RECENT DEVELOPMENTS IN THE HEARSAY RULE

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Lee Chez Kee v. Public Prosecutor [2008] 3 Sing. L.R.(R) 447
Public Prosecutor v. Lee Chez Kee [2007] 1 Sing. L.R.(R) 1142

The Court of Appeal recently delivered an important judgment on the admissibility of a specific type of evidence that is an exception from the hearsay rule. What happens when, in a “group crime” situation, the Prosecution adduces evidence in the form of a confession of a deceased co-accused who was not jointly tried? Does s. 378(1)(b)(i) of the Criminal Procedure Code become an avenue for the admission of such a piece of evidence, or does s. 378(1)(b)(i) need to be read together with s. 30 of the Evidence Act? This note considers if the Court of Appeal was correct in overruling the High Court’s decision that answered the former question in the affirmative. It also analyses the Court of Appeal’s broader and perhaps more important discussion on the relationship between the hearsay rule, the Evidence Act, and the Criminal Procedure Code.

I. INTRODUCTION

It is well established under the common law that statements made out of court that are adduced to prove facts contained in the statements are generally not admissible as evidence – this rule being otherwise known as the hearsay rule.1 Lord Normand’s judgment in the celebrated Privy Council decision of Lejzor Teper v. The Queen is often invoked to explain the rationale of this rule:

The rule against the admission of hearsay evidence is fundamental. It is not

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1 This definition of the hearsay rule was adopted by the House of Lords in Regina v. Sharp [1988] 1 W.L.R. 7 at 11 and Regina v. Kearley [1992] 2 A.C. 228 at 254 and 259. But in Regina v. Kearley, Lord Ackner observed at 254 that “the precise scope of the rule against hearsay is in some respects a matter of controversy [and] there are a variety of formulations of the rule”. Thus, in Colin Tapper, Cross & Tapper on Evidence (Oxford University Press, 11th Ed, 2007), it is stated at p 587 that the “hearsay rule has often been regarded as one of the most complex and most confusing of the exclusionary rules of evidence”. At the most basic level, however, it may be said, as is stated in Phipson on Evidence (Hodge M Malek gen ed) (Sweet & Maxwell, 16th Ed, 2005) at para 28-01, “a statement made outside the courtroom, regardless of its relevance, cannot be adduced in evidence for a hearsay purpose”.
the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.\footnote{2}

In Singapore, the \textit{relationship} between this common law rule and the Evidence Act\footnote{3} – without first mentioning the Criminal Procedure Code\footnote{4} – has quite clearly been a matter of controversy in the courts and even in the academic circles.\footnote{5} There are a number of views – suffice it to say that on one view, the common law hearsay rule essentially operates independently of the Evidence Act;\footnote{6} on another view, the hearsay rule operates through s. 62 of the Evidence Act, which requires oral evidence (and only oral evidence) to be direct;\footnote{7} and on yet another view, the hearsay rule “operates purely in the context of whether a statement is declared to be relevant or irrelevant in Part I of the [Evidence] Act.”\footnote{8} Be that as it may, both the Evidence Act and the Criminal Procedure Code seemingly contain exceptions to the hearsay rule for the admission of hearsay evidence.\footnote{9}

Recently, in the seminal decision \textit{Lee Chez Kee v. Public Prosecutor} (“\textit{Lee Chez Kee}”),\footnote{10} a case which involved a murder committed in furtherance of a common intention, the Court of Appeal set out its opinion on: (a) the conceptual basis for the applicability of the hearsay rule in the Evidence Act (and concomitantly the Criminal Procedure Code); and (b) the ambit of one exception to the rule in the criminal law context, \textit{viz}, s. 378(1)(b)(i) of the Criminal Procedure Code. This provision states:

\textit{378.} – (1) In any criminal proceedings a statement made, whether orally or in a document or otherwise, by any person shall, subject to this section and section 379 and to the rules of law governing the admissibility of confessions, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible, if —

\begin{itemize}
\item[(b)] it is shown with respect to him —
\item[(i)] that he is dead, or is unfit by reason of his bodily or mental condition to attend as a witness;
\end{itemize}

\footnote{2}{[1952] A.C. 480 at 486. See also \textit{Regina v. Blastland} [1986] 1 A.C. 41 at 54.}
\footnote{3}{(Cap. 97, 1997 Rev. Ed. Sing.) (“the Evidence Act”).}
\footnote{4}{(Cap. 68, 1985 Rev. Ed. Sing.) (“the Criminal Procedure Code”).}
\footnote{5}{See Jeffery Pinsler, \textit{Evidence, Advocacy and the Litigation Process} (LexisNexis, 2003) at 70.}
\footnote{6}{See \textit{Subramaniam v. Public Prosecutor} [1956] M.L.J. 220 at 222.}
\footnote{9}{See for instance ss. 6–40 of the Evidence Act; and ss. 378–382 of the Criminal Procedure Code.}
\footnote{10}{[2008] 3 Sing. L.R.(R) 447.}
In *Lee Chez Kee*, the majority of the court comprising V. K. Rajah JA and Choo Han Teck J took the view that certain statements of the appellant’s accomplice, Too Yin Sheong ("Too"), who had already been sentenced to death after being convicted in an earlier trial (for the same murder) and was subsequently executed, were wrongly admitted as additional evidence by the trial judge. The main reason given was that s. 378(1)(b)(i) of the Criminal Procedure Code had to be read *together* with s. 30 of the Evidence Act, and *not independently* of it.\(^\text{11}\) It will be appropriate to set out s. 30 of the Evidence Act at this juncture:

**30.** When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.

*Explanation.*—"Offence" as used in this section includes the abetment of or attempt to commit the offence.

