the time, he had tried to run away".[73]

Applying this test, he found that the appellant Sambu was "in custody".

In *P.P.* v. *Salamah*,[74] Taylor J. disagreed with this test insofar as it purported to be a general test. Brown J.'s words were to be read as qualified by the particular facts of the case in which they occurred. That test was inapplicable to the facts in *Salamah,* because although a police investigation had begun, the appellant Salamah might have been questioned as a potential prosecution witness, and might well have tried to run away to avoid interrogation, which was quite different from escaping from custody.

In a more recent decision, *Eng Sin* v. *P.P.*,[75] the Federal Court of Malaysia approved and applied a statement by *Sarkar on Evidence*[76]

71 See *Tai Chai Keh* v. *P.P.* [1948-49] M.L.J. Supp. 105, at p. 109; *Birch* v. *P.P.* [1978] 1 M.L.J. 72.
72 (1947) 13 M.L.J. 16.
73 *Ibid*., at p. 18.
74 (1947) 13 M.L.J. 178.
75 [1974] 2 M.L.J. 168.
76 *Sarkar on Evidence,* (12th ed.), p. 278.

> "A man may be in custody without having been formally arrested; it is sufficient that he cannot go where he like."

As evidence was given that a policeman "did not allow him to go anywhere" and that the appellant was sent to hospital for examination and brought back under police escort, the appellant was regarded as a person "in custody".

In India, the courts have gone even further and have adopted a much broader view of "custody". The Supreme Court has settled this view in *State of UP.* v. *Deoman Upadhyaya*:

> "When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police... the Code of Criminal Procedure does not contemplate any formality before a person can be said to be in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of section 27 of the Indian Evidence Act."[77]

If this view is preferred here, it will be seen that in scarcely any situation will a person giving information orally and in person to the police, be regarded as *not* being in custody! Clearly in situations where the informant writes a letter[78] or speaks to the police on the telephone,[79] he cannot be considered to be in custody. However, on the Indian view, any person, even a potential prosecution witness who appears to be acquainted with the facts and circumstances of a case may be regarded as being "in custody" when he makes a statement in the course of investigation of the case under sections 119-120 of the Criminal Procedure Code, Singapore (or their equivalent, sections 111-112 of the Criminal Procedure Code, Malaysia).

It is now pertinent to consider whether the informant's being "in custody" is a necessary pre-requisite to bringing section 27 into operation. The Indian cases seem to have regarded custody to be indeed a pre-requisite.[80] The Malaysian cases seem also to regard custody to be a pre-requisite. However, the Federal Court in *Soh Ten Seng & Ors.* v. *P.P.*[82] took a different view. The Court was faced with the difficulty that the accused had spoken over the telephone to a police officer below the rank of inspector. It got around this by the following argument. Ong J. said:

> "If information received from an accused person, even while in the custody of a police officer, is admissible under section 27 of the Evidence Ordinance, *a fortiori* it ought to be admissible when given by an accused person before being taken into such custody."[83]

77 A.I.R. 1960 S.C. 1125 at p. 1131 *(per* Shah J.).
78 See *State of U.P.* v. *Deoman Upadhyaya* A.I.R. 1960 S.C. 1125, at p. 1131 (para. 12).
79 See *Soh Ten Seng & Ors.* v. *P.P.* (1964) 30 M.L.J. 291; *dictum* in *State of U.P.* v. *Deoman Upadhyaya, supra,* at p. 1131 (para. 12).
80 See *Pulukuri Kotayya* v. *King-Emperor* (1947) 74 LA. 65, 76. See, further, cases cited in Field's *Law of Evidence* (10th ed. 1970) Vol. II, p. 1895, and *Sarkar on Evidence* (12th ed.), pp. 287-8.
81 *P.P.* v. *Salamah binte Abdullah* (1947) 13 M.L.J. 178 at p. 180; *Lee Kok Eng* v. *P.P.* [1976] 1 M.L.J. 125, 127.
82 (1964) 30 M.L.J. 380.
83 *Ibid.*, at p. 382.

How attractive an argument! How expedient and full of good sense! However, one must tread warily as Ong J.'s view may be due to the special facts of that case and thus justifiable in that case, but may not serve as a universal proposition.[84] On the contrary, it may be argued that in the usual case, what makes a confession inadmissible in the first place is undue pressure from the police, in circumstances where the informant is at a disadvantage, namely at the mercy of the police. Therefore, even if being in custody is not a pre-requisite, it is nearly always an *incident* to the making of a statement or the giving of information. With the wider view of "custody" taken in *Deoman Upadhyaya*[85] this would be even more true. If courts were to take an extremely narrow view of what being "in custody" means, then of course the custody requirement would lead to anomalous results.[86] It would mean that the information an accused gives would be admissible if he were in custody, but inadmissible if he were not in custody.

It may, however, be observed that there was never a requirement of custody at common law, for admissibility depended simply on relevancy of information based on its reference to facts discovered which confirmed that information. In India, section 150 of the 1861 Code of Criminal Procedure also made no mention of custody. The 1869 Code of Criminal Procedure read, with an addition of some words (italicised): "… information received from a person accused of any offence, *or in the custody* of a police officer." This made no apparent change in the law, but served to clarify that the section could apply to information from persons *not* in police custody. What is curious is that the word "or" was dropped when the provision was transferred to the new Indian Evidence Act of 1872; and what is even more curious is Stephen's statement in his Introduction to the Act that "sections 25, 26 and 27 were transferred to the Evidence Act *verbatim* from the Code of Criminal Procedure."[87] Was the omission of the word "or" in section 27 then accidental on the part of the draftsman? This belief does have some adherents.[88]

C. *"A Person accused of any Offence"*

There are two views that can be taken (and have been taken) of the meaning of these words.

