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PREVIOUS INCONSISTENT STATEMENTS: SCOPE OF SECTION 147(3) OF THE EVIDENCE ACT AND ITS APPLICABILITY WHERE THE WITNESS DOES NOT TESTIFY TO THE FACTS MENTIONED IN HIS PREVIOUS STATEMENT

INTRODUCTION

The purpose of this article is to consider whether s 147(3) of the Evidence Act (EA),
which automatically admits a previous inconsistent statement (put to a witness in cross-examination) as evidence of the facts it refers to, should apply to a witness who untruthfully claims to have forgotten those facts or otherwise refuses to answer questions on matters within his personal knowledge. Should the party be permitted to cross-examine the uncooperative witness (whether that witness is called by him or by the opposing party) on his previous statement so that, pursuant to s 147(3), the statement replaces the testimony which the witness ought to have given? In these circumstances, the application of this provision would have to be based on the argument that the previous statement is inconsistent with the witness’s statement in court of feigned loss of memory (‘I cannot remember’) or feigned lack of knowledge (‘I do not know’). This argument was accepted as valid by the Singapore High Court in PP v Heah Lian Khin, a focal point for discussion in this article.

It is the view of the author that the application s 147(3) to these circumstances would amount to an extension of the provision beyond its intended scope, be contrary to the framework of statutory provisions governing the admissibility of hearsay evidence, might encourage an abuse of process and could result in prejudice to the accused person or party against whom the previous statement is used. It will be argued that the proper approach is for the court to exercise its broad discretion to allow cross-examination so that the witness may be impeached by his previous statement. Although the previous statement would not automatically constitute evidence in the case (s 147(3) would not apply), the cross-examination of the witness on his previous statement and other evidence in the case may establish some if not all the facts in the previous

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1 The section is set out under ‘Introduction of s 147(3) of the Evidence Act’.
2 It has been held that s 147(3) applies to the previous inconsistent statement of a witness who is cross-examined by the party who calls him. See Rajendran s/o Kurusamy & Ors v Public Prosecutor [1998] 3 SLR 225, at para 101. The High Court stated in this case that where counsel puts leading questions to his own witness pursuant to s 156, he may be regarded as ‘cross-examining’ that witness.
3 [2000] 3 SLR 609.
4 In the case of a party who wishes to cross-examine his own witness, s 156 (EA) provides: ‘The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.’ Also see s 157(c) which allows a party (with the consent of the court) to impeach the credit of the witness by putting his previous inconsistent statement to him.
statement, or justify the court in exercising its discretion to admit the statement pursuant to s 380(4) of the Criminal Procedure Code (CPC) on the basis that ‘it is in the interests of justice for the witness’s oral evidence to be supplemented ....’. 5 Although there is no equivalent provision (to s 380(4) (CPC)) for civil cases, it will be argued that where, in the exceptional case, a witness is examined in chief, 6 the former statement should be admitted into evidence with the leave of the court on the basis that the hearsay rule should not be applied more rigorously than in criminal cases. 7

The rule against hearsay is well-established by case law and statute in Singapore. The Court of Appeal has endorsed the following definition:

The assertions of persons made out of court whether orally or in documentary form or in the form of conduct tendered to prove the facts which they refer to (ie facts in issue and relevant facts) are inadmissible unless they fall within the scope of the established exceptions. 8

Section 377 of the CPC states:

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.

Therefore, a previous statement of a witness (ie, a statement made out of court) is not admissible to prove the facts to which it refers unless it comes within a recognised exception to the hearsay rule. A previous statement of a witness may be used for non-hearsay purposes in certain circumstances. 9 It might be admitted to show that the witness gave a materially different version of the facts in the past. Here, the previous statement is used to reduce the significance or entirely negate the effect of his testimony concerning those facts, the rationale being that he has said something inconsistent with what he is now saying in court and therefore his evidence should not be believed. The previous statement might be consistent with his testimony in which case it might be admitted

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5 CPC, s 380(4). The sub-section is set out in full below.
6 The general rule is that a witness must give his evidence in chief in the form of an affidavit. (Order 38, rule 2(1) (RC).) However, the court may, ‘if it thinks just’ allow a witness to be examined in chief. (Order 38, rule 2(4) (RC).)
7 See below, ‘Position in civil cases’ (under Section 380(4) of the Criminal Procedure Code’).
9 In addition to the situations about to be mentioned in the main text, the hearsay rule does not apply if the out of court assertion constitutes original evidence.
to show the consistency.\textsuperscript{10} Here again, the previous consistent statement would only have the effect of supporting the testimony, in the same way that a previous inconsistent statement would have the effect of undermining the testimony. In either case, the previous statement, if exceptions to the hearsay rule do not apply, would not be admissible as substantive evidence.\textsuperscript{11} Another non-hearsay purpose of a witness’s previous statement is its use to refresh memory. The witness may refer to his previous statement\textsuperscript{12} for this purpose if the condition of contemporaneity is satisfied.\textsuperscript{13} The document is merely used as a tool to stimulate the witness’s memory and does not become evidence unless a provision specifically provides for its admissibility.\textsuperscript{14}

\textbf{COMMON LAW BACKGROUND}

The previous inconsistent statement is a formidable weapon of the cross-examiner for there is nothing quite as destructive of a witness’s testimony.

\textsuperscript{10} Pursuant to s 159 (EA) if the conditions in that section are satisfied. It provides: ‘In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.’

\textsuperscript{11} A previous inconsistent statement becomes evidence pursuant to s 147(3) if the conditions stipulated in that provision apply. A previous consistent statement may become evidence, for example, if the doctrine of res gestae operates in relation to it or s 33 of the EA (statement in former judicial proceedings) or s 380 of the CPC (previous statement of a person called or to be called as a witness) applies. A previous consistent statement does not become substantive evidence pursuant to s 159 \textit{per se}. This provision merely allows such a statement to be adduced to show the witness’s consistency in the same way that s 147(1) and (2) permit a witness’s inconsistency to be exposed. Although s 147(3) does admit a prior inconsistent statement into evidence, there is no equivalent provision for the purpose of previous consistent statements provable under s 159. Cf \textit{Khoo Kwoon Hain v PP} [1995] 2 SLR 767, at 776, where the High Court indicated that a previous consistent statement is admissible as substantive evidence pursuant to s 159.

\textsuperscript{12} Or a contemporaneous statement made by another person and adopted by the witness pursuant to s 161(2) (EA).

\textsuperscript{13} Section 161 (EA) provides: ‘(1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory; (2) The witness may also refer to any such writing made by any other person and read by the witness within the time mentioned in subsection (1), if, when he read it, he knew it to be correct; (3) Whenever the witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of such document if the court is satisfied that there is sufficient reason for the non-production of the original; (4) An expert may refresh his memory by reference to professional treatises.’ Also note s 162 (EA) which states: ‘A witness may also testify to facts mentioned in any such document as is mentioned in section 161 although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.’ See \textit{R v Carrington} [1969] NZLR 790 (concerning a witness who verified his previous inconsistent statement).

\textsuperscript{14} In this case, s 147(5) (EA).
as material self-contradiction. This was recognised early on by the common law which developed the method of putting a previous inconsistent statement to a witness.\textsuperscript{15} In the context of cross-examination of a witness by the party who calls him, the process was given statutory effect in 1854 by the Common Law Procedure Act\textsuperscript{16} in respect of civil cases. The provision was replaced and extended to criminal cases by s 3 of the Criminal Procedure Act, 1865:

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned 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 has made such statement.