\( (a) \) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said "*B* and I murdered *C*". The court may consider the effect of this confession as against *B*.

\( (b) \) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B* and that *B* said: "*A* and I murdered *C*".

This statement may not be taken into consideration by the court against *A* as *B* is not being jointly tried.

Woo Bih Li J (the minority), on the other hand, was of the opinion that the trial judge did not err in admitting the statements in question, given that it seemed apparent on several counts that Parliament’s ultimate intention was to admit the confessions of accomplices under s. 378(1)(b)(i) of the Criminal Procedure Code.\(^\text{12}\)

Although the leading judgment of Rajah JA also accorded substantial treatment in attempting to resolve the troubling doctrine of common intention under s. 34 of the Penal Code,\(^\text{13}\) this note focuses solely on the court’s consideration of the hearsay issue.\(^\text{14}\) To that end, it considers both the judgments of the majority and the minority, and comes to the conclusion that while the majority’s judgment clears up much of the uncertainty that exists in this area of law, some uncertainties remain. Briefly, uncertainties remain as to the extent to which common law exceptions to the hearsay rule that are not found in the Evidence Act are applicable in Singapore, as well as the possibility of admitting statements made by dead accomplices via s. 32(c) of the

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\(^{11}\) Ibid. at para. 103–117.

\(^{12}\) Ibid. at 295.

\(^{13}\) (Cap. 224, 1985 Rev. Ed. Sing.).

\(^{14}\) For a case comment on the common intention issue, see Nathaniel Khng and Chen Siyuan, “Recent Developments in Common Intention” (2009) 21 SAcLJ 557.
Evidence Act.

Before going into that, however, it might be helpful to: (a) set out a brief summary of the facts of the case; and (b) summarise the decision (in specific relation to the hearsay issue) of the trial judge.¹⁵

II. THE FACTS OF LEE CHEZ KEE

Too had befriended the deceased (“D”), a male professor, sometime in 1993. Their friendship grew, and eventually, Too was invited to D’s house. In the course of Too’s visit, D suddenly started touching Too’s body and thighs. Too felt very uneasy and left. He then met up with his friends, Ng Chek Siong (“Ng”) and the appellant Lee Chez Kee (“Lee”), and they hatched a plan to rob D at his house.

On 12 December 1993, the trio executed their plan to rob D. Too arranged to meet D at his home on the pretext of introducing a friend to him. Upon reaching the house, Too and Lee chatted with D over drinks. What happened after that was the subject of conflicting accounts.

According to Lee, while he chatted with D, Too had taken a knife from the kitchen and passed it to him, whereupon he used it to threaten D. D struggled, and Lee stabbed his abdominal region twice, but the knife did not penetrate successfully. Lee also rained a number of blows on D. After that, Too and Lee led D upstairs to a bedroom. They tied him up. Lee ransacked the house while Too remained in the room. Lee eventually went downstairs and on his way, he saw Too covering D’s face with a pillow. Ng came into the house to search for more valuables before the trio escaped.

According to Too, when D chatted with Lee, he slipped into the kitchen and took a knife. When he returned, Lee brandished his knife. Too did likewise and they demanded information from D as to where they could get money. They took D to the second floor and tied him up in his room and ransacked the house. Before they left, Lee stabbed D. The knife did not penetrate fully so Lee used a cord to strangle D instead. Lee only released his grip after D began frothing at the mouth. Too and Lee continued searching for valuables and at some point, Lee hit D’s head. Too and Lee then left the house.

Two days later, the police found D’s body in his house which appeared to have been ransacked. D was found with a pillow over his face. His wrists were tied together with an electrical cord, and his feet bound by a belt. Another electrical cord was found across the front of his neck. A bent knife was found beneath his body, and a chopper was also found in the hall. In total, 18 external injuries (including stab wounds) were caused to D. The cause of death was asphyxiation due to strangulation; the stab wounds were not acutely fatal.

Too and Ng were convicted in 1998. Too was convicted of murder, and Ng was convicted of robbery, theft and cheating, all with common intention. Lee was only arrested in 2006 and his trial proceeded without the oral testimonies of Too and Ng as: (a) the former had been sentenced to suffer death and had been executed; and (b) the latter had been repatriated and could not be found thereafter. At the end of the

trial, Lee was convicted and sentenced to suffer death. On appeal, his conviction and sentence were upheld.