One view is that the words refer to and describe the person against whom evidence of information alleged to have been given by him may be proved. The other is that the words indicate that information given may be proved against a person only if he was at the time the information was received from him a person formally accused of any offence.[89]

[84] Note that there is another Federal Court decision to the contrary, namely *Lee Kok Eng* v. *P.P.* [1976] 1 M.L.J. 125.

[85] *State of U.P.* v. *Deoman Upadhyaya* A.I.R. 1960 S.C. 1125, 1131

[86] See *Sarkar on Evidence* (12th ed.), pp. 287-8.

[87] See Stephen, *The Principles of Judicial Evidence, supra,* fn. 7. Whitley Stokes *(supra,* fn. 7) states at p. 819, fn. 3 that "ss. 25, 26, 27 are copied from Act XXV of 1861, ss. 148, 149, 150."

[88] See *Sarkar on Evidence* (12th ed.), p. 289.

[89] See G.L. Peiris, *The Law of Evidence in Sri Lanka,* (2nd Revised ed. 1977), pp. 160-1, and the Ceylon case of *Petersingham* (1970) 73 N.L.R. 537 (Allen J.).

The Indian authorities and the Malaysian authorities are clearly for the former view.[90]

In *Chong Soon Koy* v. *P.P.*,[91] the accused had been arrested under the Internal Security Act after which he gave information leading to the recovery of a firearm and some ammunition which he had hidden. He was then charged with illegal possession of the firearm and the ammunition. Counsel submitted that the information supplied by the accused was not admissible since he was arrested under the ISA and at the time he gave his statement he was not "a person accused of any offence" within section 27. Suffian L.P., delivering the judgment of the Federal Court, held shortly that there was no merit in that argument since these words meant "a person accused at the time or subsequently of any offence."[92]

D. *"Information" that Relates Distinctly to the Fact Discovered*

The proof of "so much of such information, whether such information amounts to a confession or not, or relates distinctly to the fact thereby discovered" (in the words of section 27) is perhaps the most important matter to be discussed in this paper. Within this discussion must lie the consideration of a number of thorny issues. What is meant by "information"? Does it take the form of a statement (oral or written) or can it take the form of acts or conduct on the part of the person accused? Under what circumstances must the information be proved? How much of the information given by the person accused can the prosecution prove? When does the information relate "distinctly" to the fact thereby discovered? Each of these questions raises yet more questions. Many of the questions raised have been answered by judicial pronouncements, and yet may not have been answered uniformly. Further, many pronouncements turn on the wording of section 27 alone, and may be difficult to reconcile with the common law doctrine of confirmation or its rationale. Judicial pronouncements and the problems of interpretation will be considered.

(a) *What is meant by "information"?*

The Judicial Committee of the Privy Council appeared in *Pulukuri Kotayya's* case to be of the view that "information" admitted under the section should take the form of a *statement,* with suitable deletions made from the original so that the product would relate "distinctly" to the facts thereby discovered.[93] However, the Privy Council was attempting to decide that case on its particular facts and was not, it is submitted, attempting to lay down any proposition that "information" in all cases should take the form of a statement by the accused in direct speech.

[90] See: *Pakala Narayana Swami* v. *King-Emperor* (1939) 66 I.A. 66; *State of U.P.* v. *Deoman Upadhyaya* A.I.R. 1960 S.C. 1125, 1129. (Indian cases). And see: *Lee Kok Eng* v. *P.P.* [1976] 1 M.L.J. 125; *Chong Soon Koy* v. *P.P.* [1977] 2 M.L.J. 78 (Malaysian cases).

[91] [1977] 2 M.L.J. 78.

[92] *Ibid.*, at p. 79.

[93] See text above fn. 60, *supra.*

It may be pertinent to quote Dalip Singh J. in the Indian case of *Karam Din* v. *Emperor*[94] (which was quoted with approval by Sharma J. in *Yee Ya Mang* v. *P.P.*[95]):

> "In connection with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement alone was intended. The word 'information' as distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person".[96]

The writer has no quarrel with this *dictum.* However, to say that the Malaysian (and Singapore) cases are equivocal on this question would be an understatement, somewhat like calling the mythical Hydra two-faced. Worse, no consistent principle emerges, no pot of gold may be found at the end of the rainbow — there is too thick a mist even to perceive the rainbow!

First, there is some authority for saying that 'information' must take the form of a statement. In *Gurusamy* v. *P.P.*,[97] the appellant was charged with theft or alternatively, dishonest retention of, 45 cartons of scotch whisky cargo stolen from a lighter. When the goods were missing, police officers arrested the appellant and gave evidence that he had led them into some mangrove trees and pointed out a spot where they found the stolen goods stacked. Sharma J. quashed the appellant's conviction on the ground that the only evidence against him was his presence when the stolen property was found. He held that section 27 "clearly had no application in this case" for the section's only purpose was to render self-incriminatory statements admissible as information. "The appellant was never alleged to have made any statement"; and that if he had given information, "such information should have been given in evidence by the police officer who heard it."[98]

This postulates information having to be in the form of an oral statement by the accused: nothing more and nothing less. Surely this is to take too narrow a view of 'information'? It rules out evidence of the accused leading police to a place and pointing out a spot where articles are to be found. Highly relevant evidence is excluded on this narrow interpretation.

The Federated Malay States' Court of Appeal, in the earlier case of *Ted Chai Keh* v. *P.P.* ruled that evidence that an accused person pointed out objects or places to the police "is really of little value and is often prejudicial to the accused unless the information which led to the discovery is disclosed at the same time."[99] This, he said, was because such evidence by itself might indicate that the accused intended to confess his guilt by showing to the police an article he had in his possession; but it might equally indicate that the accused

94 A.I.R. 1929 Lah. 338.
95 [1972] 1 M.L.J. 120.
96 *Ibid.*, at p. 122.
97 (1965) 31 M.L.J. 245.
98 *Ibid.*, at p. 247.
99 [1948-49] M.L.J. Supp. 105, 110. This was approved in *Birch* v. *P.P.* [1978] 1 M.L.J. 72.

intended to indicate somebody else's guilt. Thus such evidence should always be received with great caution, especially when a case is tried with the aid of assessors. (Presumably, the same caution must apply to trials by jury).

