Public Prosecutor v Heah Lian Khin
[2000] SGHC 154

Case Number : MA 354/1999

Decision Date : 01 August 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Chan Wang Ho (Deputy Public Prosecutor) for the appellant; Subhas Anandan (MPD Nair & Co) for the respondent

Parties : Public Prosecutor — Heah Lian Khin

Evidence – Witnesses – Impeaching witnesses' credibility – "'Previous inconsistent or contradictory statement" – Interpretation of phrase – Flexible interpretation preferred – Whether phrase encompasses witness who deliberately and falsely claimed inability to recall material facts – s 147(3) Evidence Act (Cap 97, 1997 Rev Ed)

Evidence – Witnesses – Refreshing memory – Whether previous statement used to refresh witness's memory – Whether previous statement admissible as substantive evidence – ss 147(4) Evidence Act (Cap 97, 1997 Rev Ed)

Evidence – Witnesses – Prior criminal proceedings against witness – Witness pleaded guilty to related offences – Whether prior criminal record of proceedings admissible as substantive evidence – s 45A Evidence Act (Cap 97, 1997 Rev Ed)

Evidence – Witnesses – Statements by witness – Whether admissibility of statements subject to test of voluntariness

Statutory Interpretation – Construction of statute – Purposive approach – s 9A Interpretation Act (Cap 1, 1999 Ed)

: This was an appeal by the Public Prosecutor against the decision of District Judge Hoo Sheau Peng acquitting and discharging the respondent on three charges of receiving information communicated in contravention of s 5(2) of the Official Secrets Act (Cap 213) (`OSA`) for want of a prima facie case. After hearing the submissions of both the DPP and counsel for the respondent, I allowed the appeals earlier this morning and remitted the case to the district judge for further inquiry. I now give my reasons for my decision.

The charges

The respondent was tried on the following three charges:

> *First charge - DAC 36389/99*
>
> *You, Heah Lian Khin (Male/42 years/NRIC No S1004602E) are charged that you, on or about 17 October 1998, in Singapore, received from one Tay Boon Hian, a Corporal of the Singapore Police Force and attached to the Secret Society Branch, information relating to raids to be conducted on the 17 October 1998 by the said Secret Society Branch, having reasonable ground to believe that, at the time you received it, such information was communicated to you in contravention of the Official Secrets Act, and you have thereby committed an offence under s 5(2) and punishable under s 17(2) of the Official Secrets Act (Cap 213).*

Second charge - DAC 36391/99

You, Heah Lian Khin (Male/42 years/NRIC No S1004602E) are charged that you, on or about 21 November 1998, in Singapore, received from one Tay Boon Hian, a Corporal of the Singapore Police Force and attached to the Secret Society Branch, information relating to raids to be conducted on the 21 November 1998 by the said Secret Society Branch, having reasonable ground to believe that, at the time you received it, such information was communicated to you in contravention of the Official Secrets Act, and you have thereby committed an offence under s 5(2) and punishable under s 17(2) of the Official Secrets Act (Cap 213).

Third charge - DAC 36393/99

You, Heah Lian Khin (Male/42 years/NRIC No S1004602E) are charged that you, on or about 29 November 1998, in Singapore, received from one Tay Boon Hian, a Corporal of the Singapore Police Force and attached to the Secret Society Branch, information relating to raids to be conducted on the 29 November 1998 by the said Secret Society Branch, having reasonable ground to believe that, at the time you received it, such information was communicated to you in contravention of the Official Secrets Act, and you have thereby committed an offence under s 5(2) and punishable under s 17(2) of the Official Secrets Act (Cap 213).

The prosecution`s case

The prosecution adduced undisputed evidence showing that Cpl Tay Boon Hian (`Cpl Tay`), who was named in the charges in question, was posted to the Secret Society Branch, (`SSB`) at the material time. Since October 1998, SSB had been actively conducting police operations involving raids in Geylang and had been investigating the activities of a loan shark, Chua Tiong Tiong, also known as `Ah San` or `Ah Long San` (`Ah San`).

The prosecution adduced evidence showing that a confidential order would generally be put up by SSB before each operation. The confidential order contained information pertaining to, inter alia, the date and timing, and the objective of the operation. A confidential pre-operation briefing would also be conducted for officers, touching on the contents of the confidential order and the places to be covered during the operation. SSB officers who were not involved in the operation, and members of the public, were not allowed to attend the briefings or to receive information revealed at such briefings. By the same token, officers attending the briefings were not allowed to disclose to any members of the public the contents of the briefings.

On 17 October 1998 and 21 and 29 November 1998, SSB conducted operations in the Geylang area. Cpl Tay participated in the operations on 17 October 1998 and 29 November 1998 and attended the relevant pre-operation briefings. Cpl Tay was not involved in the operation held on 21 November 1998; hence he was not authorised to attend or to receive the information revealed during the pre-operation briefing.

Evidence of Cpl Tay

Cpl Tay was the principal witness for the prosecution. Cpl Tay testified that the respondent was

known to him as `Ah Boy` and was one of his sources. He got to know the respondent in 1996 and 1997 and they subsequently became close friends. At the material time, Cpl Tay was aware that the respondent knew Ah San and that Ah San had business dealings in Geylang.

Cpl Tay testified that he was involved in a night operation conducted by SSB on 17 October 1998 and had attended a pre-operation briefing at about 8.30pm. During the briefing, he was informed of the general area which his team would be covering but he could not recall whether precise locations were mentioned. While travelling in a van after they moved out for the operation at about 8.45pm to 9pm, his team leader informed them of the rough areas which would be covered, including Geylang and Aljunied.

According to Cpl Tay`s testimony, he called the respondent at about 9pm, in response to the latter`s page, after he had moved out of the van. The respondent asked him where he was and enquired if he was free for coffee. He informed the respondent that he could not as he was `having operations`; he also told the respondent that he was `somewhere in Geylang`.

Cpl Tay was not involved in the operation conducted on 21 November 1998. At about noon on that day, he came to know from his colleagues that an operation was to be conducted that night. He could not recall: whether he spoke to or informed the respondent on 21 November 1998 about the operation which was to be conducted that night; and whether Chua or the respondent paged for him that day.

Cpl Tay agreed that he was involved in an SSB operation on 29 November 1998 and attended a pre-operation briefing. He could not recall whether the areas targeted for operation were mentioned at the briefing. His team leader informed them that they were heading for Geylang only after they had moved out for the operation at about 9.15pm. Specifically, Cpl Tay claimed that he could not recall: whether he spoke with the accused after he moved out for the operation; whether he called the respondent before 9.15pm; whether he told the respondent that SSB was conducting a raid that evening; and whether he told the respondent that SSB would be conducting a raid with the anti-vice and Gambling Suppression Branch in the Geylang area that evening.

In addition, Cpl Tay claimed not to be able to recall: whether Ah San called him in October 1998 to find out why there were so many raids by SSB in Geylang; whether he said that SSB was targeting Ah San; whether the respondent asked him if he could provide tip-offs of raids to Ah San; whether he promised to try to do so. Cpl Tay agreed however that it would undermine SSB operations if he informed the respondent of pending operations in the Geylang area.

Prosecution`s attempts to admit Cpl Tay`s previous statement in writing

Cpl Tay had given a statement to CPIB Senior Special Investigator Tin Yeow Cheng on 25 May 1999 and 26 May 1999 which had been recorded pursuant to s 27 of the Prevention of Corruption Act (Cap 241) (`PCA`). In it, Cpl Tay related a detailed account of the surrounding circumstances and the events of 17 October, and 21 and 29 November 1998. These included conversations between Cpl Tay and Ah San and the respondent at the end of October 1998 during which the respondent asked Cpl Tay to provide tip-offs of impending raids in the Geylang area as well as Cpl Tay`s promise to try and provide such tip-offs. The statement also related how Cpl Tay contacted and conveyed information on impending raids to the respondent on the material dates in question. Finally, the statement explained that Cpl Tay provided tip-offs to the respondent because of their friendship.