The position at common law, which continues in England in relation to criminal cases,\textsuperscript{17} is that although the witness might be impeached by the previous inconsistent statement, that statement does not, as general rule, become evidence in the case. The purpose of the statement is to counteract or discredit the witness’s account of the facts in court so that his testimony is less likely to be believed or (better still from the point of view of the cross-examiner), rejected altogether.\textsuperscript{18} There are traditional reasons why the previous statement of witness in criminal proceedings is not admitted into evidence. It is not sworn or affirmed in the context of court proceedings and, therefore, the maker is not constrained by the particular legal duty to tell the truth and corresponding punishment for its breach.\textsuperscript{19} As the statement is not made in court proceedings, the trier of fact is deprived of the opportunity for assessing the witness’s credibility (at the time when the statement was made) in making its determination as to the truth of the statement. Furthermore, the witness is not subject

\textsuperscript{15} See the observations of Parke B in Crowley v Page (1837) 7 C & P 789. Also see Clarke v Saffery (1824) Ry & M 126; Bastin v Carew (1824) Ry & M 127; Price v Manning (1889) 42 Ch D 372.

\textsuperscript{16} For a contemporary case on this Act, see Greenough v Eccles (1859) 5 CBNS 786.

\textsuperscript{17} Previous inconsistent statements became admissible as evidence of the facts they refer to in civil cases in England by virtue of s 3(1) of the Civil Evidence Act 1968 (c. 64). Hearsay evidence is now generally admissible pursuant to the Civil Evidence Act, 1995 (c. 38).

\textsuperscript{18} See R v Golder & Ors (1960) 45 Cr App R 5, which continues to be cited as the leading case for this principle. See, for example, Phipson on Evidence (2000), 15th ed, at para 11–61. Also see R v Birch [1924] 18 Cr App R 26.

\textsuperscript{19} See ss 10, 11 of the Oaths Act (Cap 211) and ss 191 and 193 of the Penal Code (Cap 224). The obligation also arises in other situations. For example, a person who makes a statement to a police officer in the course of a police investigation is ‘bound to state truly the facts and circumstances with which he is acquainted’ and faces penal sanctions in the event of non-compliance with this duty.
to cross-examination when he made the previous statement and it may be difficult to ascertain whether the statement was encouraged or induced\textsuperscript{20} in favour of either the defence or prosecution.\textsuperscript{21} As the hearsay rule excludes the statement as evidence of the facts it refers to,\textsuperscript{22} it is only admissible for this purpose pursuant to an exception to the rule.

**INTRODUCTION OF SECTION 147(3) OF THE EVIDENCE ACT**

Until the amendments in 1976,\textsuperscript{23} there were only two provisions in s 147\textsuperscript{24} and they set out the procedure for putting a witness’s previous inconsistent statement to him:

(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.

The wording of these provisions was substantially influenced by ss 4 and 5 of the Criminal Procedure Act 1865.\textsuperscript{25} The position at common law was...

\textsuperscript{20} For example, by questions which prompt, influence or intimidate a witness.

\textsuperscript{21} As was said by Taylor J in *Muthusamy v PP* [1947] MLJ 57, at 58: ‘The basic principle is that the court is to decide the facts on the sworn evidence given in court. What a witness said on some other occasion is prima facie irrelevant and, if unsworn, is prima facie less reliable.’ Also see *R v Golder* (1960) 45 Cr App R 5 (cited in note 18).

\textsuperscript{22} For definitions of the hearsay rule, see the main text from note 8. Cf *R v Goodway* [1993] 4 All ER 894, at 899, where the court indicated that a judge could direct a jury as to how much of the previous statement they could rely on.

\textsuperscript{23} Introduced by the Evidence Amendment Act (No 11 of 1976).

\textsuperscript{24} They have their origin in s 145(1) and (2) of the Evidence Ordinance, 1893 (Ordinance No 3 of 1893).

\textsuperscript{25} Section 4 of the Criminal Procedure Act 1865 (28 & 29 Viet. c. 18), which is applicable to oral and written statements, states: ‘If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such a 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...
applied so that while a witness could be cross-examined on his previous inconsistent statement, the significance of the statement was limited to its effect on the testimony in court; it did not become evidence in the case. Hence, in *Muthusamy v PP*, Taylor J said:

He [the magistrate] completely misunderstood the principle of using the former statement to impeach credit and took the view that the former statement could be ‘put in’ and that the court could then choose whether to accept the unsworn police statement or the witness’s sworn statement in court as his evidence of the incident. This is utterly illegal. In no case can the former statement become his evidence.

The principle was unhesitatingly applied until statutory reform in 1976 altered the effect of the previous statement. In that year, the Evidence (Amendment) Act introduced a series of additional provisions to supplement s 147(1) and (2). One of these, s 147(3), states:

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 this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

It is clear that the effect of s 147(3) was to vary the common law position by admitting the previous inconsistent statement into evidence. The result

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26 [1947] MLJ 57, at 58.
27 See, for example *Jones v R* [1948] MLJ 182, in which Murray-Aynsley CJ said at 182: ‘A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.’
28 See, for example *Jones v R* [1948] MLJ 182, in which Murray-Aynsley CJ said at 182: ‘A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.’
30 The rationale for this amendment is considered immediately below.
of this development is that the previous statement itself may be relied upon by the court in determining the outcome of the case.\textsuperscript{31} This reform has its roots in the Report of the English Criminal Law Revision Committee on Evidence.\textsuperscript{32} In the course of the Second Reading of the Evidence (Amendment) Bill,\textsuperscript{33} the Minister of Law, in proposing the adoption of s 147(3), echoed the concerns of the Criminal Law Revision Committee\textsuperscript{34} about the state of the law in relation to previous inconsistent statements:

Clause 9\textsuperscript{35} 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 subtle a distinction.\textsuperscript{36}

Now almost 15 years old, s 147(3) has been considered and applied more often than most other provisions in the Evidence Act. The scope of its operation in relation to statements to the police has not always been viewed consistently by the courts.\textsuperscript{37} The case of \textit{PP v Heah Lian Khin}\textsuperscript{38} raises another significant issue: whether a previous statement of a witness who claims to have forgotten, or denies knowledge of, the facts to which the statement refers can be admitted as substantive evidence pursuant to s 147(3).\textsuperscript{39} The approach of this article will be to set out the facts and rulings in \textit{Heah Lian Khin}, to examine the principles governing the interpretation of the provision,\textsuperscript{40} and to consider whether it would have

\begin{thebibliography}{9}
\bibitem{31} The weight of the statement being dependent on the criteria set out in s 147(6).
\bibitem{32} Cmnd 4991. The Report (the ‘11th Report’) was presented to Parliament in June 1972. The provision in the CLRC Report corresponding to s 147(3) is clause 33(1) (at pp 193 and 242 of the Report).
\bibitem{33} Which was committed to a Select Committee by a resolution of Parliament passed on 19th August, 1975.
\bibitem{34} Report of the CLRC, at paras 232 and 257. Also see the commentary at p 242 (under clause 33, the provision corresponding to s 147(3) of the EA). Interestingly, the CLRC’s Report was never implemented in England.
\bibitem{35} The clause pertaining to the reform of s 147.
\bibitem{37} See Halsbury’s Laws of Singapore (Volume 10: Evidence), para [120.493],
\bibitem{38} Cited in note 3.
\bibitem{39} This issue is framed in the first paragraph of this article.
\bibitem{40} This part will be sub-divided under ‘General principles’ and ‘Observations on the High Court’s rulings in \textit{Heah Lian Khin}’ under the main heading, ‘Scope of s 147(3) of the Evidence Act’.
\end{thebibliography}
been more appropriate to apply s 380(4) of the Criminal Procedure Code to the circumstances of the case.