This decision appears to regard "pointing out" places or articles as distinct from 'information' under section 27. Nevertheless, there is no cogent reason for regarding such acts as not being 'information'. The courts ought not to confuse the question of the admissibility of evidence under a statutory provision with the separate principle that the court has a discretion to exclude evidence that may have a prejudicial effect outweighing its probative value or with yet another principle, that the question of weight should be treated quite apart from the question of admissibility.

In Singapore, the Court of Criminal Appeal ruled in *Lim Ah Oh & Anor.* v. *R.* that:

> "Section 27 in certain cases permits evidence of what an accused person said, by way of exception to section 124 of the Criminal Procedure Code and of the provisions relating to confessions. But evidence must be given of what the appellant said. Nothing justifies inviting the jury to guess what he said".[1]

The Court therefore held that the jury could never be invited to draw an inference from the reaction of an accused person after hearing only what the police said to him.

Although *Lim Ah Oh* appears to be authority for saying that 'information' must amount to an oral statement or the actual words spoken by the accused, it is submitted that it is really authority for saying that the court should exclude evidence that is likely to have a prejudicial effect which outweighs its probative value. Any comment (by Murray-Aynsley C.J.) on section 27 was unnecessary to the decision and only *obiter dicta.* The court was really concerned with the evidence of what the police said to the accused, and the inferences to be drawn from that.

There are two further cases which, although not authority for regarding 'information' as being necessarily in the form of a statement, did deal with statements that were actually made by the accused in these cases and do cast some light on what form such statements should take in order to be admissible under section 27. Both happen to be recent decisions.

In *Sum Kum Seng* v. *P.P.*,[2] the Federal Court of Malaysia was dealing with an investigation officer's narration, in indirect speech, of what the appellant had told him. The record of evidence from the officer read: "the accused admitted burying weapons somewhere and offered to show me the place". The Federal Court held that it was no objection to admissibility that the words in evidence were not the actual words of the accused, so long as the words were "but an indirect rendering and not a paraphrase or a substitution" of the actual words used by the accused.

[1] (1950) 16 M.L.J. 269, at p. 270 *(per* Murray-Aynsley C.J.).
[2] [1981] 1 M.L.J. 244.

Chang Min Tat F.J. said:

> "But before leaving this appeal we shall express our clear view that while there is no strict necessity at law to give the actual words used by an accused person in supplying the information that led to the discovery of a fact or thing and comes within the provisions of section 27, both the decisions referred to[3] and commonsense stress the desirability that the actual words be recorded somewhere."[4]

He added that all police officers should seek to make a contemporaneous record in their notebooks of such vital information, as there ought to be no practical difficulty in this and this practice would go a long way towards establishing their creditworthiness as witnesses.

In *P.P.* v. *Tan Keo Hock*,[5] George J. reiterated the view that "as far as possible the exact words used should be proved". In the case before him, he held the evidence of what the accused was supposed to have said that led to the discovery of ammunition inadmissible as the police witness's diary had been destroyed, he was relying on his memory, and was simply giving in evidence what he understood was the gist of the statements made by the accused. George J. added:

> "Where the whole decision turns on whether the accused had said 'I know where the ammunition is hidden' or whether he had said 'I know where I hid the ammunition' then the least the Court should expect is that the actual words used by the accused are proved. This was never done".

One cannot quarrel with this decision, given the facts of this case. It is fundamental that if evidence of 'information' is to be given, the court is entitled to know *what* that information is. If there is any doubt, it should be resolved in the accused's favour or better still, the evidence should be ruled inadmissible altogether.

Next, it may be noted that there is also some authority for holding that 'information' can consist not only of words used by the accused, but also of acts like pointing out the place where articles are to be found,[6] digging or searching for articles, leading the police to a secluded spot[7] or producing the articles[8] themselves. These cases draw no distinction between statements made or acts done by the accused, presumably therefore, treating all these as 'information' admissible under section 27. If acts can be treated as 'information' then *a fortiori,* so should inferences that can reasonably be drawn from these acts. Thus, leading the police and pointing out a spot in reaction to a question from the police as to the whereabouts of article X, could give rise to the inference that by this conduct, the accused is impliedly asserting: "This is where article X is", and this ought to be regarded as 'information'. This is to be distinguished from 'a fact discovered' as a result of this information, namely that the accused had knowledge of where article X was, or that the place where it was found was or was not a place that was under his control. Thus, if article X was

3 I.e. *R.* v. *Murugan Ramasamy* [1965] A.C. 1 and *Sarkar on Evidence* (12th ed.), p. 304.

4 [1981] 1 M.L.J. 244, at p. 245.

5 Criminal Trial No. 3/81, High Court, Malaya at Raub (unreported). Judgment was delivered on 19 November, 1981.

6 *P.P.* v. *Er Ah Kiat* [1966] 1 M.L.J. 9.

7 *P.P.* v. *Lim Woon Cheng* [1978] 2 M.L.J. 204, 209.

8 *Lee Kok Eng* v. *P.P.* [1976] 1 M.L.J. 125.

found in a public place, that would be a fact relevant to the question whether he had control of the place and article, or whether other people had free access to that place as well. If it was found under his bed in his home, that would be highly relevant, possibly conclusive evidence as to his control of the place or possession of the article.