In light of Cpl Tay`s oral testimony, the prosecution sought to impeach his credit with his previous statement in writing (marked for identification as exh P7I); and to admit it as substantive evidence

pursuant to s 147(3) Evidence Act (Cap 97) (`EA`). The DPP later abandoned this application when he was not able to locate authorities supporting his submission that a witness`s inability to recall the material events fell within s 147 EA.

The DPP next sought to refresh Cpl Tay`s memory by referring to this statement pursuant to s 161 EA. Cpl Tay admitted that he gave a statement to the CPIB and confirmed that his signature appeared at the end of the statement exh P7I. Nonetheless, he maintained that he could not recall the events described therein; neither did he affirm that exh P7I was an accurate record of his statement to the CPIB. Subsequently, Cpl Tay claimed that he could not remember giving the statement to the CPIB. In the course of the DPP`s cross-examination, the district judge disallowed questions which sought explanations for the contents of the statement. She held that proceedings under s 161 EA were confined to refreshing the witness`s memory and confirming the matters contained in the statement; these questions were thus a backdoor and improper way of cross-examining Cpl Tay on the statement .

The DPP next applied to admit exh P7I pursuant to s 147(3) EA. The defence objected, arguing that s 147(1) envisaged a situation where the testimony of a witness was clearly opposite to the contents of his previous statement in writing, and not where the witness simply stated that he was unable to recall the material events. As regards Cpl Tay`s oral evidence of the events of 17 October 1998, the defence submitted that this only contained minor differences in phraseology and did not amount to material contradictions. In the event, the district judge disallowed the prosecution`s application.

At this juncture, the DPP resorted to s 45A EA. On 18 November 1998, about one month prior to the trial, Cpl Tay pleaded guilty to and was convicted, inter alia, of one charge of communicating information to the respondent in contravention of s 5(1)(d)(i) OSA (DAC No 35628 of 1999). The subject matter of the charge mirrored the first charge against the respondent. In addition, Cpl Tay consented to two other charges of communicating information to the respondent in contravention of s 5(1)(d)(i) OSA to be taken into consideration for the purposes of sentencing (DAC Nos 35629 and 35631 of 1999). The subject matter of those two charges mirrored the second and third charges against the respondent. The district judge allowed the application and admitted the record of proceedings, which included the charges and statement of facts, into evidence (exh P8). The pertinent part of the statement of facts read:

> *Sometime in October 1998, Chua Tiong Tiong contacted the accused and asked him why the SSB had conducted so many raids against his lounges. The accused then informed him that the SSB were targeting him.*
>
> *Subsequently, the accused was approached by Heah Lian Khin, an accomplice of Chua Tiong Tiong. Heah asked the accused if he could provide tip-offs regarding impending police raids to Chua Tiong Tiong. The accused agreed to do so, and was told to pass such tip-offs either to Heah or directly to Chua Tiong Tiong.*
>
> *On 17 October 1998, at about 8.30pm, the accused attended a briefing conducted by one ASP Adrian Quek Sei Wei of SSB, on a raid to be conducted in the Geylang area that evening. However, the accused was not told of the specific place that would be raided.*
>
> *After the briefing, the accused contacted Heah and informed him that the SSB would be conducting a raid in the Geylang area later that evening.*
>
> *The information which ASP Quek had given to the accused regarding the raid*

was information which had been entrusted in confidence to the accused by ASP Quek, who was a person holding office under the Government within the meaning of s 5(d) of the Official Secrets Act (Cap 213).

Cpl Tay confirmed that he pleaded guilty to the charge of communicating information to the respondent in contravention of the OSA but repudiated the statement of facts. He was advised to plead guilty and had simply wanted to get the matter over with. As such, when he admitted to the statement of facts, its contents had not mattered to him.

At this juncture, the DPP again attempted to admit exh P7I, this time relying on ss 24 and 159 EA. Both applications were disallowed by the trial judge on the basis that they were inapplicable.

Having failed in his attempts to cross-examine Cpl Tay on his previous statement in writing, the DPP closed the prosecution`s case after putting to Cpl Tay that he had wilfully and deliberately chosen not to remember the facts within his knowledge and that he lied when testifying that he was not able to recall the events of 21 and 29 November 1998.

The decision of the district judge

The critical aspect of the district judge`s decision was her refusal to allow the prosecution to cross-examine Cpl Tay on his previous statement, exh P7I, pursuant to s 147(1). She first examined the regime and history of s 147 EA and concluded that s 147(3) EA, which was introduced in 1976, had changed the law concerning the effect of previous inconsistent or contradictory statements by admitting them as evidence of facts stated therein. In her view, this formed inroads into the basic principle prohibiting the admission of a witness`s former out of court statements as substantive evidence. This meant that the use of s 147 EA should be carefully circumscribed.

The district judge ruled that there were no serious discrepancies or material contradictions between Cpl Tay`s oral evidence and exh P7I in relation to the surrounding circumstances and events of 21 and 29 November 1998 for the following reasons:

... The terms `contradiction` and `discrepancy` carry their plain and ordinary meanings. According to the ***New Oxford Dictionary of English****, a contradiction means `a combination of statements, ideas, or features of a situation which are opposed to one another` while a discrepancy is `an illogical or surprising lack of compatibility or similarity between two or more facts`. Accordingly, s 147 of the EA is resorted to when a witness gives version A in a statement and then version B to the court, with serious or material differences in these accounts. Where a witness states in court that he does not remember the events, he has not given version B to the court. Prima facie, there could not be said to be any contradictions or discrepancies as there was simply no account of the event before the court. Moreover, when a witness is unable to provide an account to the court due to a lapse in memory, the situation is chronologically consistent in that court proceedings take place after the recording of statement. It would be futile to cross-examine such a witness under s 147(1) of the EA as his explanation, if any, would be that he cannot remember the events.*

I appreciate that it could well be that a witness such as PW 3 is simply being evasive. In this scenario, a party calling the witness would be keen to admit his previous statement s 147(3) of the EA so that the contents would supplement

the paucity of evidence in court. However, I was not persuaded that the words `previous inconsistent or contradictory statement` should be strained to cover a situation where a witness does not give an account to the court, even if the witness is deliberately refusing to remember. Based on the foregoing, in relation to the surrounding circumstances, the events of 21 and 29 November 1998, there were no serious discrepancies or material inconsistencies.

The district judge next compared Cpl Tay`s account of the events of 17 October 1998 with his earlier account contained in exh P7I (at para 60(a)) and ruled that they only contained minor inconsistencies and discrepancies. Accordingly, she did not allow the prosecution to cross-examine Cpl Tay on that portion of exh P7I pertaining to the events of 17 October 1998.

At the close of the prosecution`s case, the district judge held that the prosecution had not adduced any evidence against the respondent on the second and third charges. In her view, the only evidence came from DAC Nos 35629 and 35631 of 1999 in exh P8 which were taken into consideration for sentencing. The charges however did not contain any evidence showing that the respondent had reasonable grounds to believe that such information was communicated to him in contravention of the OSA. Neither did they throw any light on the exact information communicated or the surrounding circumstances in which such information was communicated on 21 and 29 November 1998.

Turning to the first charge, the district judge examined the statement of facts contained in exh P8 and Cpl Tay`s testimony in court. She noted that the information communicated to the respondent on 17 October 1998 was in very general terms without any specifics in terms of location, time or purpose; it was also communicated in the course of a normal conversation. In her view, the sum of the evidence did not show that the respondent had any reasonable grounds to suppose that the information was protected information, communicated in breach of the OSA.