PP v HEAH LIAN KHIN

Facts

This was an appeal by the Public Prosecutor against the district court’s decision to acquit the respondent on three charges of receiving information communicated in contravention of s 5(2) of the Official Secrets Act (OSA) for want of a prima facie case. The prosecution had hoped to prove its case primarily through the evidence of its principal witness, one Corporal Tay. Corporal Tay, who was attached to the Secret Society Branch (SSB) of the Criminal Investigation Department, had already pleaded guilty to, and was convicted, inter alia, of communicating information to the respondent (on raids to be conducted by the SSB in the Geylang area).

The main ground of appeal was that the district court had not allowed the prosecution to cross-examine Corporal Tay, who claimed to have forgotten the facts to which he was expected to testify, on a previous statement made by him to a CPIB Senior Special Investigator which was recorded pursuant to s 27 of the Prevention of Corruption Act (Cap. 213). It followed that the statement was not admissible in evidence pursuant to s 147(3) and, therefore, was excluded by the court from its determination of whether the prosecution had established a sufficient case for the accused to answer. The previous statement was described by the High Court in the following manner:

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 [a third party] 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

41 [2000] 3 SLR 609.
42 Cap. 213. It is an offence under this section if at the time the respondent received the information he had reasonable grounds to believe that such information was communicated to him in contravention of the Act.
43 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.
44 Exhibit P 71.
respondent on the material dates in question. Finally, the statement explained that Cpl Tay provided tip-offs to the respondent because of their friendship.

Corporal Tay’s testimony was recounted by the court as follows:46

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 9:00pm, 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 9:00pm, 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

46 Ibid, at paras 6–11.
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.

Rulings

The district court ruled that were no serious discrepancies or material contradictions between Corporal Tay’s oral evidence and his previous statement in relation to the surrounding circumstances and events of 21 and 29 November 1998. It also found that although there were inconsistencies between his account of the events of 17th October 1998 and a particular paragraph of his previous statement, these were minor and therefore did not justify the process of impeachment pursuant to s 147(2).

The thrust of the High Court judgment, and the main concern of this article, is whether a previous statement of a witness concerning the facts in the case can be put to a witness in cross-examination (pursuant to s 147(1) or (2)) by the party who calls him when the witness is unwilling to testify to those facts (whether on the basis of feigned loss of memory or lack of knowledge), so that the previous statement becomes evidence of the facts it refers to (pursuant to s 147(3)) in lieu of the testimony which the witness refuses to give. This is only possible if the previous statement can be construed to be ‘inconsistent’ or ‘contradictory’ within

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47 The district judge stated: ‘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 page 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.’ (Paragraph 34 of the judgment of the District Court and para 62 of the judgment of the High Court.)

48 The court has a discretion to allow a party to cross-examine its own witness. See s 156 and the preliminary words of s 157. See note 4.

49 As in this case. A genuinely forgetful witness may refresh his memory provided the conditions in s 161 are satisfied.

50 The term used in s 147(2).

51 The term used in s 147(1).
the meaning of s 147.

The High Court ruled that the previous statement can be put to the witness in such a situation and that it would become evidence pursuant to s 147(3). The court was of the view that there was ‘support for adopting a flexible as opposed to a rigid, semantic interpretation of the phrase “previous inconsistent or contradictory statement”’. According to the court, these terms are satisfied even where a witness refuses to give evidence in court about the facts to which the statement refers. Yong CJ stated:

... 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.

His Honour explained his rationale for this view:

... 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.

... it would be unduly restrictive and unrealistic to confine the operation of the statutory provisions to a situation where the witness

53 Ibid, at para 32. This conclusion is based on the following pronouncement in M. Monir’s Principles and Digest of the Law of Evidence (8th ed), at p 1566 (citing Wigmore on Evidence at § 1010):

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?

It is submitted that this pronouncement is concerned with the situation in which the witness actually gives evidence of the facts in court and a comparison of the previous statement and the testimony reveals a general impression of inconsistency rather than an express or direct contradiction.

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, i.e., that he has no recollection of the material facts and what was said in the witness’s written statement, i.e., a detailed recollection of it.

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.

His Honour pointed out that the court would be deprived of evidence if s 147(3) is not construed to admit the previous statement of a witness who refuses to give evidence of the facts:

[This] 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

55 Ibid, at para 44.
56 Ibid, at para 51.
57 Ibid, at para 54. With respect, this conclusion is incorrect. As will be shown, the court could have relied on s 380(4) to exercise its discretion to admit the previous statement.
facts. This construction accorded with the spirit and objectives of s 147(3) and would not unduly broaden the scope of the legislative amendments.58

Applying these principles to the facts of the case, the High Court ruled that ‘Corporal Tay had lied and was simply being deliberately evasive about his recollection’.59 The court concluded that ‘his oral testimony clearly contradicted the relevant portions of his previous statement in exhibit P71’ and that, accordingly, s 147(3) applied to the circumstances.60 The rulings of the High Court in Heah Lian Khin are examined in the course of this article.61

SCOPE OF SECTION 147(3) OF THE EVIDENCE ACT

General principles

The rationale of allowing the witness to be cross-examined on his own previous inconsistent statement is well established. The court must be able to effectively assess the impact and weight of the witness’s evidence at trial by considering material contradictions emanating from his previous statements concerning the facts to which he is now testifying. The underlying basis of the common law restriction against the admission of the previous inconsistent statement as evidence62 is that the court is generally only concerned with direct evidence actually given in court and will only consider out of court inconsistent statements to the extent that they affect the evidence given in court. The purpose of s 147(1) and (2)63 is to provide the procedure by which a witness’s testimony in court can be challenged (and, therefore, tested) by his own previous inconsistent statements. The fact that the common law never recognised the previous statement as evidence64 shows that the process of impeachment was intended for the purpose of determining the significance of the testimony in court. Section 147(3) does not change this position. It admits the previous statement as evidence not primarily because it has suddenly been conferred a higher evidential status worthy of greater attention.65 The admission of the previous statement is incidental to the witness’s

58 Ibid, at para 55.
60 Ibid. A number of other significant observations were made by the High Court in the case including the effect of a previous statement of facts (in relation to a plea of guilt) and the issue of whether a statement of a witness who is not an accused must be voluntary.
61 See below, ‘Observations on the High Court’s rulings in Heah Lian Khin’ (under Scope of s 147(3) of the Evidence Act’).
62 See above, under ‘Common Law background’ and ‘Introduction of s 147 of the Evidence Act’.
63 Set out in the main text after note 24.
64 See above, ‘Common law background’.
65 Although this could be the indirect effect of s 147(3) depending on the weight accorded to the statement pursuant to s 147(6) (EA).
testimony. It is adduced only because it concerns facts which \textit{have already been put in issue} by the witness. The previous statement, being a contradictory account of those facts, is allowed in the interest of testing the reliability of the witness’s testimony. The purpose of s 147(3), which is to admit the previous statement as evidence, is to eradicate a practical problem faced by the courts when considering the previous statement of the witness against his testimony in court. The Minister of Law justified the amendment on the basis that the present law caused difficulty by limiting the use of the previous statement to the negation of the witness’s testimony. He considered the distinction between the admission of the previous statement to neutralise the witness’s testimony and its admission as substantive evidence as being ‘too subtle’.\footnote{Parliamentary Debates (19 August 1975, Vol 34, pp 1246–1247). The pertinent extract is set out in the main text at notes 35–36.}