In *Chalmers* v. *H.M. Advocate,* the accused, under interrogation, took police officers to a cornfield and pointed out the purse of a murder victim. Although the actual decision in that case does not concern us here, Lord Cooper made these observations:

> "Next, I feel unable to accept the distinction drawn by the presiding judge between statements and "actings", and I suspect that a fallacy lurks in the word "actings".. ."actings", in the sense of conduct, may be perfectly neutral as a communication of specific information; but "actings", in the sense of a gesture or sign, may be indistinguishable from a communication by word of mouth or by writing. The question here was — where exactly is the purse? and this question might have been answered by an oral description of the place where it was, or by going to the place and silently pointing to that place. It seems to me to make no difference for present purposes which method of answering the question was adopted... ."[9]

The writer associates himself with these views without reservation. Clearly, acts or 'actings', may have an assertive quality, and so should qualify as 'information'. On the other hand, to hold strictly to the view that only statements are 'information' may be foolhardy, as it must be observed that some 'statements' can also have a non-assertive quality,[10] in much the same way as acts do, in which case there is no good reason why every statement should be regarded as being 'information' within section 27. One may agree, however, that so long as a statement is shown to relate distinctly to any facts discovered thereby, it would probably have an assertive quality.

So far, then, it is submitted that we may be able to arrive at the tentative conclusion that 'information' may consist of either:

(i) an 'expurgated' statement made by the accused, namely *part* of the inadmissible confession or other statement (not amounting to a confession) to the police; or

(ii) some *other* statement or statements *not* forming any part of the inadmissible confession or other statement to the police: or

(iii) acts or conduct by the accused;

provided that in all cases, such statements or acts are assertive in quality.

Finally, it must be observed that it follows that the operation of section 27 is not to be limited to saving a part of an otherwise inadmissible statement to the police; in other words, it is not limited to being an *exception* to sections 24-26 of the Evidence Act or sections 121 and 113 of the Criminal Procedure Codes of Singapore and Malaysia respectively. So long as evidence qualifies as 'information' under section 27 relating to facts thereby discovered, it should be

9 1954 J.C. 66, 76.

10 See J.A. Andrews, *Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases — II,* [1963] Crim. L.R. 77 at pp. 82-3. And see *Subramaniam* v. *P.P.* [1956] 1 W.L.R. 965.

admissible *per se* without reference to other provisions being necessary —thus section 27 can simply be used as an admissibility section in its own right, rather than as an 'exception to inadmissibility' section. Not only is this feasible and sensible, but there appears to be authority for such an approach. The late Arulanandom J. took such an approach in two cases. In *P.P.* v. *Birch*,[11] he stated that "section 27 of the Evidence Act is a section which stands by itself in the Evidence Act" and also stood independently of section 113 of the Criminal Procedure Code, Malaysia.[12] He finally said:

> "All statements if they fall within the province of section 27 of the Evidence Act are admissible in the courts of law.... I therefore direct the learned President to reconsider the application... to admit under section 27 of the Evidence Act a statement made by the accused in the course of police investigation and consider its admissibility either as a whole or in part wholly under the provision of section 27 of the Evidence Act."[13]

In *P.P.* v. *Lim Woon Chong & Anor.*,[14] Arulanandom J. admitted information and evidence of discovery of two guns, magazines and live rounds of ammunition on the basis of the celebrated passage in *Pulukuri Kotayya* v. *King-Emperor*[15] without any consideration of other provisions and even though there, cautioned statements made by the accused were in fact already admitted as voluntary.

In *P.P.* v. *Er Ah Kiat*,[16] Raja Azlan Shah J. admitted information leading to the discovery of facts independently of the accused's cautioned statement, which he earlier admitted as being voluntarily made. The information was admitted as an *additional* item of evidence and was not part of any inadmissible confession. Unfortunately, this case is not convincing authority for this approach suggested, since His Lordship Raja Azlan Shah J. nowhere mentioned section 27 itself, although he clearly discussed, and was aware of, the principle of that provision.

(b) *When can such 'information' be given in evidence and section 27 be applied?*

(i) *A 'Statement'* We have already seen above that there is a strong judicial view that a *statement* must have been made in the first place before section 27 can apply.[17] It is even suggested that this statement must be an oral one. However, any such view must surely be absurd. Why should a written statement be inadmissible? In any case, the law reports abound with cases where an accused person's cautioned statement (written) was ruled inadmissible but a part of it was admitted by virtue of section 27.

The writer does not propose to add any more to what has already been discussed on this question of what 'information' must be.

[11] [1977] 1 M.L.J. 129.
[12] *Ibid.*, at pp. 129, 130.
[13] *Ibid.*, at p. 131.
[14] [1978] 2 M.L.J. 204.
[15] See text above fn. 60, *supra.*
[16] [1966] 1 M.L.J. 9.
[17] *Gurusamy* v. *P.P.* (1965) 31 M.L.J. 245; *Lim Ah Oh & Anor.* v. *R.* (1950) 16 M.L.J. 269.

(ii) *Discovery of Facts as a Pre-Condition* In *Pulukuri Kotayya* v. *King-Emperor,* Sir John Beaumont said:

> "The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved.... Normally the section is brought into operation when a person in custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused."[18]

This pre-condition has a sound basis in principle, for only if a fact is actually discovered in consequence of information given, is some guarantee afforded that the information was true, and safely allowable in evidence.[19] It also has a basis in section 136(2) of the Evidence Act, which reads:

> "If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned...."

In both Malaysia and Singapore, there are authorities for this procedure. There are at least five Singapore and Malaysian cases[20] that clearly state that some fact must have been discovered as a result of information given by the accused, or, its corollary, that information given must lead to the discovery of a fact. Otherwise any 'information' sought to be adduced will be ruled to be inadmissible under section 27.