Accordingly, the district judge acquitted the respondent of all three charges at the close of the prosecution`s case without calling upon him to enter on his defence.

The appeal

Whether exh P 7I admissible pursuant to s 147(3) EA

The thrust of the DPP`s appeal hinged on his submission that exh P7I should have been admitted for the purposes of cross-examination or impeachment pursuant to ss 147(1) and 157(c) EA and as substantive evidence pursuant to s 147(3) EA. It is established law that, for proceedings under ss 147(1) and 157(c) EA, the court must first find that there are serious discrepancies or material contradictions between the witness`s oral testimony and his version contained in a prior statement in writing before it grants leave for the proceedings: **Muthusamy v PP** [1948] MLJ 57 , **Somwang Phatthanasaeng v PP** [1992] 1 SLR 850 and **Lim Young Sien v PP** [1994] 2 SLR 257 .

The district judge`s reasons for not allowing the prosecution to cross-examine Cpl Tay on exh P7I in relation to the surrounding circumstances and the events of 21 and 29 November 1998 are set out above. Before me, the DPP argued that the phrase `previous inconsistent or contradictory statement` could also encompass a situation where the witness deliberately refused to give an account to the court. Counsel for the respondent on the other hand associated himself with the trial

judge`s reasoning; he argued that, since Cpl Tay had not testified to the facts, he had not provided any affirmative version in court which could be considered to be contradictory.

The meaning of `previous inconsistent or contradictory statement`

This ground of appeal raised an important question of law as to the ambit of s 147(3) EA. For convenient reference, the relevant provisions are set out below:

> *Section 147 EA*
>
> *(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*
>
> *(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement.*
>
> *(3) Where in any proceedings a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of this section, that statement shall by virtue of those proceedings be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.*
>
> *Section 157 EA*
>
> *The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:*
>
> *(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.*

The phrase `previous inconsistent or contradictory statement` is not defined in the EA. At the outset, I noted that the terms are ordinarily defined as follows:

> ***Contradictions** - a combination of statements, ideas or features of a situation which are opposed to one another: **New Oxford Dictionary of English***
>
> *- a statement containing propositions one of which denies or is logically at*

variance with the other: ***The Oxford English Dictionary*** *Vol III (2nd Ed, 1989)*

> ***Inconsistent*** *- ... not agreeing in substance, spirit or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous:* ***The Oxford English Dictionary*** *Vol VII, (2nd Ed, 1989)*

The DPP submitted that the phrase `previous inconsistent or contradictory statement` need not be restricted to a situation where the witness gives two substantive opposing version of events. He contended that, when a witness failed to give a version which was materially similar to his previous statement, that per se constituted a materially inconsistent testimony. He argued that, when a witness had given a detailed account of events in a previous statement, the implicit idea or feature of that statement was that he remembered the events and was able to provide an account of it. If the witness subsequently claimed that he was unable to remember the events stated in his previous statement, even after it was shown to him to refresh his memory, this was a `combination of ideas or features of a situation that were opposed to one another`. The DPP further argued that when a witness had provided a detailed account of events in a previous statement but subsequently, without any reason, gave testimony which did not agree `in substance, spirit or form` with the previous statement, the previous statement constituted a materially inconsistent statement.

I found the DPP`s submissions to be of merit. There was, in my view, support for adopting a flexible as opposed to a rigid, semantic interpretation of the phrase `previous inconsistent or contradictory statement`. In discussing s 145 of the Indian Evidence Act 1872 which is in pari materia with s 147(1) EA, the learned authors of Chief Justice ***M Monir`s Principles and Digest of the Law of Evidence*** (8th Ed), citing ***Wigmore on Evidence*** at [sect] 1010, commented at p 1566:

> *... There must be a real inconsistency between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true. Thus,* ***it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential****; it is an inconsistency that is required.* ***Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. ... As a general principle, it is to be understood that this inconsistency is to be determined not by individual words or phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?*** *[Emphasis added.]*

I was in full accord with the above observations. Indeed, in practice, there could be a wide variety of statements; an absolute oppositeness was not essential. In my view, the court had to compare the oral evidence and the previous statement and to assess the overall impression which had been created as a whole. The critical question was whether the two utterances, even if one was the utterance that `I can`t remember`, were in effect inconsistent and appeared to have been produced by incompatible beliefs.

American jurisprudence, however, seems to support the interpretation adopted by the district judge. It is stated in 98 ***Corpus Juris Secundum (A Complete Restatement of the Entire American Law)*** at [sect] 583 that:

> ***A prior statement of a witness, in order to be provable for the purpose of***

> ***impeachment, must be contradictory to, or inconsistent with, his testimony in some degree; and if such contradiction or inconsistency does not appear, the prior statement is properly excluded****. Whether such inconsistency actually exists should be determined not from single or isolated answers, but from the testimony of the witness as a whole; and the questions of contradiction is whether or not the proffered statement and the testimony of the witness lead to inconsistent conclusions, indicating that the differing expressions of the witness appear to have been based on incompatible beliefs.*
>
> ***Accordingly, statements of the witness with respect to matters as to which he has not testified cannot be shown****; ... Where a witness has testified to certain facts, he may not be impeached by proof of prior statements that he did not remember such facts; and* ***where a witness merely states that he does not remember, he cannot be impeached by the showing of former statements with respect to the facts which he claims not to remember****, and the same principle applies where, at a trial, a witness professes lack of knowledge as to a particular matter. [Emphasis added.]*

The relevant parts of the commentary cited in support are the cases of ***Click v Commonwealth*** 269 SW 2d 203; ***State v Jolly*** 116 P 2d 686; ***Sadie Anthony v Don Hobbie*** 193 P 2d 748.

It is crucial to note that none of the cited decisions contained an analysis of the phrase `previous inconsistent or contradictory statement`. The decision in ***Click v Commonweath*** was underpinned by the Kentucky Court of Appeal`s concern over the admission of prejudicial evidence (at p 205):

> *We think it is perfectly obvious that* ***the real objective of the Commonwealth`s attorney and the real purpose of the seven `impeaching witnesses`, was not to impeach Lloyd Click, but to prove by indirection that Ray Click had fired the fatal shot****. The purpose was to put in Lloyd`s mouth words Lloyd was unwilling to use on the trial, which would have the effect of establishing Ray`s guilt.*
>
> *In* ***Maddox v Commonwealth*** *311 Ky 685, 225 SW 2d 107, 108, after receiving a number of `I don`t` know` answers from an evasive witness, the Commonwealth`s attorney questioned her about some positive statements she allegedly had made to him before the trial, and he later took the stand himself and testified that she had made such positive statements. In holding this to be prejudicial error, the court said:*
>
> ***`If the testimony is merely negative or the witness fails to make the statements which the party introducing him apparently expected, he will not be permitted to get before the jury the anticipated evidence by this second method.`*** *[Emphasis added.]*

State v Jolly was a decision of the Supreme Court of Montana. There, the prosecution witness claimed that he could not recall a particular statement made by the defendant; he was then cross-examined on his previous affidavit where he gave an account of the conversation in question. The argument on appeal was limited to the effect of the prior conflicting statement. The question whether the impeachment should have been allowed in the first place was not raised at all as no objection was taken. Chief Justice Johnson took the view that the prior inconsistent statement was substantive evidence but held on the facts that the defendant`s alleged statement was so inherently improbable

and incredible that it ought to be disregarded (at p 688). Justice Angstman in fact noted that the statement was proof that the witness made a statement contrary to his oral testimony; he took the contrary position that prior self-contradictions have no substantive or independent testimonial value (at p 689). With respect, the case did not in my view stand for the general proposition for which it was cited.