This observation was taken from the Criminal Law Revision Committee’s 11th Report in which the reform is proposed.\footnote{CLRC Report, at para 232. Also see para 257 and the commentary on clause 33 at page 242.} Therefore, although previous statement is admitted as evidence and can certainly be assessed for its own effect as such,\footnote{As is assumed by s 147(6) which lists factors governing its weight. The CLRC justified clause 33 of the Draft Bill (on which s 147(3) of the EA was based), on the basis that ‘... contradictory statements by the same person should confront one another on the same evidential footing’. (See para 257 of the Report.)} its admission is intimately linked to (indeed, dependent on), the witness having given evidence in court. The purpose of s 147(3) is not simply to admit in evidence a witness’s out of court statement irrespective of the circumstances. Its intention is not to replace the testimony expected of, but not given by, a reluctant witness even though this outcome might very usefully resolve the problem for the examining advocate or prosecutor. If the advocate or prosecutor is allowed to rely on the previous statement of a witness as evidence (irrespective of its reliability) whenever the latter is uncooperative, the decision-making process could be compromised by the lower quality of the information on which the court must act.\footnote{The reasons why a previous statement out of court might be unreliable are considered under ‘Common Law background’ (above).} The rationale of the trial process in criminal cases would be nullified by such a practice. In civil cases, the evidence of witnesses must generally be adduced by affidavit which is equivalent to testimony by oath or affirmation.\footnote{See Order 38, rule 2 of the Rules of Court, 1997.} As a matter of principle, the process in criminal cases should not be more lax than this. It would be if previous statements are admitted to replace the testimony of witnesses whenever those witnesses fail to testify as required. The keystone of the common law trial is that evidence is adduced and assessed by the judge in court; for the judicial process generally turns its face against evidence in
statements obtained beyond the purview of the court unless they provide a basis for reliance.\textsuperscript{71} Therefore, previous statements of witnesses are only admissible in court to prove the facts to which they refer if they constitute exceptions to the hearsay rule. These exceptions are justified on the ground that they offer a relative measure of reliability\textsuperscript{72} and/or that the statement may be the only source of evidence or the ‘best evidence’ available.\textsuperscript{73} Indeed, as will be seen, there is such an exception (subject to its own particular safeguards)\textsuperscript{74} in the context of an officially recorded statement of a witness who refuses to testify to the facts contained therein, the situation in \textit{Heah Lian Khin}.\textsuperscript{75}

Although s 147(3) is also an exception to the hearsay rule,\textsuperscript{76} its basis of operation is different to the traditional exceptions, which do not require an inconsistent version of the facts to have been given in court.\textsuperscript{77} Section 147(3) does not apply where a witness has \textit{not} testified to, and put into issue, the facts which are the subject matter of the previous statement. As in the case of other exceptions to the hearsay rule, s 147(3) imposes a standard of reliability for the admissibility of the previous statement. It is this demand for reliability which limits the scope of s 147(3) to the situation in which the witness’s previous statement of facts is materially inconsistent with his evidence in court as to those facts. There are two accounts of the facts by the same witness (his previous statement and his testimony in court) which assist the court in assessing the reliability of the evidence.\textsuperscript{78} Section 147(3) merely changes the effect of the previous statement. It does not alter the process for putting previous inconsistent statements to a witness, which continues to be governed by s 147(1) and (2). These provisions clearly assume the existence of testimony in court by providing that the witness may be cross-examined as to previous statements made by him which are ‘relevant to the matters in question in the suit or proceeding’ and which ‘contradict him’\textsuperscript{79} or are ‘inconsistent

\textsuperscript{71} See ‘Common Law background’ (above).
\textsuperscript{72} See, for example, ss 32(a)–(h), 33–40 (EA) which recognise certain categories of statements on the basis that they offer a measure of reliability. Also see s 380(1) (CPC), which imposes the requirements of duty on the compiler of a record and intermediaries preparing it, and personal knowledge on the part of the supplier. Section 380(1) is considered below, under ‘Section 380(4) of the Criminal Procedure Code’.
\textsuperscript{73} As when the witness is not available to give evidence for one of the prescribed reasons in the preamble to s 32 (EA) and s 378(1)(a), (b)(i)–(iii) (CPC).
\textsuperscript{74} I.e., the requirements stated in s 380 (CPC) as well as the leave of the court which will only be given if it is just to do so. See s 380(4) (CPC).
\textsuperscript{75} See below, ‘Section 380(4) of the Criminal Procedure Code’.
\textsuperscript{76} \textit{PP v Sng Siew Ngoh} [1996] 1 SLR 143, at 157.
\textsuperscript{77} See notes 72 and 73 for some of these traditional exceptions.
\textsuperscript{78} \textit{PP v Sng Siew Ngoh} [1996] 1 SLR 143, at 156: ‘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’.
\textsuperscript{79} The words in s 147(1) (previous oral statements).
with his present testimony'. It is obvious from this wording that the witness must have given testimony in court concerning 'the matters in question in the suit or proceeding' which the previous statement contradicts or is inconsistent with. A witness who says in court: ‘I cannot remember’ or ‘I do not know’ is not testifying or giving evidence concerning the ‘the matters in question in the suit or proceeding’; quite the contrary, he is disclaiming any recollection or knowledge about such matters. He is not testifying or giving evidence but is asserting an excuse for not testifying or giving evidence. What one has here is not a case of inconsistent statements in the context of s 147 of the EA (because there is no evidence in court), but (if the witness is feigning lack of memory or knowledge), a case of inconsistent positions taken by that witness: his position before the trial that he knew the facts and his position at the trial that he does not know or does not remember the facts. In this situation, the statement is put to the witness not to contradict his testimony (there is no testimony because he has not given evidence concerning the facts in his statement), but to show that he once knew the facts and is now being evasive. The facts recorded in the statement are not in issue because there is no testimony concerning those facts. Therefore, no inconsistency or contradiction can arise in the context of a single source of evidence of those facts (the previous statement).

The pertinent question in this situation is whether the witness is deliberately refusing to testify or whether he has truly forgotten the circumstances. It is the existence (the making) of the statement that is relevant to this issue, not its content. In this situation it is not s 147 which applies but the general law governing cross-examination. The witness may be cross-examined by the party who called him in order to challenge the position which he has taken in court; for example, by showing that his failure to respond to questions in court is a result of his steadfast unwillingness to testify and that his excuse of forgetfulness is false. Further questions may show that the previous statement of the witness is reasonably reliable in which case, the court may exercise its

80 The words in s 147(2) (previous written statements).
81 Also see s 157(c) (EA) which provides that the credit of a witness may be impeached ‘by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted’. The term ‘evidence’ refers to his testimony concerning the facts in issue. ‘Evidence’ is defined by s 3(a) (EA) as oral evidence ‘in relation to matters of fact under enquiry’. Also see the two illustrations to s 157 which contemplate the witness giving testimony in court concerning the facts.
82 The term ‘evidence’ is defined in the preceding note.
83 The court has the discretion to permit counsel to cross-examine his own witness. See ss 156 and 157 (EA). Also see Yuen Chun Yiu v PP [1997] 3 SLR 57; R v Thompson (1977) 64 Cr App R 96. R v Thompson is considered in the main text from note 117. The extent to which the cross-examiner can exploit this situation is considered in note 155.
prerogative to grant leave for its admission pursuant to an entirely different provision.\textsuperscript{84}

Section 147(3)’s requirement of two inconsistent accounts of the facts is revealed by the case-law conditions. First, the inconsistency must be material. Second, the witness must be given the opportunity to explain the inconsistency. In \textit{Muthusamy v PP},\textsuperscript{85} which concerned the provisions in s 147(1) and (2),\textsuperscript{86} Taylor J said in relation to a previous statement in writing:

On the request of either side, the court reads the former statement. If there is no serious discrepancy, the court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable. Differences may be divided into four classes: (a) minor differences, not amounting to discrepancies; (b) apparent discrepancies; (c) serious discrepancies; (d) material contradictions. 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 a discrepancy. If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement. If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him,\textsuperscript{87} preferably by the court, and he must have a fair and full opportunity to explain\textsuperscript{88} the difference.