In *Hamiron bin Mat Udin & 2 Others* v. *P.P.*,[21] Murray-Aynsley C.J., delivering the judgment of the Court, made the clearest statement of principle, on holding that information given by the second accused was inadmissible since nothing was deposed to as having been discovered as a result of what he had said, so that section 27 had no application. He said:

> "We think it desirable to emphasize that the first step which must be taken before section 27 can be invoked at all must be proof of some fact discovered as a result of the information given by the accused."[22]

In *P.P.* v. *Liew Sam Seong*,[23] Mohamed Azmi J. was persuaded by the defence to see through a police attempt to "stage a scene" so as to turn a 'recovery' of incriminating exhibits into a 'discovery' in order to utilise section 27 of the Evidence Act. There, he found that they had knowledge of the existence of the incriminating exhibits (ammunition) at certain premises, but during the subsequent ten days' interrogation, managed to 'break' the accused and persuade him to give the 'information' leading to the alleged discovery even though the exhibits had already been recovered by the police. As such section 27 could not apply. The writer agrees with this reasoning, as the police

[18] (1947) 74 LA. 65, at p. 76.

[19] *Ibid.*, at p. 76. *Cf.* Taylor, *Treatise on the Law of Evidence* (1st ed.), s. 654.

[20] *Urn Chew Kee* v. *R.* (1947) 13 M.L.J. 164; *Hamiron bin Mat Udin & 2 Others* v. *P.P.* (1948) 14 M.L.J. 50; *Tan Hung Song* v. *R.* (1951) 17 M.L.J. 181 (Singapore); *Siah Ik Kow* v. *P.P.* [1969] 1 M.L.J. 121; and *P.P.* v. *Liew Sam Seong* [1982] 1 M.L.J. 223 (Malaysia).

[21] (1948) 14 M.L.J. 50.

[22] *Ibid.*, at p. 51.

[23] [1982] 1 M.L.J. 223.

clearly attempted to put the cart before the horse and obtain, by pressure, a confession in the thin guise of 'information' under section 27. What they were really doing was coaxing him into incriminating himself by admitting his knowledge, not obtaining information since they already had it. The information would in fact, only confirm his knowledge which should be a fact discovered. But surely facts discovered should confirm the information given!

Finally, assuming that there is information that does lead to the discovery of facts, how should the prosecution go about proving each of these? Clearly, the facts discovered should be proved first, and only then the 'information'. Although section 136(2) of the Evidence Act appears to settle the question, Brown Ag. C.J., delivering the judgment of the Court of Criminal Appeal of Singapore in *Tan Hung Song* v. *R.* was reluctant to insist on this precise order of proof. He said only:[24]

> "While we do not wish to lay down any hard and fast rule we think that as a general rule it would be safer first to give evidence of the discovery of the fact before giving evidence of the information which the accused supplied. And in this connection section 137 sub-section 2[25] of the Evidence Ordinance is material."

(iii) *The Information 'Relates Distinctly' to the Fact thereby Discovered* There are two qualifications to the 'information' that is sought to be put in evidence. First, it must relate to the fact or facts thereby discovered; and second, it must relate 'distinctly' to the facts discovered. The word 'distinctly' has been emphasized in at least three cases, two Malaysian,[26] and one from Singapore.[27] In one, *Tan Hung Song* v. *R.*, Brown Ag. C.J. said:

> "But this section is not intended to let in a confession generally, and not one word more of the information which the accused supplied should be given in evidence than is strictly necessary to show how the fact which was discovered is connected with the accused so as in itself to be a relevant fact against him."[28]

As to how such information may 'relate' to facts thereby discovered, *Pulukuri Kotayya* v. *King-Emperor*[29] is again instructive. The Judicial Committee of the Privy Council pointed out that the extent of the information admissible must depend on the exact nature of the fact discovered to which the information is required to relate. It also settled the rule that information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is produced. Thus, the words, "I will produce a knife concealed in the roof of my house" would be admissible, but the additional words "with which I stabbed A" would be inadmissible, as they do not relate to the discovery of the knife in question in the house of the informant.[30] The Privy Council therefore held, on a charge of murder, that the whole of the accused persons' confessions were inadmissible except the words referring to their hiding of spears in certain places

24 (1951) 17 M.L.J. 181, at p. 182.
25 Presently s. 136(2).
26 *P.P.* v. *Salamah binte Abdullah* (1947) 13 M.L.J. 178; *Yee Ya Mang* v. *P.P.* [1972] 1 M.L.J. 120.
27 *Tan Hung Song* v. *R.* (1951) 17 M.L.J. 181.
28 *Ibid.*, at p. 182. See also *R.* v. *Murugan Ramasamy* [1965] A.C. 1, at p. 31.
29 (1947) 74 LA. 65.
30 *Ibid.*, at pp. 76-7.

and offering to show the police the place. The spears had been used as the murder weapons, but nothing the accused had confessed to the effect that they had stabbed the murder victims with them was admissible.

This reasoning has been applied in several Malaysian and Singapore cases.[31] In two further cases, the "previous history" reasoning appears to have been applied to exclude information although *Pulukuri Kotayya's*[32] case was not cited. In one of these, *P.P.* v. *Salamah binte Abdullah*,[33] Taylor J., (in a case involving dishonestly receiving stolen property) stated in relation to a stolen piece of cloth discovered hidden under a coconut shell, that so much of the accused's statements that related to the finding of the cloth or the reason why she put it where it was found could be given in evidence, but not her statement as to who gave it to her as it related exclusively to the previous history of the cloth.

However, as we shall see, although the courts speak of excluding the 'previous history' of the objects found, they have inadequately defined what the limits of 'previous history' are. Thus, on a charge, say, of murder, the courts will exclude a statement by the accused that he has stabbed someone with a weapon found as 'previous history', but will allow his statement that he hid the weapon in the place where it was found. The writer is unable to see a rational reason for saying that the act of hiding a weapon is not previous history, but stabbing someone with it is, as in *Pulukuri Kotayya*,[34] or receiving it from another person is, as in *Salamah*[35] and in *Packiam*.[36] If the answer to this query is that hiding a weapon is not seriously incriminating on a charge of murder, as stabbing with it is, and so hiding is admissible; or that hiding an article is not seriously incriminating on a charge of dishonestly receiving stolen goods, as receiving itself is, and so hiding is admissible, the writer has no serious objection. For one should indeed have reference to what the charge itself is, and not inadvertently allow under section 27 what should be regarded as a full confession in itself, and thus permit section 27 to let in by the back door an inadmissible confession that was already rejected at the front door of the voluntariness principle or the rule barring all statements to police officers (i.e. below the rank of sergeant or inspector, as the case may be).