III. THE DECISION OF THE TRIAL JUDGE IN RELATION TO THE HEARSAY ISSUE

A brief recapitulation of what transpired at trial is now in order, before analysing the decision of the Court of Appeal on: (a) the conceptual basis of the hearsay rule in the Evidence Act (and concomitantly the interplay between the common law hearsay rule, the Evidence Act, and the Criminal Procedure Code); and (b) the ambit of s. 378(1)(b)(i) of the Criminal Procedure Code.

Since Too and Lee were not tried jointly, the Prosecution simply could not attempt to admit Too’s confessions under s. 30 of the Evidence Act. The Prosecution, however, argued that since Too had died, his confessions were nevertheless admissible under s. 378(1)(b)(i) of the Criminal Procedure Code. The defence countered this by arguing that the statements were not only hearsay and did not fall under any exceptions to the hearsay rule, but that s. 378(1)(b)(i) – and the rest of s. 378 for the matter – could not act as a platform to admit otherwise inadmissible confessions.

Indeed, the heart of the issue resided in the proper construction of a particular phrase (which the trial judge had termed the “qualifying phrase”) in s. 378(1) of the Criminal Procedure Code; specifically, “subject…to the rules of law governing the admissibility of confessions”. In other words, did the qualifying phrase only refer to the requirements of the voluntariness of confessions, or did it refer to all the rules of law (such as s. 30 of the Evidence Act) governing the admissibility of confessions?

The trial judge determined, as a preliminary issue, that Too’s statements necessarily fell within the general purview of the hearsay rule. He considered the hearsay rule as being “exclusionary” in nature, although the hearsay rule was restated statutorily in an “inclusionary” form via s. 377 of the Criminal Procedure Code. Since Too was absent from the proceedings before him, his statements fell within the purview of s. 377, and could only be admissible if “one of the statutory exceptions under either the [Criminal Procedure Code] or the Evidence Act could be shown to apply.”

The trial judge then recited the background to s. 378(1) of the Criminal Procedure Code. He stated that s. 378(1) was initially s. 371C(1)(b)(i) within cl. 23 of the

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16 See para. 4 where s. 30 of the Evidence Act is fully set out.
17 The test for whether a confession has been voluntarily made is determined by whether it was caused by any inducement, threat or promise: see s. 122 of the Criminal Procedure Code and s 24 of the Evidence Act. See also Chan Chien Wei Kelvin v. Public Prosecutor, [1998] 3 Sing. L.R.(R) 619 at para. 45.
18 “In any criminal proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Code or any other written law, but not otherwise.”
20 Ibid. at para. 28.
21 Ibid. at para. 36.
Criminal Procedure Code (Amendment) Bill 1975 (“the CPC Bill”). The proposed s. 371C(1)(b)(i) had been adapted from cl. 31(1) of the Draft Criminal Evidence Bill (“the UK Bill”) suggested by the United Kingdom Criminal Law Revision Committee. The trial judge highlighted the fact that s. 378(1) was similarly worded to cl. 31(1) of the UK Bill, albeit containing a distinction in that cl. 31(1) was “subject… to section 2 [ie, cl. 2 of the UK Bill] of this Act”, as opposed to being subject to the qualifying phrase found in s. 378(1) of the Criminal Procedure Code.

Proceeding on that basis, given the connection and the similarity between s. 378(1) of the Criminal Procedure Code and cl. 31(1) of the UK Bill, the trial judge concluded that “the rules of law governing the admissibility of confessions” necessarily corresponded to the rules set out in cl. 2, viz, the requirement of voluntariness.

Pertinently, the trial judge made this observation:

Though no explanation was expressly furnished in either the parliamentary debates or the Select Committee discussions on the CPC Bill, given its lineage, the qualifying phrase in the proposed s. 371C(1) of the CPC Bill – and subsequently in s. 378(1) of the [Criminal Procedure Code] – was presumably intended as a substitute for the reference in cl. 31(1) of the UK Bill to cl. 2 of the same Bill. The equation of the qualifying phrase and cl. 2 of the UK Bill would also comport with the close coincidence that otherwise exists between s. 378(1) of the [Criminal Procedure Code] and cl. 31(1) of the UK Bill. Significantly, the other provisos to s. 378(1) of the [Criminal Procedure Code] appear to mirror those in cl. 31(1) of the UK Bill. Apart from the qualifying phrase, s. 378(1) additionally provides that it is “subject to this section and section 379” [emphasis added]. Clause 31(1) was in turn expressed as being “subject to this and the next following section” [emphasis added]. Notwithstanding the apparent disparity in language, “the next following section” to s. 378 of the [Criminal Procedure Code], ie, s. 379, was in fact adopted from cl. 32 of the UK Bill, which was itself “the next following section” to cl. 31: see the comparative table to the CPC Bill. This general coincidence of the respective provisos to s. 378(1) of the [Criminal Procedure Code] and cl. 31(1) of the UK Bill leads clearly to the conclusion that the current qualifying phrase in the former was intended to correspond with the reference to cl. 2 in the latter.

The trial judge next referred to the legislative debate surrounding s. 378(1)’s first emergence in draft form. He concluded:

“Parliament’s intention to “admit all hearsay evidence … to the greatest extent possible” [emphasis added] clearly accords with a more limited interpretation of the qualifying phrase. The dangers of manufactured or unreliable out-of-court confessions being admitted under s. 378(1) would also be sufficiently protected against by the requirement of voluntariness.”