This approach has been endorsed by the Singapore Court of Appeal and High Court on several occasions.\textsuperscript{89} It follows that if a witness made a previous statement concerning certain facts but refuses, or is unable, to

\textsuperscript{84} Namely, s 380(4) CPC. Sec below, ‘Section 380(4) of the Criminal Procedure Code’.
\textsuperscript{86} At the time, s 145(1) and (2).
\textsuperscript{87} Emphasis added.
\textsuperscript{88} Emphasis added.
testify to those facts, there is no basis for comparison for the purpose of determining the materiality of the contradiction, and the witness is not in a position to explain because there is only one version of the facts available.\textsuperscript{90} The rationale for s 147(3) is that there are two sources of evidence which the court can scrutinise. It can look at the specific inconsistency between the previous statement and the testimony in court and consider any explanation which the witness might offer. Hence, a measure of reliability is offered to justify this exception to the hearsay rule.\textsuperscript{91} In \textit{PP v Sng Siew Ngoh},\textsuperscript{92} the High Court justified s 147(3) as a legitimate exception to the hearsay rule on the basis of reliability and policy. When the court has before it two sources of evidence (the witness’s testimony and his previous statement) to assist in the decision-making process, the opportunity must not be shunned:

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.

The Criminal Law Revision Committee stated as its justification for clause 33 of the Draft Bill (on which s 147(3) of the EA was based), which admits the previous statement as evidence, that ‘... contradictory statements by the same person should confront one another on the same evidential footing’.\textsuperscript{93} This justification is not present when the witness merely states that he cannot recall the facts and is unable to verify his previous statement, the situation in \textit{Heah Lian Khin}. All one has in this situation is a single account of the facts in the previous statement and there is no question of ‘confrontation’ or the ‘same evidential footing’ in the absence of testimony concerning those facts.

\textsuperscript{90} All he can do is to say that while he may have known the facts at one time he no longer has any recollection of them.
\textsuperscript{91} The hearsay rule is discussed in the ‘Introduction’.
\textsuperscript{92} \textit{PP v Sng Siew Ngoh} [1996] 1 SLR 143, at 156 and 157.
\textsuperscript{93} CLRC Report, para 257.
Indeed, s 147(6), which concerns the weight of the previous statement, assumes that the witness can be cross-examined on the facts to which the statement refers.\textsuperscript{94} The court is required to consider all the circumstances of the case in making its determination on weight and this would include examining the evidence given by the witness in court as to those facts. If the witness disclaims memory or knowledge of the facts and does not give evidence about them, all the court has to go on is the previous statement and the circumstances surrounding it. The witness cannot be cross-examined on that statement because he ‘knows nothing’ or ‘has completely forgotten’ about the facts contained in it. There is no reference point (the testimony given in court) against which the reliability of the previous statement can be assessed. Even if the court believes that the witness is lying about his forgetfulness or lack of knowledge, how much of the previous statement can the court safely rely on – part(s) or all of it? The statement is tantamount to a statement of a person not giving evidence at the trial because there is no testimony. Testimony in court concerning the facts in the previous statement is a threshold requirement for the admissibility of the previous statement pursuant to s 147(3). This requirement must be satisfied before the court can effectively accord the appropriate weight to the previous statement. The difficulties involved in assessing the weight of a previous statement of a witness who refuses to testify is shown by many cases in which the High Court has emphasised the importance of considerations which can only apply where the witness has actually given evidence concerning the facts referred to in his previous statement.\textsuperscript{95}

Reference has already been made to the use of a witness’s previous statement for non-hearsay purpose such as refreshment of memory or to show consistency.\textsuperscript{96} Conditions concerning the reliability of a statement used for refreshing memory or to show consistency are applicable even though the statement is not admitted as substantive evidence.\textsuperscript{97} Therefore,

\textsuperscript{94} Section 147(6) states: ‘In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of this section regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.’


\textsuperscript{96} See the main text after note 10.

\textsuperscript{97} A statement used to refresh a witness’s memory may be admissible as evidence if the additional conditions in s 147(4) and (5) are fulfilled. A witness may refer to a previous statement of his to show consistency pursuant to s 159 (EA). However, the previous statement does not become substantive evidence thereby unless it contains facts otherwise admissible pursuant to the provisions in Pt 1 (ss 5–57) of the EA. Cf \textit{Khoo Kwoon Main v PP} [1995] 2 SLR 767, at 776. Also see note 10.
the argument may be made that if the standard of reliability for such a statement is not satisfied, it would certainly not be sufficient to admit such a statement as substantive evidence pursuant to s 147(3). A witness is only permitted to refresh his memory from a contemporaneous document. Such a document, even if contemporaneous, does not become evidence in the case unless the witness has been cross-examined upon it. The requirement of cross-examination ensures the reliability of the statement by allowing the witness to be questioned on the facts with which that statement is concerned. For this purpose, the document used to refresh the witness’s memory must be made available to the party who has the right to cross-examine the witness. It has been observed by the Singapore High Court that the rationale of this procedure is ‘(i) to secure the full benefit of the witness’s recollection as to the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement’. There is an obvious assumption here that the witness must be able to answer questions in court about his previous statement. In Heah Lian Khin, the witness claimed not to be able to answer questions about the facts in his previous statement to the CPIB. Furthermore, he did not affirm that the statement was an accurate record of what he said to the CPIB. Accordingly, his memory could not be refreshed. Therefore, a statement which would not even have been permitted to be used for the limited purpose of refreshing the witness’s memory, was regarded by the High Court in Heah Lian Khin as admissible evidence pursuant to s 147(3).

Observations on the High Court’s rulings in Heah Lian Khin

The discussion under the previous sub-heading raises various concerns about the correctness of the High Court’s approach to s 147(3) in Heah

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98 Section 161(1) (EA) states: ‘A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.’

99 EA, s 147(4), (5).

100 Section 163 (EA) states: ‘Any writing referred to under section 161 or 162 must be produced and shown to the adverse party if he requires it; such party may cross-examine the witness thereupon.’

101 Yuen Chun Yii v Public Prosecutor [1997] 3 SLR 57, at paras 24 and 25 citing Re Jhubbo Mahton 12 CLR 233. Also see Republic of India v GP Rajan 1967 AIR 115 (Or).

102 It could have been adduced as his testimony if, despite his ‘forgetfulness’, he had verified the statement as a correct record of the facts. See s 162 of the EA and Yuen Chun Yii v Public Prosecutor [1997] 3 SLR 57, at para 21.