The writer is of the view that judges should not blindly apply the *Pulukuri Kotayya*[37] rule excluding "previous history" by allowing, as a direct result of the strict *ratio decidendi* of that case, in all and sundry cases, evidence of the accused's *concealment* of an article or articles on the assumption that this cannot be "previous history". This was permitted in the context of the charge in *Pulukuri Kotayya,* namely murder. However, should it be regarded as a *principle,* that evidence

[31] *Hashim & Anor.* v. *P.P.* (1956) 22 M.L.J. 233; *Tan Hung Song* v. *R.* (1951) 17 M.L.J. 181; *Chandrasekaran & Ors.* v. *P.P.* [1971] 1 M.L.J. 153; *Yee Ya Mang* v. *P.P.* [1972] 1 M.L.J. 120.
[32] (1947) 74 LA. 65.
[33] (1947) 13 M.L.J. 178.
[34] (1947) 74 I.A. 65.
[35] (1947) 13 M.L.J. 178.
[36] *Packiam* v. *P.P.* [1972] 1 M.L.J. 247.
[37] (1947) 74 I.A. 65.

of concealment is admissible?[37a] What if the charge is illegal concealment of someone's death, and evidence is then given of the accused's admission of concealment of the deceased's body, under section 27? On a charge of unlawful possession, say of a firearm or ammunition, it is evident that the accused's admission that he hid a firearm or had hidden ammunition in a particular place, is highly incriminating especially if the article in question is found in a place over which he has exclusive control, such as a location inside his home or in a hole in his garden. It is hardly solace for him if a cautioned statement by him amounting to a full confession of possession is ruled inadmissible, when under section 27, 'information' is admitted that the accused said he had hidden a gun in his bedroom (where it is found). This evidence would still be enough to establish possession, and the accused will still be convicted on the basis of a part of a statement admitted under section 27 which qualifies nevertheless as a confession. No doubt the wording of section 27 allows for "information, whether such information amounts to a confession or not...." But when section 27 was originally drafted, a much narrower view was taken of what a 'confession' amounted to. It could amount simply to an admission given by an accused and adduced in a criminal case.

Stephen himself stated, in his Introduction to the Indian Evidence Act:[38] "Admissions in reference to crimes are usually called confessions". He also defined an 'admission' in section 17 as merely "a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact...." Certainly, section 27 information may amount to evidence suggesting an 'inference' of this nature! One cannot quarrel with that. It is clear that before *Anandagoda's* case[39] and *Lemanit* v. *P.P.*,[40] a limited view was taken in Malaysia of a confession so that something falling short of a full admission of guilt, might yet be a 'confession'.[41]

In *Pulukuri Kotayya,* Sir John Beaumont did have this to say:[42]

> "the difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into section 27 something which is not there, and admitting in evidence a confession barred by section 26."

However, he proceeded immediately to add:

> "Except in cases in which the possession, or concealment of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."

Sir John appears here to approve of an exception in cases where possession or concealment of an object constitute the gist of the offence charged, where the 'information' admitted alone might well be conclusive to convict the accused in addition to the evidence of the discovery itself. It must be observed however, that this was only a *dictum* in that case.

[37a] In *San Soo Ha* v. *P.P.* [1968] 1 M.L.J. 34 at 35, Raja Azlan Shah J, thought that the admissibility of words evincing concealment was "established law".

[38] *The Principles of Judicial Evidence, supra,* first fn. 7.

[39] *Anandagoda* v. *R.* (1962) 28 M.L.J. 289.

[40] [1965] 2 M.L.J. 26.

[41] See *Liew Kon Kiow* v. *P.P.* [1948-49] M.L.J. Supp. 150.

[42] (1947) 74 LA. 65, at p. 78.

Nevertheless, it does seem that the possession cases — and there are many of these involving firearms and ammunition under the security laws in Malaysia — are productive of some difficulty and resultant prejudice to the persons charged with such offences.

There appear to be two approaches taken in the Malaysian 'possession' cases, one a broad view, permitting more incriminating information under section 27, and another, a more limited view, sufficient for the needs of the case, and not unduly productive of hardship or prejudice to the accused.

We will consider the cases taking the broader view first. In *P.P.* v. *Er Ah Kiat*,[43] a case involving an offence of having under one's control, a hand-grenade without lawful authority, Raja Azlan Shah J. approved of an old Allahabad State decision from India, *Emperor* v. *Chokhey*,[44] which had allowed evidence of the accused's saying "I have buried the gun at... place" and which held that the accused must be deemed to be in possession and control of a gun even though it was buried in a public place because he had concealed it himself and no other member of the public could have access as a result. Therefore, Raja Azlan Shah J. held:

> "In my view, if the hand-grenade was discovered in consequence of the statement it would be evidence of his control even though the hand-grenade is concealed in a public place because unless he had control he would not have concealed it there.. . ,"[54]

He was thus easily persuaded of the accused's being in possession of the hand-grenade.