22 Bill No. 35 of 1975.
24 Ibid. at para. 38–39.
26 Ibid. at para. 39.
27 Ibid. at para. 43 [emphasis in original].
Finally, he stated:\textsuperscript{28}

“A blanket exclusion of all out-of-court confessions from the sphere of s. 378(1) of the [Criminal Procedure Code] would not only be unnecessary, but would additionally lead to manifest absurdity and inconsistency in the application of the subsection. As I highlighted during the course of counsel’s oral submissions, the Defence’s interpretation of the qualifying phrase would turn the concern regarding manufactured or unreliable hearsay evidence on its head. 

Inculpatory out-of-court statements would be excluded from the purview of s. 378(1), whilst exculpatory out-of-court statements would remain potentially admissible under the exceptions to hearsay enshrined therein. This result would be unjustifiable given that confessions, which implicate their makers, are generally regarded as being more reliable since they are against the makers’ interests. In contrast, statements which purport to exculpate their makers would perceivably be less reliable since they would be more likely to be manufactured evidence. To permit the admission of the latter but not the former through the exceptions to hearsay under s. 378(1) would, therefore, be absurd and irrational, to say the least.

These considerations led me to the conclusion that the qualifying phrase merely had the effect of excluding involuntary confessions from the ambit of s. 378(1) of the [Criminal Procedure Code]. Contrary to the Defence’s submissions, s. 378(1) was indeed capable of rendering admissible voluntary out-of-court confessions that would otherwise have been inadmissible by virtue of the hearsay rule. As no objection to voluntariness arose regarding Too’s statements, I therefore ruled that Too’s statements were admissible in evidence by virtue of the statutory exception to hearsay evidence enshrined in s. 378(1)(b)(i) of the [Criminal Procedure Code].”

Having set out the salient parts of the trial judge’s judgment, we turn now to our analysis of the decision of the Court of Appeal.

IV. \textbf{ANALYSIS OF THE COURT OF APPEAL’S TREATMENT OF THE CONCEPTUAL BASIS OF THE HEARSAY RULE IN THE EVIDENCE ACT}

Rajah JA began his analysis of the evidential issues by stating that rather than characterising the hearsay rule as an exclusionary rule that exists either within or independently of the Evidence Act, the Evidence Act merely contains “an implicit acknowledgement of the rule”.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{28} \textit{Ibid.} at para. 44–45 [emphasis added]. For a brief response to this aspect of the decision, see Tay Eu-Yen, “Lee Chez Kee v. Public Prosecutor: Murder Beyond Reasonable Doubt?”, Law Gazette, October 2008 (1).
\item \textsuperscript{29} \textit{Lee Chez Kee, supra} note 10 at para. 67 [emphasis in original]. It is difficult to refute
\end{itemize}
That is to say, the Evidence Act treats hearsay evidence as being a statement of relevant facts, which is *prima facie* an irrelevant fact and inadmissible due to the lack of general provisions making statements of relevant facts themselves relevant facts.\(^\text{30}\) It is the provisions that set out the traditional exceptions to the hearsay rule that allow statements of relevant facts to be relevant facts, and thus admissible.\(^\text{31}\) In that sense, the Evidence Act does not prescribe any real exceptions to the hearsay rule. Therefore, to be really precise, the Evidence Act only “gives effect to... common law exceptions to the hearsay rule”.\(^\text{32}\) Indeed, in our view another way to look at this is whereas the UK common law applies a three-step approach in ascertaining the admissibility of hearsay evidence (first, whether the evidence is relevant; second, whether the evidence is excluded by the operation of any exclusionary rule; and third, whether any exception to the exclusionary rule in question applies), Singapore applies a two-step approach (first, whether the evidence is relevant under ss. 6–11 of the Evidence Act; and second, even if it is not, does it nevertheless fall under ss. 14–57 of the Evidence Act).\(^\text{33}\)

Accordingly, rather than approaching issues of hearsay with a common law analysis, i.e. asking whether a statement falls within the definition of hearsay and then asking whether a statement falls within a common law exception to the hearsay rule,\(^\text{34}\) the key question when dealing with what the common law would consider to be hearsay evidence is as follows:\(^\text{35}\)

The important question is thus whether the statement to be admitted satisfies any of the definitions of *legal* relevancy (which is a separate issue from whether the statement is *logically* relevant) in the [Evidence Act]. If so, it is relevant, and is made admissible by s. 5 of the [Evidence Act] and that is the end of the enquiry. It does not matter whether evidence of the relevant fact thus established matches that which the common law denotes as being original evidence or as being hearsay evidence admissible under an exception to the hearsay rule.