The decision in ***Sadie Anthony v Don Hobbie*** hinged on a rule in California, that a party may not impeach his own witness unless surprised by hostile testimony. The Court of Appeal of California noted that the witness did not give unfavourable testimony but merely stated that she did not remember the facts of the accident. The element of surprise was also absent (at p 751). In any event, the prior statement was not substantive evidence but only served to impeach the witness`s testimony that he could not remember. Clearly, the case also did not hold that the witness had not given a previous inconsistent statement.

There is no statutory requirement under ss 147(1) and 157(c) EA that the witness must have given surprise hostile evidence. Further, s 147(3) EA is unequivocal in effect; it provides that the prior inconsistent statement is admissible as substantive evidence. It may well be meaningless to permit the cross-examination of a witness who testifies to a lack of memory if the statement is not admissible as substantive evidence. It would only show that the witness had previously provided an account but has advanced the case no further. In light of these significant differences, and in the absence of any analysis of the phrase `previous inconsistent or contradictory statement`, I declined to follow the approach adopted in those decisions.

A similar argument was raised before the English Court of Appeal in **R v Thompson** [1977] 64 Cr App R 96. The accused`s daughter was called as a witness for the prosecution but refused to give evidence. She was treated as hostile and cross-examined on her previous statement. Upon cross-examination, she admitted that her previous statement was true and affirmed its contents. On appeal, the accused contended that it was not permissible to cross-examine the witness on her previous statement under s 3 of the Criminal Procedure Act 1865. This provided that a party may prove that the witness had at other times made a statement inconsistent with his testimony. It was argued that the witness could not be considered to have given a contradictory or inconsistent oral version since she had refused to testify to the material events.

The court did not find it necessary to express a view on this argument; upholding the trial judge`s ruling on the basis that the common law right of the judge to allow cross-examination of a hostile witness in his discretion had not been destroyed or removed by statute. Nonetheless I found the following remarks by the Lord Chief Justice to be particularly pertinent (at p 99):

> *... We are dealing here with a witness who shows himself decidedly adverse, and ..., it is always in the discretion of the judge to allow cross-examination. After all, we are only talking about the asking of leading questions.* ***If the hostile witness declines to say anything at all, that is as inconsistent with his or her duty as making a second and inconsistent statement about the facts.*** *[Emphasis added.]*

A far more helpful and persuasive authority was the decision of the Supreme Court of Canada in ***McInroy v The Queen*** 42 CCC (2d) 481. There, a Crown witness, when questioned on a certain conversation she had with the accused, stated that she could not recall the conversation. The trial judge permitted the Crown to cross-examine her on a previous statement pursuant to s 9(2) Canada Evidence Act, RSC 1970. In the statement, the witness related a conversation with the accused

during which the latter confessed to the murder of the victim. The statement was recorded a few days after the conversation while the trial took place seven months later. When shown the statement, she maintained that she could not recall the conversation nor could she recall having said those things to the police. She however confirmed that her signature appeared at the end of the statement and agreed that what she had told the police was what she believed to be true then.

On appeal, the British Colombia Court of Appeal took the view that the trial judge erred in permitting the cross-examination under s 9(2) Canada Evidence Act: see ***R v Rouse*** 36 CCC (2d) 257 at p 264. Chief Justice Farris reasoned that the witness had testified to nothing damaging the Crown`s case but had simply disclaimed any present relevant testimonial knowledge of the conversation. In such cases, a prior inconsistent statement of facts may not be used to impeach her. He also held that the admission of such statements would allow a party to reinforce by pure hearsay the gap in the witness`s evidence.

On further appeal, the Supreme Court disagreed with the Court of Appeal and upheld the trial judge`s decision to permit cross-examination pursuant to s 9(2) Canada Evidence Act, RSC 1970 which read:

> *Where the party producing a witness alleges that the witness made at other times a statement in writing, or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse.*

This provision is quite similar to s 147(1) EA and requires the witness to have made an inconsistent statement on another occasion.

The decision of Martland J on this point, which received the unanimous concurrence of the other Supreme Court judges, was especially instructive (at p 494):

> *Section 9(2) is not concerned with the cross-examination of an adverse witness. That subsection confers a discretion on a trial judge where the party producing a witness alleges that the witness has made, at another time, a written statement inconsistent with the evidence being given at the trial. The discretion is to permit, without proof that the witness is adverse, cross-examination as to the statement.*
>
> ***The task of the trial judge was to determine whether Mrs St Germaine`s testimony was inconsistent with her statement to the police. In my opinion, he was properly entitled to conclude that it was. At trial Mrs St Germaine swore that she could not recall any part of the conversation with McInroy in the kitchen of her house on the night of the killing, although only some seven months earlier she had given to the police, in her written statement, the details of that conversation, including McInroy`s admission that he was the murderer. If her statement at trial as to her recollection was true, inconsistency would not arise****, but the trial judge saw Mrs St Germaine and heard her evidence on the voir dire.* ***It was quite open to him to conclude that she was lying about her recollection and to form his own conclusions as to why she was refusing to testify as to her true recollection. Chief Justice Farris says [at p 263] in terms that `the trial judge clearly did not believe her when she said that she had a lack of recall`. This being so there was evidence of an inconsistency between what she said at the trial, ie that she had no recollection of a conversation,***

and what was contained in her written statement, ie a detailed recollection of it.

*In **Wolf v The Queen** [1974] 17 CCC (2d) 425, 47 DLR (3d) 741, ... this court upheld a conviction for perjury against a person who had been the complainant on a charge of unlawfully causing bodily harm. He had given a signed statement to the police in connection with that charge. At the preliminary hearing he said that he could not remember the events described in the statement. The issue before this court was as to whether his evidence at the preliminary hearing was given `with intent to mislead` within s 120 of the Criminal Code. This court held that the case was not one of mere error, honestly made, but that the circumstances justified the conclusion that the failure of memory was dishonest and deliberately asserted to prevent the court from arriving at a decision on credible evidence.*

***The granting of the Crown`s application was a matter for the sole discretion of the trial judge** and, in my view, he had adequate grounds for exercising that discretion as he did. ... The trial judge was careful to explain, ... the limited extent to which that cross-examination might be considered by the jury. [Emphasis added.]*

In my view, Martland J`s treatment of the issue was sound and accorded with common sense and logic. Due to the varying permutations of inconsistent statements, it would be unduly restrictive and unrealistic to confine the operation of the statutory provisions to a situation where the witness gives two affirmative versions of the facts. A less semantic approach, which calls for a comparison of the oral testimony with the previous statement as a whole to determine whether they are compatible, congruent or consonant in substance, spirit or form, is preferred. A trial judge is perfectly entitled in the proceedings to conclude that a witness is deliberately lying about his recollection and to form his own conclusion as to why the witness is refusing to testify as to his true recollection. This will constitute evidence of an inconsistency between what the witness said at the trial, ie that he has no recollection of the material facts and what was said in the witness`s written statement, ie a detailed recollection of it.

Principles of statutory interpretation

In interpreting s 147 EA, I had borne in mind s 9A Interpretation Act (Cap 1) which provides:

(1) In the interpretation of a provision of a written law, an interpretation that would promote the object or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

As explained in **Constitutional Reference No 1 of 1995** [1995] 2 SLR 201 at pp 210 and 211, a purposive approach should be adopted in interpreting legislation so as to give effect to the intent and will of Parliament. The operation of s 9A required no ambiguity or inconsistency.