Next, in *Chong Soon Koy* v. *P.P.*,[46] where the appellant had been convicted of possession of a firearm and ammunition (under the ISA), the Federal Court of Malaysia upheld the conviction and dismissed the appeal. It held that the following information from the accused was rightly admitted, namely "information with regard to a firearm and some ammunition *which he had hidden* in the Berapit Hills in Bukit Mertajam," in the words of a police witness Mr. Ong. Suffian L.P. held this admissible on the authority of *Pulukuri Kotayya* v. *King-Emperor*[47] and went on to say:

> "In view of the above authority all the evidence of Mr. Ong's which we have reproduced is admissible and that evidence alone, apart from the cautioned statement, is enough to justify the verdict arrived at by the learned trial judge"[48]

Finally, in *Sum Kum Seng* v. *P.P.*,[49] the Federal Court again upheld the appellant's conviction for the offence of having under his control, 16 firearms, and held that the accused's statement that "he admitted burying weapons somewhere and offered to show me the place" was information leading to the proven discovery and was "clearly admissible". The Court also considered that this evidence "so completely inculpates the appellant".

43 [1966] 1 M.L.J. 9.
44 A.I.R. 1937 All. 497.
45 [1966] 1 M.L.J. 9 at p. 11.
46 [1977] 2 M.L.J. 78.
47 (1947) 74 I.A. 65.
48 [1977] 2 M.L.J. 78 at p. 79.
49 [1981] 1 M.L.J. 244.

A more cautious approach was taken in the other line of cases. In *Tai Choi Keh* v, *P.P.*,[50] as we have already noted, the F.M.S. Court of Appeal was reluctant to regard evidence of 'pointing out' an object or place as of much value, or even as being 'information' and admissible as such. The Court also regarded the appellant as not being in possession of the arms and ammunition found although he led the police to a spot in a plantation and rubber estate owned by his deceased father's estate, as he was not proved to have exclusive control of the places where the articles were found. Thus, the conviction was quashed. It will be apparent how much in contrast this case stands from *Er Ah Kiat*.[51]

Then, in *Yee Ya Mang* v. *P.P.*,[52] Sharma J. displayed by his analysis, considerable understanding of the operation of section 27.

When a police witness (probably below the rank of Inspector) testified to the nature of the interrogation of the accused, and said that the accused told him he had a revolver and in the course of the interrogation told him that he, the accused, would take him to the place of the revolver, Sharma J. ruled the entire statement alleged to have been made by the accused inadmissible because of the violation of section 25 of the Evidence Act (the police officer was below the rank of Inspector) and said:

> "The fact that the accused admitted having a revolver meant and could only mean that he had possession of the same. This is the very charge the accused was asked to answer. The statement alleged to have been made by the accused was thus a confession to P.W.I."[53]

He further said:

> "It is not necessary to go into the various authorities but a study of them does show that that part of the statement sought to be put in evidence under section 27 of the Evidence Ordinance which is the very admission of the commission of the crime has been held inadmissible.... In the circumstances, apart from the very serious prejudicial effect the statement was likely to have against the accused, I am of the opinion that the learned president was wrong in admitting that confessionary statement".[54]

The writer fully endorses Sharma J,'s views, for to have allowed the so-called 'information' under section 27 would have defeated the object of section 25 (or section 24 or section 26).

Finally in *P.P.* v. *Toh Ah Keat*,[55] Hashim Yeop Sard J. took an approach that may be commended to all courts. The respondent had been charged with unlawful possession of a pistol and several rounds of ammunition. The following statement was sought to be adduced before the Sessions Court President:

> "He told me that *he was having a pistol* and that it was an automatic pistol and he *was also having 7 rounds of .22 ammunition and this pistol was hidden* in a heap behind some houses in Pasir Pinji and that he would take me to that place".

[50] [1948-49] M.L.J. Supp. 105.
[51] *P.P.* v. *Er Ah Kiat* [1966] 1 M.L.J. 9.
[52] [1972] 1 M.L.J. 120.
[53] *Ibid*., at p. 121.
[54] *Ibid*., at p. 122.
[55] [1977] 2 M.L.J. 87.

Of this statement, Hashim Yeop Sani J. held the last limb only admissible, applying *Pulukuri Kotayya.*[56] The final statement admitted was:

> "… this pistol was hidden behind some houses in Pasir Pinji and that he would take me to the place".

It is to be noted that this statement does not indicate that the *respondent* (accused) hid the pistol in any place. It is a matter of conjecture whether His Lordship would have admitted the same last limb of the statement if the respondent had said "I hid this pistol..." instead of "this pistol was hidden." Nevertheless, there is no objection by this writer to what in the end was actually held admissible.

It is clear that the 'possession' cases give rise to problems in applying section 27. The writer would like to suggest (very tentatively) that a return to the common law doctrine of confirmation by subsequent (discovery of) facts, may be helpful in reaching a correct and just solution to the question of how much 'information' is admissible under section 27. Do the words 'relates distinctly' create a test that differs altogether from the common law test of information that is *confirmed* by discovery of facts? The writer humbly submits that they do not, and that both tests are basically the same.

An excursion into the history of the words 'relates distinctly' may be instructive. Leach, in a note to *R.* v. *Warickshall*,[57] cites a case, *R.* v. *Butcher*[58] as authority for this view:

> "But it would seem that so much of the confession *as relates strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true".

East[59] however, cautioned against going too far in holding an inadmissible confession to be so substantiated and therefore admissible. He said:

> "… for even in such case, the most that is proper to be left to the consideration of the jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; *but not the acknowledgement of the prisoner's having stolen or put them there,* which is to be collected or not from all the circumstances of the case: and this is now the more common rule".

[56] (1947) 74 I.A. 65.

[57] (1783) 1 Leach 263 at p. 265 (fn. (a) 2).

[58] Some Indian writers wrongly cite *R.* v. *Lockhart* 1 Leach 386 (instead of *R.* v. *Butcher)* as the authority in question in Leach's note: See *Sarkar on Evidence* (12th ed.) at p. 293 and Field's *Law of Evidence* (10th ed.), Vol. II, at p. 1888. Perhaps this is due to a convenient adherence to Hidayatullah J.'s words in *State of U.P.* v. *Deoman Upadhyaya* A.I.R. 1960 S.C. 1125 at p. 1145, where he obviously misread Leach's note and said that section 27's words "were taken bodily from *R.* v. *Lockhart* (1785) 1 Leach 386" and then proceeded to quote words which are not to be found in that cited report but only in Leach's note on *R.* v. *Butcher*! The juxtaposition of the two cases' names in the same note must have caused his error which the commentators have unfortunately perpetuated through their inadequate research into the actual note of Leach.