Rajah JA then considered the prevailing local judicial opinions on the basis for the hearsay rule in the Evidence Act. The first, which basically calls for the application of common law rules,\(^\text{36}\) was dismissed as being contrary to “the tone of the [Evidence Act]”.\(^\text{37}\) Furthermore, Rajah JA wrote that taking this approach would be contrary to s. 2(2) of the Evidence Act, of which the provision in his view repeals all rules that are

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31 Ibid. at para. 67–68, 74.
32 Ibid. at para. 67 [emphasis in original].
34 Lee Chez Kee, *supra* note 10 at para. 70.
35 Ibid. at para. 69 [emphasis in original].
36 *Supra* note 6.
not preserved by statute and which are inconsistent with the Evidence Act. We pause to note that Prof Jeffrey Pinsler has helpfully identified various categories of possible incompatibilities or inconsistencies between the common law (including the judicial statutory interpretation) and the Evidence Act. The categories are:

(a) when a provision is vague or imprecise;
(b) when there is a complete absence of a common law doctrine in the Evidence Act;
(c) when the Evidence Act recognises a common law doctrine but limits its parameters to a specific area of legal practice;
(d) when the Evidence Act recognises a common law doctrine but limits its general application;
(e) when there is a direct conflict between the common law and the Evidence Act;
(f) when both the common law and the Evidence Act recognise a rudimentary legal principle but differ in its operation;
(g) when both the common law and the Evidence Act recognise a rudimentary legal principle but differ in its conceptual basis; and
(h) when the adoption of a common law principle threatens to undermine the structure of the scheme of the Evidence Act.

The second prevailing judicial opinion on the basis of the hearsay rule in the Evidence Act, which argues that s. 62 of the Evidence Act, a provision requiring oral evidence to be direct, reflects the common law hearsay rule, was likewise rejected. This was because s. 62 relates to the mode of proof rather than the type of proof. Additionally, this approach, which accepts that common law exceptions to the hearsay rule are applicable, would run contrary to the intentions of Sir James Fitzjames Stephen, the drafter of the Indian Evidence Act, upon which the Evidence Act was modelled; Stephen had clearly desired to comprehensively formulate the traditional exceptions to the hearsay rule in ss. 17–41 of the Evidence Act.

Rajah JA’s views are a welcome clarification on the conceptual basis for the hearsay

38 Ibid. at para. 75. See also Law Society of Singapore v. Tan Guat Neo Phyllis [2008] 2 Sing. L.R.(R) 239 at para. 126, where the Court of Appeal states that “the overarching principle in the [Evidence Act is] that all relevant evidence is admissible unless specifically expressed to be inadmissible.”
40 Supra note 7.
41 Lee Chez Kee, supra note 10 at para. 73. See also Tan Yock Lin, Criminal Procedure (LexisNexis, 2007) vol. 2 at ch XVI at para. 51.
42 Act No. 1 of 1872 (“the Indian Evidence Act”).
43 For an excellent piece on the history to the enactment of the predecessor to the current Evidence Act, the Straits Settlements Evidence Ordinance (Ordinance No 3 of 1893), see Andrew Phang Boon Leong, “Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore” (1989) 31 Mal. L.R. 46.
44 Lee Chez Kee, supra note 10 at para. 74; see also Pinsler, Evidence, Advocacy and the Litigation Process, supra note 5 at 13.
rule in the Evidence Act. It is true that Stephen had intended his code of evidence law to be, on the whole, all-encompassing. As it was once observed, the “effect of the common or unwritten law was... to be eradicated as far as was possible”. Stephen himself later wrote in an introduction to a treatise that:

“In the years 1870–71 I drew what afterwards became the Indian Evidence Act (Act I of 1872). This Act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since September 1872.”

However, more needs to be said on the extent to which common law exceptions continue to apply, if at all, in Singapore. Rajah JA had stated that if there is “the application of all the common law exceptions without discrimination” (emphasis in original), there will be a divergence from the intentions of Stephen. This might be interpreted as being a hint by Rajah JA of his remaining open to the possible application of common law exceptions to the hearsay rule. There are undoubtedly certain common law exceptions to the hearsay rule that are not recognised or are only reflected in a modified form in the Evidence Act – something we have also alluded to a couple of paragraphs back. Needless to say, by virtue of s. 377 of the Criminal Procedure Code, which requires hearsay evidence to be admitted by virtue of statute, common law exceptions to the hearsay rule cannot apply where criminal cases are concerned. Yet, there is ostensibly nothing to prevent the applicability of common law exceptions to the hearsay rule if they are consistent with the provisions of the Evidence Act (ie not contrary to s. 2(2) of the Evidence Act).

But in principle, the continuing applicability of common law exceptions to the hearsay rule would appear to be erroneous. Rajah JA had stressed that Stephen desired to comprehensively codify the traditional exceptions to the hearsay rule in ss. 17–41 of the Evidence Act. If that had been Stephen’s intention, it follows that no other exception to the hearsay rule would be consistent with the Evidence Act. If the opposite view were to be taken, the fact remains that there are many

47 Lee Chez Kee, supra note 10 at para. 74.
48 Ibid. at para. 74; see also Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code”, supra note 39 at 382.
50 Section 377 has been described as restating the hearsay rule statutorily in an inclusionary form: Public Prosecutor v. Lee Chez Kee, supra note 15 at para. 28; and Chin Tet Ying, “Hearsay – A Doctrine in Retreat?” 32 (1990) Mal. L.R. 239 at 241.
common law exceptions to the hearsay rule, and being basically ad hoc responses to the hearsay rule, these exceptions lack coherence.\(^{52}\) The difficulty that would arise would be in determining when an exception is inconsistent with the Evidence Act.\(^{53}\) No further guidance on the approach to be taken in determining whether an exception is consistent or inconsistent with the Evidence Act was provided for in \textit{Lee Chez Kee}. If indeed there is still room for common law exceptions to the hearsay rule to be applicable, then undoubtedly, further guidance from our courts will be necessary.