In explaining the rationale for the introduction of s 147(3) EA, the then Minister for Law and the Environment, Mr EW Barker stated (see ***Reports of Parliament*** Vol 34 at cols 1246, 1247):

> ***Clause 9 proposes that a previous statement made by a witness should be admissible not only to support or impugn his credibility as a witness but as evidence of the fact stated in it****. The present law has caused difficulty when evidence is given that a witness made a previous statement inconsistent with his evidence given in court.* ***Evidence that the witness did so is admissible but it is admissible not in order to prove the truth of what was said in the previous statement but only in order to neutralise the effect of the evidence given in court by the maker of the statement. Many regard this as too fine a distinction****. [Emphasis added.]*

The explanatory statement to the Bills Supplement stated that:

> *Clause 9 [bringing in s 147(3)]* ***provides where a previous inconsistent or contradictory statement made by a person called as a witness in the proceedings in question is proved*** *or where a document used by a witness to refresh his memory is proved, then the previous statement or any statement made in that document used to refresh the witness`s memory* ***shall be admissible in evidence of any facts stated in it of which direct oral evidence of the witness would be admissible****. [Emphasis added.]*

The draft cl 9 was based on the draft clauses prepared by the United Kingdom Criminal Law Revision Committee`s 11th Report on Evidence (General): see **PP v Sng Siew Ngoh** [1996] 1 SLR 143 at pp 152 and 153. Their reasons for the proposal (at p 136) were reflected in the Minister`s statement set out above. The Committee further explained (at p 139):

> *...* ***The essence of our proposed scheme is to supplement the oral evidence by hearsay evidence which is likely to be valuable for the ascertainment of the truth and cannot be given because of the restrictions in the present law****. In the case of a previous statement by a person who is called as a witness there is a special reason for proposing to make the statement admissible. It might be argued that, since the maker is giving evidence, there is no need to allow evidence to be given of what he said on a previous occasion. But assuming, as one must, that a person called as a witness in criminal proceedings is more likely than not to intend to try to tell the truth, it follows that what he said soon after the events in question is likely to be at least as reliable as his evidence given at the trial and will probably be more so. This may not always be the case, because the earlier statement may have been made in haste and perhaps under the influence of shock caused by the events in question, and the evidence given at the trial may be more carefully thought over; but at any rate,* ***if there is a discrepancy, it is likely to be helpful to the court or jury to have both statements****. [Emphasis added.]*

I had previously examined the underlying purpose of s 147(3) EA in ***PP v Sng Siew Ngoh*** where I stated at p 156:

> *... reliability is not itself the sole justification for constituting an exception to s 122(1). Various policy reasons may come in as well. ... A similar reason must apply to s 147. When a prior statement is used to impeach the credit of a witness giving testimony in court, there are two possible sources of evidence: the prior statement or the testimony.* ***The testimony has been given in court - it may still be considered as evidence. But as a result of the impeachment process, that evidence may be considered unreliable. For***

> ***the court to close its eyes to the evidence in the inconsistent statement may be to deny itself a possible source of evidence. The very fact of its inconsistency would indicate that either the testimony in court or the inconsistent statement should contain the truth. What is more, the inconsistent statement would have been given closer in time to the events related than the testimony at trial****. While the inconsistent statement would not have that inherent reliability which confessions or dying declarations would have for example,* ***it would be altogether too artificial to exclude it as well****. ... [Emphasis added.]*

Bearing in mind the above, the essence of s 147(3) EA could be summarised as follows: (i) it allows a previous inconsistent statement to be admitted as substantive evidence of the facts stated; (ii) it supplements oral evidence with a previous inconsistent statement which is likely to be valuable for the ascertainment of the truth; (iii) it prevents the artificial exclusion of a possible source of evidence which could contain the truth. In interpreting the phrase `previous inconsistent or contradictory statement`, the court `will prefer a construction which advances this object rather than one which attempts some way of circumventing it`: ***Bennion Statutory Interpretation*** (3rd Ed, 1997) at p 785

When the witness falsely claims to have no recollection of the material events, he contradicts the essence of his previous statement which contains a detailed account of the facts. Such a witness is no different from a witness who gives false oral evidence. Both have essentially refused to provide a truthful account in court. The previous statement constitutes a valuable source of evidence which could enable the court to ascertain the truth. To exclude such statements by a rigid and semantic construction of the phrase `previous inconsistent or contradictory statement` would not promote the objectives of s 147(3) EA. On the contrary, it imports an unwarranted restriction of the use of the previous inconsistent statement and, in effect, circumvents and defeats the intention of Parliament.

As I observed in **Kwang Boon Keong Peter v PP** [1998] 2 SLR 592 (at [para] 23):

> *With the enactment of s 147(3) in 1976,* ***the common law position has been departed from****. [Emphasis added.]*

Consequently, I agreed with the DPP that the trial judge failed to give adequate consideration to the purpose and intention behind the legislative enactment of s 147(3) when she held that the use of s 147 should be carefully circumscribed and that a statement such as exh P7I was not a previous inconsistent or contradictory statement.

The above reasoning also accorded with established canons of statutory interpretation. ***Bennion Statutory Interpretation*** (3rd Ed, 1997) described the approach to be adopted by the court as follows (at p 751):

> *The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of `absurdity`, using it to include virtually any result which is unworkable or impractical, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter-mischief.*

Maxwell on the Interpretation of Statutes (12th Ed, 1969) further explained thus (at p 201):

Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act, which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results.

Adopting the construction advocated by the respondent would mean that a witness could not be cross-examined on his previous statement so long as he claimed to have no recollection of the facts, even if it was a deliberate lie. This would also prevent the admission of the previous statement as substantive evidence. This contrasted with the position of a witness who deliberately gave a different oral version of the facts. Such a construction would lead to absurd and anomalous results and would create an obvious loophole in the application of s 147(3) EA which could not possibly have been intended by Parliament.

In my opinion, the phrase `previous inconsistent or contradictory statement` must necessarily encompass a witness who had deliberately and falsely claimed that he was unable to recall the facts. This construction accorded with the spirit and objectives of s 147(3) and would not unduly broaden the scope of the legislative amendments. The court would still be required to evaluate the credibility of a witness`s testimony; while the weight to be attached to the previous statement would continue to be governed by the safeguards set out in s 147(6) and the factors set out in **PP v Tan Kim Seng Construction Pte Ltd** [1997] 3 SLR 158 at [para] 27-31; approved in **Chai Chien Wei Kelvin v PP** [1999] 1 SLR 25 at [para] 56: the contemporaneity of a statement with the occurrence or existence of the facts stated, the possibility of misrepresentation by the maker of the statement, the explanations for the inconsistencies, the context of the statement and the cogency and coherence of the facts relied upon.

Application to the facts

The district judge therefore applied the wrong approach in determining whether Cpl Tay`s oral evidence was materially inconsistent with or contradicted his previous statement exh P7I. The district judge should have assessed whether the alleged lack of recollection was a lie and stemmed from a deliberate refusal, for whatever reason, to testify as to his true recollection. The surrounding circumstances, such as the time lapse between the material events, the recording of the statement and the trial, the nature of the information and its significance to the witness as well as the demeanour of the witness, would have to be considered. The above factors are not exhaustive and would very much depend on the particular circumstances at hand.

From a review of the proceedings below, there were in my view sufficient grounds to conclude that Cpl Tay lied when he claimed to have no recollection of the relevant events. First, the statement exh P7I was recorded on 25 and 26 May 1999, barely six to seven months after the material events of October and November 1998. The trial took place on 27 and 28 December 1999; which was only seven months after exh P7I was recorded and about one year after the material events. It was not such a long lapse of time as to have caused this dramatic loss of memory. Secondly, the matters described in exh P7I were not peripheral or unrelated to Cpl Tay but were significantly and closely intertwined with his own circumstances. The respondent`s request led Cpl Tay to embark on a course of conduct described in his statement which led to his subsequent conviction for communicating information to the respondent in contravention of the OSA. Incidentally, I also noted that Cpl Tay pleaded guilty and admitted to the charges and the statement of facts on 18 November 1998, just prior to the commencement of the trial. It was inconceivable, in the absence of a credible explanation, for this sudden inexplicable loss of memory, even after exh P7I was shown to him to

refresh his memory.