[59] Edward Hyde East, *Pleas of the Crown* (1803), Vol. II, p. 658. (Italics mine).

Later, Taylor, in his Treatise, speaking of the doctrine of confirmation, said:[60]

> "It is competent... to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there.... The sounder doctrine seems to be, that so much of the confession as relates *distinctly* to the fact discovered by it may be given in evidence, as this part at least of the statement is proved to have been true".

Thus, it may be seen, the term 'relates strictly' in the note on *R.* v. *Butcher*[61] was altered by Taylor to 'relates distinctly', although Taylor himself cites *R.* v. *Butcher* in a note as authority for his last proposition of the 'sounder doctrine'! Presumably, Taylor treated the two phrases as identical in meaning and possibly even interchangeable.

However this may be, Sir James Fitzjames Stephen drew greatly from Taylor's work for his Indian Evidence Act, and probably did so also for his *Digest* on the Law of Evidence. Thus Article 23 of his *Digest*[62] states the rule of admissibility of facts discovered and of so much of the confessions as 'distinctly relate' to such facts.

Taylor had other followers, a notable one being McRuer C.J.H.C. in the Ontario case of *R.* v. *St. Lawrence*,[63] currently still the law in Canada.

McRuer C.J.H.C. said that "that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible", and went on to say that what the accused said "is not admissible to show that the accused said he *put* the articles where they were found, as the finding of them is equally consistent with the accused's knowledge that some other person may have put them in the place where they were found."[65]

In other words, the *finding* of articles in a particular place does not confirm the accused's statement as to the *hiding* of them there by the accused.

It is fairly clear that the Taylor view would result in not putting in evidence of stealing, putting or concealing any article in question that is found where others are led by the accused. The Taylor view is certainly not widely accepted, for the common law itself is uncertain, and no one view has gained dominance. There are in fact, some five views as to how much information is admissible under the doctrine.[66] As far as we are concerned, only one view of admissibility is most relevant, because of the Evidence Act. The only real question is to what extent information 'relates distinctly' to the facts discovered. And as we are already so indebted to Taylor for our Law of Evidence (owing to Stephen), we should perhaps take Taylor's view on this question.

60 Taylor, *Treatise on the Law of Evidence* (1st ed.), s. 654.
61 (1783) 1 Leach 265, n.
62 *Digest of the Law of Evidence* (12th ed.), p. 37. (See first fn. 8 *supra).*
63 [1949] O.R. 215.
64 See *R.* v. *Wray* [1971] S.C.R. 272.
65 [1949] O.R. 215 at pp. 228-9.
66 See A. Gottlieb, *Confirmation by Subsequent Facts,* 72 L.Q.R. 209.

CONCLUSION

In conclusion, the writer Would argue that there are perhaps two good reasons for taking a narrower view of section 27 so as to allow nothing in evidence that is not confirmed by the discovery of facts.

First, to take a wider view would be to continue to violate the rule excluding 'tainted' confessions — as the possession cases so clearly illustrate. The suggestion in section 27 that 'information' can amount to a 'confession' has to be seen in the light of what Stephen regarded as a confession at the time the original Indian Evidence Act was drafted. A 'confession' then, and possibly even until at least 1962 [67] was certainly not a piece of evidence that necessitated conviction without more evidence, and so could come in under section 27. It may be that it is for the Legislature to put the matter beyond doubt by amending the Evidence Act either to restore the old meaning to 'confession', or to require corroboration for present-day confessions before conviction is possible. In another respect also, in the context of section 24 the present definition of confession may produce an anomaly thus: a confession must be excluded if not voluntarily made; but an admission is admissible nevertheless![68]

Second, the narrower view would be more in accord with the doctrine of confirmation, as evidenced by Taylor's view. Further, the strict doctrine, when applied with an eye on what is actually confirmed by the discovery, is more juridically sound than the far more vague test of "past history" or "past user". The latter tends to result in mechanical applications of some kind of 'blue pencil test', executing a severance of words or sentences from the original information with the belief that anything referring to the concealment of objects relevant to the offence must be admissible. All the circumstances, it is submitted, must be looked at: the nature of the charge and what facts are in issue; how 'distinctly' the information relates to the facts discovered; what precisely are the 'facts discovered', and so on. Too often, for example, do judges speak of the objects found and knowledge of the accused interchangeably as 'facts' or as having been 'discovered'. There is not enough clear thinking on this entire subject. The resort to formulae or jargon, like 'past history' may not be apt.

It may well repay the Courts not to be too ready to employ section 27 to admit relevant evidence on the ground that there is some guarantee of truth in it; for, as Knight Bruce V.C. said many years ago (although in a different context):

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel

[67] *Anandagoda* v. *R.* (1962) 28 M.L.J. 289. See, *e.g.* (on the pre-1962 position), *Liew Kon Kiow* v. *P.P.* [1948-49] M.L.J. Supp. 150.

[68] In English law, however, any admission in a criminal case must satisfy the test of voluntariness: *Commissioners of Customs & Excise* v. *Harz & Power* [1967] 1 A.C. 760.

is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination.... Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much".[69]

V.S. WINSLOW*

[69] *Pearse* v. *Pearse* (1846) 1 De G. & Sm. 12, 28. (Quoted by Stephen and Aickin JJ. in the High Court of Australia in *Bunning* v. *Cross* 52 A.L.J.R. 561 at 565, supporting a judicial discretion to exclude unfairly obtained evidence).

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