V. ANALYSIS OF THE COURT OF APPEAL’S TREATMENT OF S. 378 OF THE CRIMINAL PROCEDURE CODE

Rajah JA prefaced his consideration of s. 378 of the Criminal Procedure Code by observing that the Criminal Procedure Code could potentially be construed as widening the scope of admissibility for hearsay evidence.\(^{54}\) However, he was critical of, \textit{inter alia}, the inconsistencies and the “lack of symbiosis” between provisions in the Criminal Procedure Code \textit{inter se} and between provisions in the Criminal Procedure Code and the Evidence Act in relation to the admissibility of statements of police witnesses.\(^{55}\) In his opinion, the ideal solution would lie in law reform. He stated:\(^{56}\)

“The way forward must surely involve a reconsideration of these principles and their appropriate statutory reformulation. However, until such reformulation is actually realised, the courts will do well to be simply aware of the different conceptual bases underpinning the admissibility of hearsay evidence in both the [Evidence Act] and the [Criminal Procedure Code], and be equally alive to the problems which might arise as a result.”

To recapitulate, the trial judge had, in essence, equated s. 378(1) with its counterpart cl. 31(1) of the UK Bill, and had, accordingly, accepted that the qualifying phrase was intended to have the “limited effect of importing the requirement of voluntariness”.\(^{57}\) Rajah JA, although agreeing with the trial judge that legislative intention should be sought in interpreting a provision, was of the opinion that a “rudimentary comparison of the language” of the two provisions would not be satisfactory as both provisions are not entirely on all fours with each other.\(^{58}\) He posed the following rhetorical questions:\(^{59}\)

\(^{52}\) \textit{Halsbury’s Laws of Singapore, supra} note 29 at para. 120.101.
\(^{54}\) \textit{Lee Chez Kee, supra} note 10 at para. 76.
\(^{55}\) \textit{Ibid.} at para. 76–77.
\(^{56}\) \textit{Ibid.} at para. 77.
\(^{57}\) \textit{Public Prosecutor v. Lee Chez Kee, supra} note 15 at para. 40.
\(^{58}\) \textit{Lee Chez Kee, supra} note 10 at para. 79–80.
\(^{59}\) \textit{Ibid.} at para. 81 [emphasis in original].
“What are the rules of law governing the admissibility of confessions? Was the trial judge correct in equating the rules of law [in the qualifying phrase] to the requirement contained in cl. 2 of the UK Bill simply by reason of the similarity in structure and historical connection between the UK Bill and the [Criminal Procedure Code]? To answer these questions, one must first address the threshold question of whether the UK Bill can, and should, be regarded as the \textit{equivalent}, and therefore the historical predecessor, of the sections of the [Criminal Procedure Code] as amended in 1976.”

Rajah JA then analysed the available parliamentary material, and observed that subsequent to the parliamentary debates that the trial judge had alluded to, a Select Committee declined to completely model the eventual s. 378(1) after cl. 31(1); just as importantly, while cl 31(1) contained a sub-clause dealing with the confessions of a co-accused, s. 378(1) did not have a corresponding equivalent.\textsuperscript{60} Instead, this was dealt with by s. 30 of the Evidence Act.\textsuperscript{61} Rajah JA concluded:\textsuperscript{62}

“Thus, while the trial judge was correct in saying that the references to “the next following section” in the UK Bill and to “section 379” in the [Criminal Procedure Code] pointed to broadly similar sections, he had, with respect, neglected to have regard to the fact that the references to “\textit{this} … section” [emphasis added] in both the UK Bill and the [Criminal Procedure Code] did not likewise point to broadly similar sections. The important omission of cl. 31(2) of the UK Bill (which touched on the confession of a co-accused) from s. 378 of the [Criminal Procedure Code] means that the qualifying phrase could not have been intended to correspond entirely to cl. 2 of the UK Bill.”