103 I.e., it would not have been admitted into evidence unless s 147(4) and (5) applied (as to which see above).

104 I.e., ‘General principles’.
Lian Khin. As will be subsequently shown, the application of s 380(4) of the Criminal Procedure Code would have been the ideal mechanism for putting Corporal Tay’s previous statement into evidence in the circumstances of the case. 105

The analysis of the High Court’s reasoning in Heah Lian Khin would not be complete without an examination of the case law applied by the court in support of its conclusion. The court considered the decision of the Supreme Court of Canada in McInroy & Rouse v The Queen106 to be the most persuasive authority107 for its conclusions on the applicability of s 147(3). In McInroy & Rouse (which involved a charge of murder), the prosecution witness, when questioned on a certain conversation she had with the accused concerning the alleged crime, stated that she could not recall the conversation. The trial judge permitted the prosecution to cross-examine her on a previous statement (to the police) pursuant to s 9(2) Canada Evidence Act. In her previous statement, the witness had referred to a conversation with the accused during which the latter confessed to the murder. 108 When the witness was shown her previous statement, she maintained that she could not recall the conversation with the accused. Although she 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 truth at that time, she could not recall ‘having said those things to the police’. The Supreme Court reversed the position taken by the Court of Appeal109 and ruled that the trial judge had been correct in allowing the witness to be cross-examined pursuant to s 9(2) of the Canada Evidence Act. 110 Martland J stated: ‘... there was evidence of an inconsistency between what she said at the trial, i.e., that she had no recollection of a conversation, and what was contained in her written statement, i.e., a detailed recollection of it.’ The High Court in Heah

105 See below, ‘Section 380(4) of the Criminal Procedure Code’.
106 42 CCC (2d) 481 (1978).
108 The statement was recorded a few days after the conversation. The trial took place seven months later.
109 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 and McInroy 36 CCC (2d) 257 at 264. Chief Justice Farris reasoned that the witness 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. The Supreme Court pointed out that the statement was not considered as evidence by the trial judge. This point is discussed in the text below.
110 This provision reads: ‘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.’
Lian Khin applied Martland J’s reasoning to the facts.111

There are a number of important distinctions between McInroy & Rouse and Heah Lian Khin making it doubtful whether the reasoning in the former case could apply to the latter. The issue before the trial judge in McInroy & Rouse was whether the prosecution could examine its own witness in order to show that the witness was adverse. This is the intention of s 9(2) of the Canada Evidence Act.112 That section is not concerned with the substantive content of the previous statement, but the inconsistency of the positions taken by the witness: between the witness’s previous statement to the police revealing that she had a conversation with the accused and her stand in court denying any such conversation. The court in Heah Lian Khin thought that s 9(2) was ‘quite similar’ to s 147(1).113 However, the doctrine of the ‘adverse’ witness has no part in Singapore law because the court has a general discretion to allow a party to cross-examine his own witness (whether adverse or otherwise) when it is in the interest of justice.114 Accordingly, there is no counterpart to s 9(2) in s 147 of the EA. Section 9(2) is necessary in the Canadian context because a party may only impeach the credit of his own witness if he is ‘adverse’ pursuant to s 9(1). Accordingly, s 9(2) provides the procedure for showing that the witness is ‘adverse’.

Although s 147 of the EA does not specify the condition that the witness be ‘adverse’, the procedure for putting a previous inconsistent statement to the witness is similar to that found in s 9(1) of the Canada Evidence Act.115 The fundamental difference between s 9 of the Canada Evidence Act and s 147 of the EA is that the latter includes a specific subsection (s 147(3)) which admits the previous statement as evidence once the procedure under s 147(1) or (2) is complied with. Section 9 of the Canada

111 [2000] 3 SLR 609, at para 44. Part of this paragraph is set out in the main text at note 55.
112 The provision is set out in note 110.
113 [2000] 3 SLR 609, at para 42.
114 See ss 156 and 157(c) (EA). Both provisions are set out in note 4. Where counsel asks leading questions of his witness with a view to showing his lack of cooperation or adversity, this is regarded as cross-examination. See Rajendran s/o Kurusamy & Ors v Public Prosecutor [1998] 3 SLR 225, at para 101.
115 Section 9(1) states: A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. Section 9(1) has its origin in s 3 of the Criminal Procedure Act, 1865. See under ‘Common Law Background’ after note 14.
Evidence Act is not intended to admit the previous statement as evidence. This was clearly pointed out by Martland J in the Supreme Court when he approved the trial judge’s decision not to allow the previous statement to be put in evidence and his specific admonition to the jury that it could only take the previous statement into account for the purpose of assessing the witness’s credibility.\(^{116}\)

In support of its position in *Heah Lian Khin*, the High Court also referred to a statement by Cantley LCJ in *R v Thompson*.\(^{117}\) In *Thompson*, it was argued that a previous statement could not be put to a witness when that witness refused to testify to the facts referred to by that statement.\(^{118}\) The English Court of Appeal did not find it necessary to rule on this point. Cantley LCJ, who delivered the judgment of the court, concluded that common law allowed cross-examination in such circumstances so that ‘pressure could be brought to bear upon witnesses who refused to cooperate and perform their duties’.\(^{119}\) His Lordship added that ‘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’.\(^{120}\) The court in *Heah Lian Khin* pointed specifically to this last phrase in support of the cross-examination of Corporal Tay on his previous statement pursuant to s 147 of the EA.

However, like *Rouse*, there are distinctions between *Thompson* and *Heah Lian Khin*. The scope of the common law, which gives the court a discretion to allow a witness to be cross-examined by the opposing party or the party who called him,\(^{121}\) has its own independent basis extending beyond the scope of s 147. The discretion may be exercised even if there is no previous statement inconsistent with his testimony.\(^{122}\) The rationale, according to Cantley LCJ, is to ensure that the witness performs his ‘duty’ in court. If, being able to do so, he refuses to give evidence in court, he is acting in a manner ‘inconsistent’ with his duty and the effect is the same as if he gives evidence in court inconsistent with a previous statement. Cantley LCJ was merely saying that the impropriety in both cases is of the same genus. His Lordship was not invoking the provisions

\(^{116}\) Martland J said of the trial judge’s direction: ‘The trial judge was careful to explain, in the passage I have already quoted [42 CCC (2d) 481 (1978), at 493] the limited extent to which that cross-examination might be considered by the jury’. (42 CCC (2d) 481 (1978), at 495.)

\(^{117}\) (1977) 64 Cr App R 96, at 99.

\(^{118}\) The pertinent provision being s 3 of the Criminal Procedure Act, 1865 (28 & 29 Viet. c. 18).

\(^{119}\) (1977) 64 Cr App R 96, at 99. References were made to *Clarke v Saffery* (1824) Ry & M 126 and *Bastin v Carew* (1824) Ry & M 127.

\(^{120}\) (1977) 64 Cr App R 96, at 99.

\(^{121}\) As formulated in ss 150 and 157(c) (EA). These provisions are set out in note 4.

\(^{122}\) He may be cross-examined or asked leading questions on other matters arising in the case which establish his adversity.
of the Criminal Procedure Act, 1865 governing previous inconsistent statements because the matter was dealt with at common law.

SECTION 380(4) OF THE CRIMINAL PROCEDURE CODE

When proofs of evidence are admissible

The Criminal Procedure Code sets out the exceptions to the hearsay rule in a series of provisions from ss 377–385. The admissibility sections are s 378 and s 380. The previous statement of a witness giving evidence in court is not generally admissible under the Criminal Procedure Code. Section 378(1) limits the admissibility to the previous statements of persons who are unavailable for various reasons such as when a compellable witness refuses to be sworn or affirmed, when he is dead or physically or mentally unfit to give evidence, when he is out of the country and ‘it is not reasonably practicable to secure his attendance’ or when he is competent but not compellable and he refuses to give evidence. It is particularly significant that the Singapore Legislature chose not to adopt the Criminal Law Revision Committee’s proposal that a witness’s previous statements be admitted. That the Legislature certainly classified the previous statement of a witness giving evidence in court to be hearsay to the same extent as the previous statement of a person not called as a witness is patently obvious from the enactment of s 377 (CPC), which states: ‘...a statement other than one made by a person