Cpl Tay`s responses in the trial were an obvious reflection of his obtuse, wilful refusal to provide truthful testimony in court. He gave the stock responses of `I cannot recall` or `I can`t remember` to almost every question posed by the DPP which would have directly incriminated the respondent. In contrast, he could provide fairly detailed responses to questions that did not directly implicate the respondent, strongly indicating that his loss of memory was selective in nature and was not genuine. The following extract illustrated this point most starkly:

> *Q: Did you talk to the accused about operation by SSB on 21 November 1998?*
>
> *A: I cannot recall*
>
> *Q: Did you tell the accused there was going to be an operation that night?*
>
> *A: I cannot recall. This would not be stated in my pocket diary.*
>
> *Q: Did Ah San - Chua Tiong Tiong - page for you?*
>
> *A: I cannot recall.*
>
> *Q: Did the accused page for you?*
>
> *A: I can`t recall*
>
> *Q: I move on to 29 November 1998. Was there an operation by SSB?*
>
> *A: Not just SSB. Also, GSB, Anti-Vice and the Singapore Armed Forces. SSB was involved in the operation.*
>
> *Q: Were you involved in the operation?*
>
> *A: Yes*
>
> *Q: Did you attend a pre-operation briefing?*
>
> *A: Yes*
>
> *Q: In the briefing, was it mentioned areas targeted for operations?*
>
> *A: I can`t recall.*
>
> *...*
>
> *Q: In the briefing, was it mentioned that Geylang was one of the targeted areas?*
>
> *A: No, not in the briefing.*
>
> *Q: What time did you move out for operations?*
>
> *A: At 9.15pm.*

Q: Before you moved out, were you aware Geylang was one of the areas targeted for operations?

A: Yes

...

Q: When did you find out?

A: On the way there, I was assigned to a team under ASP Mark Chee. He informed us we were going to Geylang.

Q: On 29 November 1998, before you moved out for the operations, did you speak with the accused?

A: I can`t recall.

Q: Did you call the accused before 9.15pm?

A: I can`t recall.

Q: Did you tell the accused SSB was conducting a raid/operation that night?

A: I can`t recall.

Q: Did you tell the accused SSB conducting a raid with anti vice and GSB in the Geylang area that evening?

A: I can`t recall.

Q: Did operation subsequently cover the Geylang area?

A: Yes

Q: In October 1998, did Chua Tiong Tiong call you to find out why there were so many raids/operations in Geylang.

A: I can`t recall.

Q: Did you tell him that SSB was targeting Chua Tiong Tiong?

A: I can`t recall.

Q: After that, did the accused call you to ask if you could provide tip-offs of raids to Chua Tiong Tiong?

A: I can`t recall.

Q: Did you tell the accused you would try?

A: I can`t remember.

Q: Did you tell the accused you would give tip-offs to Chua Tiong Tiong or the accused?

A: I can`t remember.

...

Taking all the circumstances into account, the irresistible inference to be drawn was that Cpl Tay had lied and was simply being deliberately evasive about his recollection. His oral testimony clearly contradicted the relevant portions of his previous statement exh P7I where he was able to give a detailed account of the surrounding circumstances which took place in October 1998 and the events of 21 and 29 November 1998. This scenario was within the ambit of s 147(3) EA and the district judge ought to have allowed the prosecution to proceed to prove and cross-examine Cpl Tay on the relevant portions of exh P7I.

At this point, I would briefly address the district judge`s concern that it would be futile to cross-examine such a witness under s 147(1) of the EA as his explanation, if any, would be that he could not remember the events. In my view, that would not pose insurmountable difficulties. It is but a factor to be taken into consideration in assessing the weight of the previous statement. The need for a credible explanation, such as a medical cause, would be pressing when the time lapse is short and the information is of a nature which the witness would ordinarily be expected to remember.

Whether there were material discrepancies between Cpl Tay`s testimony and exh P7I in relation to the events of 17 October 1998

The DPP next contended that the trial judge erred in holding that there were no material inconsistencies or discrepancies between Cpl Tay`s oral evidence of the events of 17 October 1998 and his previous statement exh P7I. The relevant portion of exh P7I stated:

60 I did give tip-offs to Ah San and Ah Boy on about four occasions. From my pocket diary, I confirmed that I gave tip-offs on impending police raid on the following occasions:

a On 17 October 98 (Saturday). I contacted Ah Boy at his handphone number 07363571 and informed him that [there] was going to be a raid conducted in the Geylang area. I could have called him at about 2100 hrs. From my pocket diary, I attended a briefing at 2030 hrs conducted by deputy head SSB, ASP Adrian Quek. We were only informed that there was going to be a raid at Geylang area and we were not told of the specific place that we were going to hit. We moved out at 2100 hrs. I contacted Ah Boy through my handphone No 97645751 just before we moved out.

...

The district judge disposed of the matter as follows:

There was an inconsistency between para 60(a) of exh P7I and [Cpl Tay`s]

> *evidence in court, being whether [Cpl Tay] contacted the accused before or after moving out for the raid. However, this difference in time, in my opinion, was minor. There was also one omission, the failure to mention in exh P7I that it was the accused who had paged [Cpl Tay] and asked [Cpl Tay] to go out for coffee. In this regard, I note the observation by Taylor J in Muthusamy v PP at p 58 that `[a] mere omission is hardly ever a discrepancy`. I held that the omission was not a serious discrepancy. Accordingly I did not grant the DPP leave to invoke s 147 of the EA.*

In arriving at her ruling, the district judge appeared to have assessed the discrepancies in isolation. I had doubts as to whether this was the correct approach. It is useful to recall my earlier exhortation that the essence of an `inconsistent or contradictory statement` is whether the two versions amount to a `combination of features which are opposed to one another` or whether they agree in `substance` or `spirit`. The better approach would be to compare the two versions as a whole to ascertain whether they stemmed from incompatible or irreconcilable beliefs.

I also hesitated from an unqualified endorsement of the statement that `a mere omission is hardly ever a discrepancy`. To this end, I felt it necessary to set out in full, Taylor J`s observations in ***Muthusamy v PP*** (at p 58):

> *Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection.* ***A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy****. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expression used in either, and all the less so when he does not speak English. [Emphasis added.]*

Viewed in context, Taylor J was really referring to a truthful witness who had omitted a detail due to genuine forgetfulness, differences in interpretation or the manner in which the statement was recorded. It would not extend to a witness who had deliberately omitted the material facts in an attempt to paint a different picture of the events which occurred.

The following passage from ***Sir John Woodroffe & Amir Ali`s Law of Evidence*** Vol 4 (15th Ed, 1992) at p 769 is instructive:

> *... **a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact**. This is conceded as a general principle of evidence. ... **Whether silence or omission amounts to an inconsistency depends upon the individual circumstances of each case**. ... Obviously there may be omissions in the previous statements which make it inconsistent with and therefore contradictory to the evidence given by the witness in court. **The test is, would it have been natural for the person to make the assertion in question**. [Emphasis added.]*

As explained in ***Dasu v State of Maharashtra*** 1985 Cri LJ 1933 at [para] 14:

> *In order to see whether there is a contradiction by omission it is necessary to*

> *find out whether the two statements cannot stand together. It is also necessary to see whether the statement which the witness has made in the witness-box should have been made by him while reporting the matter soon after the incident.* ***If the two statements made by the witness cannot stand together and the statement in the court is such that the witness would necessarily have made at the time of his earlier statement, then alone omission thereof can be considered to be a contradiction****. [Emphasis added.]*

A comparison of the two versions as a whole was therefore essential. The tenor of Cpl Tay`s oral testimony suggested that the communication of 17 October 1998 was inadvertently and innocently made in the course of a casual conversation initiated by the respondent`s page and invitation to coffee. It did not carry the implication that the respondent had reasonable grounds to suppose that the information was protected information conveyed in breach of the OSA. In contrast, the relevant portions of exh P7I indicated that Cpl Tay contacted the respondent for the specific purpose of informing him about the impending raid just before moving out for the operation. The timing of the conversation was crucial as it would have been difficult for Cpl Tay to tip-off the respondent after the team had moved out in the van and in the presence of his team members. This must also be viewed against the respondent`s request to Cpl Tay at the end of October 1998 to provide tip-offs of impending raids, as described in exh P7I.