Reasoning on that footing, Rajah JA held that insofar as the qualifying phrase was concerned, it had to be that confessions were governed by other admissibility requirements in the Evidence Act apart from the requirement of voluntariness.\textsuperscript{63} In cases involving two or more offenders jointly tried (for the same offence), the confession of one offender might only be taken into consideration against the other offenders if s. 30 of the Evidence Act was satisfied. The corollary then was that “the rules of law governing the admissibility of confessions” included s. 30 of the Evidence Act. To interpret the qualifying phrase otherwise would result in divorce between the interpretation of the two statutes (\textit{viz}, the Criminal Procedure Code and the Evidence Act), and also render the voluntariness provisions in the Evidence Act otiose.\textsuperscript{64}

Rajah JA concluded his analysis by opining that s. 30 of the Evidence Act contained a positive prohibition against the admission of statements that were confessions made

\begin{itemize}
  \item \textsuperscript{60} \textit{Ibid.} at para. 82–91.
  \item \textsuperscript{61} \textit{Ibid.} at para. 91.
  \item \textsuperscript{62} \textit{Ibid.} [emphasis in original]
  \item \textsuperscript{63} \textit{Ibid.}
  \item \textsuperscript{64} \textit{Ibid.} at para. 95–102. This line of reasoning – that the correct statutory interpretation must necessarily avoid the consequence of rendering another statute otiose – also permeated the common intention aspect of the judgment.
\end{itemize}
by an accomplice in a separate trial who was not called to testify in the accused person’s trial.\textsuperscript{65} As s. 378(1)(b)(i) of the Criminal Procedure Code was subject to s. 30 of the Evidence Act, Too’s statements were not admissible.\textsuperscript{66} He added that the rationale for s. 30 of the Evidence Act was to avoid the intellectual difficulty that would plague a judge in a joint trial where one accused makes a confession affecting another accused, and therefore could not be extended to cover Too’s statements.\textsuperscript{67}

As for the decision of the minority, Woo J opined that “there was some force in the trial judge’s matching of the words in s. 378(1) [of the Criminal Procedure Code] with cl. 31(1) of the UK Bill.”\textsuperscript{68} He observed that the relevant report of the United Kingdom Criminal Law Revision Committee indicated that once the requirements for cl. 31(1) and cl. 2 were met, a statement would still be admissible.\textsuperscript{69} He further opined that the majority’s interpretation of the qualifying phrase would result in no confession of a dead accomplice ever being admitted into evidence.\textsuperscript{70} The fact that sub-para (v) of cl. 31(1)(c) of the UK Bill was not adopted did not mean that the UK position on the qualifying phrase was also meant to be departed from.\textsuperscript{71} This difference, in his opinion, was neutral.\textsuperscript{72} He then stated: \textsuperscript{73}

“I… do not think that adopting the interpretation of the trial judge would render provisions on admissibility of confessions, like s. 30 [of the Evidence Act], otiose. I am of the view that the trial judge’s interpretation would only mean that s. 30 will no longer apply when the conditions in s. 378(1) [of the Criminal Procedure Code] are met. In other conditions, s. 30 [of the Evidence Act] continues to apply.”

He concluded that if the rationale for s. 30 of the Evidence Act was to avoid the intellectual difficulty that would plague a judge in a joint trial where one accused makes a confession affecting another accused, then there is nothing to prevent s. 30 from not applying to exclude the admissibility of the confession of a dead accomplice under s 378(1)(b)(i) of the Criminal Procedure Code.\textsuperscript{74} In the case at hand, however, he would have given no weight to Too’s statements.\textsuperscript{75} But, he added, in another case, weight could be given to the confession of a dead accomplice.\textsuperscript{76} He gave the example of an accomplice who had given a confession which exonerates another accused person.\textsuperscript{77}

\textsuperscript{65} Lee Chez Kee, supra note 10 at para. 103.
\textsuperscript{66} Ibid. at para. 103, 117.
\textsuperscript{67} Ibid. at para. 114.
\textsuperscript{68} Ibid. at para. 285.
\textsuperscript{69} Ibid. at para. 287.
\textsuperscript{70} Ibid. at para. 288.
\textsuperscript{71} Ibid. at para. 289.
\textsuperscript{72} Ibid. at para. 290.
\textsuperscript{73} Ibid. at para. 291.
\textsuperscript{74} Ibid. at para. 294.
\textsuperscript{75} Ibid.
\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid.
While the opinion of Woo J was well-reasoned, it would appear that it would not be correct. Of course, his observation that the fact that the qualifying phrase differed from that found in cl. 31(1) of the UK Bill has some strength of reasoning. After all, the amendments to the Criminal Procedure Code which gave rise to s. 378(1) were clearly based on the UK Bill. Furthermore, the amendments were enacted:

(1) to admit all hearsay evidence likely to be valuable to the greatest extent possible without undue complication or delay to the proceedings;
(2) to ensure that evidence should continue to be given for the most part orally by allowing hearsay evidence only if the maker of the statement cannot be called or it is desirable to supplement his oral evidence; and
(3) to include necessary safeguards against the danger of manufactured hearsay evidence.

While Rajah JA was of the opinion that the trial judge’s approach necessarily placed far too much emphasis on (1) and (2) and that emphasis had to be placed on (3) as well, one cannot but observe that the amendments giving rise to s. 378(1) of the Criminal Procedure Code were for the purposes of allowing for the easy admissibility of hearsay evidence where the maker of the statement could not be called for (see (2)). Nonetheless, the majority’s opinion would be preferable, especially in light of s. 377 of the Criminal Procedure Code – a provision which neither the majority nor the minority considered. This section requires that a statement can only be admissible “by virtue of any provision of this Code [ie, the Criminal Procedure Code] or any other written law, but not otherwise” (emphasis added). On its face, this provision would indicate that the phrase “rules of law governing the admissibility of confessions” should be a reference to written rules of law. Section 377 was inserted by cl. 23 of the CPC Bill and corresponds to cl. 30(1) of the UK Bill, which states:

In any proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Act or any other statutory provision, or by virtue of any rule of law mentioned in section 40 of this Act, but not otherwise.