123 No view was expressed on the applicability of the provisions. ((1977) 64 Cr App R 96, at 98.)
124 These sections were introduced by the Criminal Procedure (Amendment) Act (10/76). As in the case of s 147(3)–(7)(EA), they were adopted (subject to modifications) from the Report of the English Criminal Law Revision Committee (CLRC) on Evidence. Cmd 4991. The Report was presented to Parliament in June 1972. The pertinent clauses of the Report are 30–34.
125 Which governs ordinary statements.
126 Which governs documentary records.
127 CPC, s 378(1)(a).
128 Ibid, s 378(1)(b)(i).
129 Ibid, s 378(1)(b)(ii).
130 Ibid, s 378(1)(b)(iii).
131 The Singapore Legislature incorporated paragraphs (b), (c) (i), (ii) and (iii) of clause 31(1) of the CLRC Report but excluded paragraph (a) of that clause. (Paragraph (a) of clause 31(1) of the English Report provided: ‘he has been or is to be called as a witness in the proceedings.’) Paragraphs (b), (c) (i), (ii) and (iii) exactly correspond to 378(1)(a), (b) (i), (ii) and (iii) of the CPC and concern the statement of person not called as witness. (Paragraphs (iv) and (v) of clause 31(1)(c) (persons whose identity could not be determined or persons who could not be found respectively) were also excluded.)
while giving oral evidence\(^{132}\) ... 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.\(^{133}\) Therefore, the Legislature turned its face against admitting hearsay evidence pursuant to s 378(1) (CPC) where this took the form of a previous statement of a witness giving evidence in court.\(^{134}\) Herein lies the distinction between s 378(1) (CPC) and s 147(3) (EA), both of which were given effect in Singapore by the same series of reforms.\(^{135}\) The measure of reliability afforded by s 147(3) (EA) – namely, the opportunity which the court has to scrutinise two separate sources of evidence concerning the same facts and, if appropriate, to require an explanation for the contradiction – is not available where a previous statement of a witness is raised without reference to conflicting testimony at trial. Accordingly, the previous statement of Corporal Tay in *PP v Heah Lian Khin*\(^ {136}\) would not have been admissible under s 378(1).

However, Corporal Tay’s statement in *Heah Lian Khin* might have been admitted pursuant to s 380 (CPC) — not automatically — but with the express permission of the court. Section 380 (CPC) admits documentary records if the record is compiled by ‘a person acting under a duty’ from a person who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information’.\(^{137}\) The particular provision in this section which would have applied to Corporal Tay’s statement is s 380(4) (CPC), which states:

> Where a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated proceedings, whether civil or criminal, and that document falls within subsection (1) (a), then in any criminal proceedings in which that person has been or is to be

\(^{132}\) Emphasis added.

\(^{133}\) It is also clear from the case law that the Singapore Courts regard a witness’s previous statements as hearsay. See the definitions of the hearsay rule in the main text at notes 8–9. Also see *PP v Sng Siew Ngoh* [1996] 1 SLR 143, at 157, where the High Court specifically stated that a previous statement of a witness is admitted pursuant to s 147(3) of the Evidence Act is as an exception to the hearsay rule.

\(^{134}\) See p 1222 of the Parliamentary Debates where the Minister of Law states that the views expressed by the General Council of the Bar of England and Wales and the Council of the Law Society were taken into account in deciding what provisions to adopt. Note that the proposals in the English Report were not implemented in England.

\(^{135}\) In the case of s 378, the Criminal Procedure (Amendment) Act (10/76). In the case of s 147(3), the Evidence (Amendment) Act (Act 11/1976).

\(^{136}\) See main text from note 45.

\(^{137}\) The information may be supplied directly or through intermediaries acting under a duty. See s 380(a) of the CPC. Also see the supplementary provisions in this section and ss 381–385.
called as a witness a statement contained in that document shall not be given in evidence by virtue of subsection (2) (a) or (2) (c) (iv) without the leave of the court; and the court shall not give leave under this subsection in respect of any such statement unless it is of the opinion that, in the particular circumstances in which that leave is sought, it is in the interests of justice for the witness’s oral evidence to be supplemented by the reception of that statement or for the statement to be received as evidence of any matter about which he is unable or unwilling to give oral evidence.

A number of observations may be made about s 380(4). Primarily, it is a qualification to s 380(1) which admits documentary records as evidence of the facts stated in them. Prima facie, proofs of evidence and other documents setting out the evidence of persons intended to be called as witnesses are not admissible. However, the court may give leave for the record to be admitted if it believes that in the circumstances of the case it would be in the interests of justice (a) for the witness’s oral evidence to be supplemented by that statement or (b) for the statement to be admitted as evidence of any facts which the witness is ‘unable’ or ‘unwilling’ to testify. This would include a genuinely forgetful witness who is unable to refresh his memory from his previous statement and a witness who deliberately withholds evidence from the court. It would also include any situation in which the court believes that it would be in the interests of justice for that witness’s evidence to be supplemented. Section 380(4) also applies to a proof of evidence or document setting

138 Although s 380(4) does not refer to ‘proof of evidence’, this is clearly contemplated by the words: ‘document setting out the evidence which a person could be expected to give as a witness ...’. This includes the information which a prosecution gives to the police or law enforcement officer for the purpose of contemplated proceedings. See the CLRC’s Report at para 239, the pertinent part of which is set out in the main text at note 144. Glanville Williams states in his article (‘The proposals for hearsay evidence’ [1973] Crim LR 76, at p 88), that a statement made to the police comes within this phraseology: “In general, when a police officer investigating an offence takes a statement, he intends this statement to be used as a written statement in lieu of a deposition for the committal proceedings, and also as a proof of evidence at the trial; and the statement will in due course be copied out with the prefatory words: ‘X will say that ...’. Sometimes counsel for the prosecution may advise that a further statement should be taken from the witness in order to amplify some particular point; but it seems reasonable in any case to say that any statement taken by the police is a document falling within the requirement of leave. Similarly, it seems that a deposition or statement in committal proceedings would fall within clause 32(3).”

139 The leave requirement in s 380(4) only applies to the previous statement of a witness giving evidence in court by virtue of that sub-section’s reference to s 380(2)(a) and (c)(iv). (The situations in s 380(2)(b) and (c)(i)–(iii) concern persons who refuse to be sworn or affirmed or who are not available.)

140 See s 380(2)(c)(iv) which is referred to by s 380(4).
out the evidence intended for a civil case\textsuperscript{141} so that such a document would be admissible in criminal proceedings with the leave of the court. An important point to bear in mind about s 380(4) is that the court may give leave to any party to put in the statement of the witness, not merely the party who called the witness.\textsuperscript{142} For example, the opposing party (whether prosecution or the accused) might want to put in the witness’s proof of evidence to attack the witness’s case or credibility or to support the opposing party’s case.

In the absence of any local authorities on s 380(4), the Singapore courts are likely to be assisted by the English Criminal Law Revision Committee’s explanation of the corresponding provision proposed in their Report:\textsuperscript{143}

\begin{quote}
... if the earlier statement is a proof of evidence, or a document of a similar nature, it seems desirable to make special provision in order to ensure that the proof or other document does not take the place of oral evidence. For even if the person taking the proof has not tried to get the witness to tell his story in the way most favourable to the party in whose interest it is taken, it is obviously likely that it will come out in this way; and therefore it would be wrong to enable the party calling the witness, say, simply to call him, show him the proof and put it in as his evidence. It is for this reason that we propose that the leave of the court should be necessary for the proof to be given in evidence. In the ordinary case the court would no doubt require the witness to give his evidence without the aid of any document (except such as may be used for refreshing memory); but if, for example, the witness is clearly unable to remember the events described in his proof, then the court will be likely to allow the proof to be referred to. Whether a document is in the nature of
\end{quote}

\textsuperscript{141} This is expressly mentioned by the sub-section.