Looking at all the circumstances of the case, it would have been most natural for Cpl Tay to mention that it was the respondent who paged and invited him for coffee in exh P7I. This information would have placed a significantly different perspective on the communication which transpired between them. After all, the account in exh P7I would have incriminated Cpl Tay; one would certainly have expected him to provide an accurate account to the authorities at that time, particularly in view of its serious repercussions. His failure to do so was a significant omission which required an explanation.

I therefore agreed with the DPP`s submission that Cpl Tay had given a materially inconsistent oral account of the events of 17 October 1998. In the circumstances, the prosecution should have been allowed to prove and cross-examine Cpl Tay on para 60(a) of exh P7I.

Whether exh P7I should have been admitted under s 147(4) EA

In the alternative, the DPP contended that exh P7I should have been admitted into evidence pursuant to s 147(4) which reads:

> *Where a person called as a witness in any proceeding is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings.*

This submission was, in my view, misconceived. Cpl Tay had not refreshed his memory using exh P7I. He had instead maintained that he was unable to remember the events in question and did not confirm its contents or the accuracy of the recording. The pre-condition for the exercise of s 147(4) EA was thus absent.

Furthermore, s 147(4) EA has to be read in conjunction with s 163 EA:

> *Any writing referred to under section 161 or 162 [relating to refreshing of memory and testimony to facts stated in such document] must be produced and shown to the* ***adverse party*** *if he requires it;* ***such party may cross-***

> ***examine the witness thereupon***. *[Emphasis added.]*

Thus, when a witness`s memory has been refreshed with a document, the party adversely affected by the resulting testimony (the respondent), can cross-examine the witness (Cpl Tay) on the document. This in turn triggers s 147(4) EA. That was patently not the case here.

In support of his submissions, the DPP cited the case of **Yuen Chun Yii v PP** [1997] 3 SLR 57 . There, the prosecution sought to refresh the witness`s memory by reference to his previous statement which on its face contained evidence adverse to the accused. The witness confirmed that he made the statement but proceeded to qualify its contents. The defence then cross-examined the witness on his responses. It was in this context that I observed (at [para] 26):

> *Moreover, by the operation of s 147(4) EA, the defence may have unwittingly allowed the CPIB statement to be made evidence in the proceedings once they proceeded to cross-examine Chia on that document.*

The circumstances in the present appeal were quite different. Exhibit P7I contained evidence which was potentially adverse to the respondent. Even if Cpl Tay had refreshed his memory using exh P7I, the party who could properly cross-examine him on exh P7I pursuant to s 163 EA was the respondent. In view of the nexus between ss 163 and 147(4) EA, s 147(4) EA really referred to cross-examination by the party adversely affected by the statement. Section 147(4) EA was thus inapplicable and could not have been relied on to admit exh P7I.

Once Cpl Tay intimated that he was still unable to recall the events, the proceedings under s 161 EA were rightly stopped by the district judge. Correspondingly, the prosecution was not allowed to cross-examine the respondent on the contents of the exh P7I. At that stage, Cpl Tay was a potentially unfavourable, if not hostile witness. The prosecution would have to turn to ss 147, 156 or 157(c) EA in order to cross-examine Cpl Tay on exh P7I and to admit it into evidence pursuant to s 147(3) EA: see ***Yuen Chun Yii v PP*** at [para] 32.

Whether admissibility of a witness`s statement is subject to the test of voluntariness

In her grounds of decision, the district judge queried whether exh P7I was subject to the requirement of voluntariness specified in s 24 EA, in the event that it was admissible for the purposes of impeachment or cross-examination. Counsel for the respondent, without citing any authorities in support, submitted that this requirement applied to all statements used against an accused person so as not to defeat the doctrine of voluntariness. The DPP did not pursue this issue although he appeared to have implicitly conceded this requirement when he noted, in his written arguments, that Cpl Tay ought to be aware that he could challenge the voluntariness of his statement.

Under such circumstances, it was strictly speaking not necessary for me to address this query. Nonetheless, in view of its impact on the procedure to be adopted in the admission of exh P7I for the purposes of impeachment or cross-examination, I felt compelled to express my observations on this pertinent issue.

At the outset, I noted that there are no statutory provisions which subject the admissibility of a witness`s statement to the requirement of voluntariness. Section 147(3) EA provides that the previous inconsistent or contradictory statement shall be admissible as substantive evidence once it

is proved. `Proved` is in turn defined in s 3(3) EA as follows:

> *A fact is said to be `proved` when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*

This refers to the proof of the existence of the statement and makes no reference to the question of voluntariness.

Statements of accused persons are, on the other hand, governed by express statutory provisions. Section 24 EA reads:

> *A confession made by an **accused person** is irrelevant in **a criminal proceeding** if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal **nature in reference to the proceeding against him**. [Emphasis added.]*

The proviso to s 122(5) Criminal Procedure Code (Cap 68) (`CPC`), which relates to any statement recorded from an accused person by the police, is expressed in similar terms. On a plain reading, both provisions are not applicable to witnesses as they deal with statements of accused persons: see **Chua Poh Kiat Anthony v PP** [1998] 2 SLR 713 at [para] 12 (on s 122(5) CPC). That therefore indicates that the question of voluntariness would only go to the weight of a witness`s statement.

A similar view was expressed in Tan Yock Lin ***Criminal Procedure*** , Vol 2 (1999) at para 2501:

> *There is a difference between a witness`s statement and a statement made by the accused, which in Malaysia is referred to as a cautioned statement. **Unlike a witness`s statement, an accused`s statement is inadmissible in evidence for the purpose of impeachment unless it is voluntary**. An accused cannot be cross-examined on a statement which he made involuntarily. **This is not a general rule; but the requirement of voluntariness is imposed by the statute on statements made by an accused person**. [Emphasis added.]*

In **PP v Sng Siew Ngoh** [1996] 1 SLR 143 , I postulated a justification for this distinction in relation to s 122(5) CPC (at p 155):

> *It is clear then that [s 122(5) CPC] is intended to regulate the activities of the police. The basis of the proviso to sub-s (5) is not rooted in the reliability or otherwise of the statement made to the police, but is intended clearly to prevent any impropriety on the part of the interrogators.*
>
> ***The position of a mere witness is in any event quite different from that of the accused**. The accused may be expected to be exposed to the danger of pressure or harassment, but the mere witness would not be. **This is clearly reflected in the absence of any overt safeguards against impropriety***

> ***acting on witnesses***. *There is none simply because there is generally no need for any.* ***In any event, such impropriety would be dealt with by the residual discretion recognised in Cheng Swee Tiang v PP*** *[1964] MLJ 291 . [Emphasis added.]*

To recall, ***Cheng Swee Tiang v PP*** recognised that, while evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence, if its reception would operate unfairly against an accused.