The UK Bill, of course, had cl. 2, which was, as mentioned earlier, concerned with voluntariness. However, the CPC Bill had no such provision. The only other source of written law concerning the admissibility of confessions would be found in the Evidence Act. Thus, Rajah JA’s views would appear to be correct.

Woo J’s trepidation that the statements of dead accomplices would never be admissible could possibly be resolved, because one point which was not canvassed was the possibility of Too’s statements being admissible under s. 32 of the Evidence Act. This was because the Prosecution, for reasons that are not recorded, had conceded

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that the statements were not admissible under that section. However, it would seem that there is the possibility that the statements would have been admissible under s. 32(c), which states:

32. Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

…

or against interest of maker;

(c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

…

[emphasis added]

The relevance and applicability of s. 32(c) to statements made by dead accomplices against their interest is one area which the court should resolve if given the opportunity. There had been cases where the statements of a deceased accomplice, which were against his or her interest, have been held to be admissible under s. 32(3) of the Indian Evidence Act (ie, the equivalent of s. 32(c) of the Evidence Act). In *Mohammad v. Emperor*, the statement of a deceased accomplice was held by the Lahore High Court to be admissible so far as it referred to or explained the part which the deceased accomplice had admitted to having taken in the crime. a case which would appear to be similar to *Lee Chez Kee*, the confession of a dead accomplice was held to be admissible notwithstanding s. 30 of the Indian Evidence Act (ie, the equivalent of s. 30 of the Evidence Act). The case concerned the murder of one Kon Min. One Pya Nyo was tried for the offence, convicted and sentenced to death. He was executed before the trial of the appellant Po Yin. One of the issues in the case was whether Pya Nyo’s statement to the Committing Magistrate that Po Yin had decapitated the victim could be admitted under s. 32(3). The Court of Judicial Commissioner, Upper Burma, held that the statement would be relevant and therefore admissible under s. 32(3), unless barred by another provision. It was further held that:

79  *Lee Chez Kee*, supra note 10 at para. 49, 64, 103.
81  (1925) 26 Cr LJ 1308 at 1313; see also the decision of the Privy Council dismissing the petition for special leave to appeal against the sentence of death in *Umrao v. Emperor* AIR 1925 PC 52.
82  (1906) 5 Cr LJ 300.
83  *Ibid.* at 301.
“Section 30 merely enacts a special exception to the general rule that a confession (admission) can be provide (only) against the person who made it. It does not limit the operation of section 32. Illustration (b) to section 30 cannot … be construed to have this effect.”

In contrast, in Achhay Lal Singh v. Emperor, the Patna High Court declined to admit the statement of a dead accomplice under s. 32(3). The principle underlying that provision, according to the court, was that a statement made by a person rendering him liable to prosecution would likely be a true statement. Therefore, the court continued, the statement should not be admitted, as before the dead accomplice had made the statement, there was already evidence in existence “which would inevitably have led to his prosecution and might by itself have led to his conviction”. However, in Narpat v. The State, the statement of a dacoit implicating his accomplices was admitted under s. 32(3) even though the dacoit had died of gunshot wounds. The Allahabad High Court considered Achhay Lal Singh v. Emperor, but stated:

“It is not necessary to suppose that S. 30 Indian Evidence Act contains the only exception to the rule that a confession can be used only against its maker. … Another exception is to be found in cl. (3) of Sec. 32 Indian Evidence Act. This clause lays down that, when the statement is likely to expose a person to a criminal prosecution, the statement may be admitted if the maker of the statement is dead. …

[A] statement admitted under Cl. (3) of Sec. 32, Indian Evidence Act need not be confined to that portion, which exposes the maker to a criminal prosecution. The statement may well extend to connected matters. So such a statement may be admitted in evidence in so far as it implicates accomplices and the maker of the statement.”

VI. CONCLUSION

Lee Chez Kee is a welcome decision simply because it has provided some important clarifications on two questions: first, the conceptual basis of the hearsay rule in the Evidence Act and Criminal Procedure Code; and second, the ambit and application of the hearsay exception in the form of s. 378(1)(b)(i) of the Criminal Procedure Code.

85 AIR 1947 Patna 90.
86 See also Emperor v. Keshav Narayan Manolkar (1913) 25 Bom LR 248; and Janu s/o Kadir Baksh v. Emperor AIR 1947 Sind 122.
87 Achhay Lal Singh v. Emperor, supra note 85 at 96.
88 Ibid.
89 (1961) 62 CrLJ 591.
90 Ibid. at 592. But see M Monir, Principles and Digest of the Law of Evidence (The University Book Agency, 8th Ed, 1991) at 468, where it is indicated that as the general rule is that a confession is evidence against only its maker, there should be reluctance in allowing for a further exception.
However, as we have sought to point out, there remain a number of unanswered questions that we hope our courts can resolve when the next opportunity arises.