Nevertheless, my comments in ***Sng Siew Ngoh v PP*** have to be construed in context. In that case, the witness in question was the complainant and was what I would term a `mere witness`. Complications may arise, however, when the witness is not a mere witness, but an `accomplice` who has either been dealt with or, for whatever reason, was not charged. Such a witness would have been either a suspect or an accused person at the time of recording of the statements and was no different in status from any other accused person. He may therefore be expected to be exposed to the same danger of pressure or harassment. The prosecution would have to prove that the statement was voluntary before it could be tendered into evidence in a criminal proceedings involving that accomplice or in a joint trial with the accused on the same charge (neither of which was the case here). The same policy reasons for the statutory safeguards exist regardless of the current status of the individual.

As explained above, where there is any impropriety in the recording of the statements, the court may exclude such statements in the exercise of its residual discretion. To be consistent with this policy consideration, and as a prudent measure, the court will generally have to be satisfied as to its voluntary nature before it allows the admission of previous inconsistent statements of such witnesses.

The practice of the courts in several previous cases has been to conduct voir dires to ascertain the voluntariness and admissibility of the witness`s statement: see **Rajendran s/o Kurusamy & Ors v PP** [1998] 3 SLR 225 at [para ] 103-110 and **Chua Poh Kiat Anthony v PP** [1998] 2 SLR 713 at [para ] 12-14. In the latter case, I described the voir dire as being a `preliminary examination by the judge to seek to discover if the witness is telling the truth` (at [para] 12). The voluntariness of the witness statements was also a consideration in **Tang Keng Boon v PP** [2000] 1 SLR 535 [para] 13 and **Tan Khee Koon v PP** [1995] 3 SLR 724 at p 740.

I fully recognise that there was no specific discussion in those cases, of the legal basis for the requirement of voluntariness, no apparent objection having been raised to the decision to convene a voir dire. In the ultimate analysis however, I was not prepared, at this stage, to disturb what appeared to me to be an accepted practice in the absence of full arguments by parties.

Whether the record of proceedings (exh P8) was properly admitted pursuant to s 45A EA

In the proceedings below, the district judge admitted the record of proceedings (exh P8) pursuant to s 45A EA and relied on it as substantive evidence against the respondent. Although this issue was not raised before me, I was not convinced, upon a review of the relevant provision, that the district judge was entitled to do so pursuant to s 45A EA.

Section 45A(1) EA reads:

> *Without prejudice to the generality of sections 42, 43, 44 and 45, the fact that*

> *a person has been convicted or acquitted of an offence by or before any court in **Singapore shall be admissible in evidence for the purpose of proving, where relevant to any issue in the proceedings, that he committed** (or, as the case may be, did not commit) **that offence**, whether or not he is a party to the proceedings; and where he was convicted, whether he was so convicted upon a plea of guilty of otherwise. [Emphasis added.]*

Section 45A EA was inserted by the Evidence (Amendment) Act (No 8 of 1996). The Minister of Law, Professor S Jayakumar explained the purpose of this provision as follows (see Reports of Parliament Vol 65 at col 455):

> *... Section 45A is to reverse a common law rule (known among lawyers as the rule in **Hollington v Hewthorn**, an English case) that operated to exclude evidence of judicial findings of convictions or acquittals This common law rule states that the evidence in an earlier criminal case cannot be admitted against the defendant in a later civil trial, although, as is known, the standard of proof is higher in a criminal case. For example, a criminal conviction for dangerous driving is inadmissible as evidence of negligence in a civil action for causing personal injuries to the other driver. Reversing this rule means that judicial time and legal costs will be saved by not having to litigate all over again the issues which have been decided by another court in previous proceedings. ...*

Plainly, s 45A EA was limited to proving the fact that a particular individual had been convicted or acquitted of an offence, where relevant to an issue in the proceedings, and was really intended to save judicial time and costs in subsequent civil proceedings. It did not create an avenue for the admission of a previous conviction of a person as substantive evidence against an accomplice in subsequent criminal proceedings. Furthermore, charges which have been taken into consideration are neither convictions nor acquittals. It therefore follows that the district judge had erred in admitting the charges and statement of facts pursuant to s 45A EA and, without more, relying on them as substantive evidence against the respondent.

In my view, the error made by the district judge did not give rise to any failure of justice, insofar as it related to the first charge against the respondent (pertaining to the events of 17 October 1998). This was because the statement of facts would have been admissible as substantive evidence in any case.

What was the basis for the admission of a statement of facts? I had analysed this issue rather extensively in **PP v Liew Kim Choo** [1997] 3 SLR 699 at [para] 65-87. In that case, the only evidence implicating the accused was the statement of facts which the accomplice had admitted to at the time he pleaded guilty to the related charges. After reviewing the relevant law, I surmised (at [para] 87):

> *I therefore took the view that the statement of facts, properly classified as a confession for the purposes of s 17, was a statement made by PW4. It was a statement on which he could be properly cross-examined under s 147 of the Act. I also found that if such a statement was properly proved against him, the statement could be used as proof of the facts stated therein by virtue of s 147(3) of the Act ...*

Applying the above principle, the statement of facts (pertaining to DAC 35628 of 1999) was a confession by Cpl Tay within the meaning of s 17 EA. Being inconsistent with his oral testimony, it was a statement on which he could be cross-examined under s 147 EA once it was proved against him.

The statement of facts was proved when the prosecution tendered the record of proceedings showing that Cpl Tay had admitted to it without qualification. Cpl Tay also confirmed that he had admitted to the statement of facts but chosen to dispute the truth of the contents. Since the contents of the statement of facts mirrored exh P7I, my earlier analysis of exh P7I applied here with equal vigor. I was satisfied that Cpl Tay`s oral testimony was materially inconsistent with his confession as contained in the statement of facts. The prosecution was therefore entitled to cross-examine Cpl Tay on the statement of facts and to rely on it as substantive evidence pursuant to s 147(3) EA.

Whether there was prima facie case on the first charge

In view of my earlier decision in relation to exh P7I, I did not find it necessary to address the DPP`s further submission that the district judge should have called the defence in respect of the first charge. Suffice to say that the admission of exh P7I may well affect the district judge`s overall assessment of the evidence in the resumed trial.

As an ancillary matter, I noted that the district judge below held that there was no prima facie evidence showing that the respondent had any reasonable ground to suppose that the information was protected information, communicated in breach of the OSA. In this regard, it would be useful to recall that a guilty mind could be proved by direct evidence of knowledge or by inferring knowledge from the primary facts: **PP v Bridges Christopher** [1998] 1 SLR 162 at [para] 41. As I observed in **Bridges Christopher v PP** [1997] 1 SLR 406 , in determining whether the relevant mens rea was present for an offence under s 5(2) OSA (at [para] 57, 58):

> *... **a very relevant consideration is the nature of the information received ... If it is obvious that the information is official secret information, then the mere fact that it was received from someone working in the government would raise the inference that the recipient knew or had reasonable ground to believe that it was communicated to him in contravention of the Act. It would then be on him to offer some explanation as to why he thought otherwise.***
>
> *If, however the information appears innocuous and is widely believed to be in the public domain, then the mere fact that the supplier of the information works for the government need not lead to the inference that the recipient had reasonable ground to believe that it was communicated to him in contravention of the Act. [Emphasis added.]*

It would be useful for the district judge to bear the above comments in mind when evaluating the evidence at the close of the prosecution case.

Conclusion

In the event, I allowed the appeals and remitted the three charges to the district judge. I directed the district judge to allow the prosecution to proceed to prove and admit exh P7I into evidence for

the purposes of cross-examination; and to conduct further inquiry to determine the credibility of Cpl Tay`s oral testimony and the weight to be accorded to exh P7I.

Outcome:

Appeals allowed.