\textsuperscript{142} Although arguments concerning privilege may arise in these circumstances. For example, X and Y are tried for an offence. X is unable or unwilling to testify to certain facts although he has previously given a statement concerning these facts. Y may apply to the court to grant leave for the admission of the statement on the ground that it is important to Y’s defence and, therefore, in the interests of justice. X might claim that his statement to his lawyer (or a part of it) is privileged pursuant to ss 128 and 131 (EA). Such a claim is unlikely to succeed if the statement was intended to set out the evidence to be adduced at trial as opposed to being a confidential communication contemplated by ss 128 and 131 (EA) and the common law. It has been held in England that where a communication between a client and his lawyer is privileged, the privilege is absolute so that it even overrides the interest of an accused person in relying on such communication for the purpose of his defence. See \textit{R v Derby Magistrate’s Court} [1995] 3 WLR 681; \textit{Re L (A Minor)} [1996] 2 WLR 395.

\textsuperscript{143} Namely, clauses 32(3) and 34(5) of the CLRC Report.
a proof of evidence will depend on the circumstances. Ordinarily, for example, a statement taken by the police for use as a written statement under s 2 or s 9 of the Criminal Justice Act, 1967 will count as proof for this purpose.\textsuperscript{144}

The observations of Glanville Williams on the proposed provision are also useful.\textsuperscript{145}

The object is to prevent proofs of evidence from being freely used to supplement or supplant oral evidence. ...

... in general ... lawyers attach much greater weight to evidence given in court than to the proof of evidence, because the proof may have been obtained by the use of leading questions and prompting. When a police officer takes a statement from a witness his purpose is to get something that will support the case for the prosecution, and he may persuade a suggestible witness to put his signature to the version of the facts that fits the prosecution case. Conversely, a statement taken for the defence tends to be slanted in favour of the defence; and the other side is not present to rectify the situation by cross-examination. Therefore, it was not the intention of the Committee that the trial judge should give leave to put in a proof of evidence as a matter of course, merely to save the witness from giving oral evidence, or merely because the witness has not ‘come up to his proof’, or merely to show that the witness has said the same thing before. Examples of cases where the trial judge may be expected to give leave are (1) where the witness has clearly forgotten the whole affair (eg where he is elderly and the matter happened a long time ago), and (2) where the document is a technical report by an expert. Such a report is commonly put in as a matter of course, the expert entering the witness box to explain his report.

These examples are not exclusive. A witness who deliberately refuses to give evidence of facts contained in his statement would also be within the scope of s 380(4), for in this situation he would be a witness who is ‘unwilling to testify’. This would apply to a defence witness who has given a statement to the defence counsel\textsuperscript{146} as well as a prosecution witness

\textsuperscript{144} CLRC’s Report, para 239. For related comments in the report concerning this provision, see pages 241 and 244 and paras 237(ii), 256 and 258.


\textsuperscript{146} This is because the defence counsel would be acting under a duty in the context of s 380(1). For the purpose of this provision, a person acting under a duty ‘includes ... a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him’: s 380(5).
who has given the information in his statement to the police or other law enforcement officer.\textsuperscript{147} Applying s 380(4) to Heah Lian Khin,\textsuperscript{148} the position would be as follows. Corporal Tay’s statement (exhibit P 71) was recorded by a CPIB officer.\textsuperscript{149} It is a statement in a documentary record compiled by someone acting under a duty and, therefore, within the scope of s 380. It is also ‘a document setting out the evidence which a person could be expected to give as a witness’ which has been ‘prepared for the purpose of any pending or contemplated proceedings’ pursuant to s 380(4). Accordingly, the statement was prima facie inadmissible except with the leave of the court. The court could have given leave in the circumstances if it was in the interests of justice for (a) Corporal Tay’s testimony to be supplemented by exhibit P 71 or (b) for exhibit P 71 to be admitted as evidence of any facts which the witness is ‘unable’ or ‘unwilling’ to testify. As the High Court found that Corporal Tay was being ‘deliberately evasive’ and ‘had lied’ about his forgetfulness,\textsuperscript{150} leave could have been granted under s 380(4) on the basis that he was ‘unwilling’ to testify to the facts contained in the statement.

Section 380 does not appear to have been put before the District Court or the High Court in Heah Lian Khin. Yet, this is the only provision which could have been used to admit Corporal Tay’s statement as an exception to the hearsay rule. Section 380 is distinguishable from s 378 (which does not capture the statement)\textsuperscript{151} because the former involves a duty\textsuperscript{152} on the part of the compiler of the record\textsuperscript{153} and, therefore, confers an element of reliability. However, this is not guaranteed, particularly in the situation where evidence is being prepared for the purpose, or in contemplation, of trial. The accused (or a witness called by him) may fabricate evidence in his favour by making an ‘appropriate’ statement before trial. A prosecution witness may give false information in his statement to the police or other law enforcement officer if it benefits him to do so (for example, where he is an accomplice) or as a result of inappropriate methods of interrogation.\textsuperscript{154} Therefore, the court must be wary of the possibility that the statement may be tainted by unreliability. In the absence of any authority on the manner in which the discretion under s 380(4) should be exercised, it is suggested that the court should not give leave for the statement to be admitted unless satisfied by the

\textsuperscript{147} A statement to the police is a record in respect of which the leave of the court must be obtained pursuant to s 380(4). See note 146.

\textsuperscript{148} See main text from note 41.

\textsuperscript{149} See main text from note 45.

\textsuperscript{150} See main text at note 59.

\textsuperscript{151} This section is discussed in the main text after note 126.

\textsuperscript{152} This is defined in s 380(5). See note 146.

\textsuperscript{153} As well as on the part of any intermediary. See note 137.

\textsuperscript{154} See the references in note 144 and the main text from notes 145–146.
nature of the existing evidence that the statement would effectively supplement the witness’s oral evidence, and that this would be in the interests of justice. For example, if as in *PP v Heah Lian Khin*, it is clear from the cross-examination of the witness that he is lying and feigning loss of memory concerning the facts in his previous statement (so that he is a witness who is ‘unwilling to give oral evidence’), and other evidence in the case points to the viability of that statement, the court might exercise its discretion in admitting it into evidence.\(^{155}\) No doubt, the court would consider s 381(2) (CPC) which governs admissibility of a statement pursuant to s 378 or 380 (CPC). It states:

> For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 378 or 380, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.

Clearly, the circumstances in which the statement was made or given and the manner in which the statement is recorded are primary issues in the determination of admissibility. If the court decides to give leave for the admission of the statement, its weight would be determined by the

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\(^{155}\) If the witness feigns loss of memory so that the process for refreshing his memory cannot be utilised (because the witness is uncooperative), counsel may have to use appropriate techniques of cross-examination to show that he is lying. This would include putting the previous statement to him to show that he made a statement in the past and that it is unlikely that (given the short lapse of time) he could have lapsed into forgetfulness so quickly. If he admits making the statement (*as in Heah Lian Khin*), and he is shown to be lying in court, and other evidence indicates that what he said in the statement is true, there is no reason why counsel cannot show by direct evidence that the part of the statement is true. That is, the truth of the statement may come out in the process of examination. (In this situation, the statement is not admitted to prove the facts contained in it, but it may indirectly lead to proof of those facts through effective cross-examination in court.) This is particularly the case if there is other evidence before the court which establishes the facts in that statement. A witness may, unwittingly or impliedly, adopt the facts in his statement. See *United States v Insana* 423 F 2d 1165 (2d Cir), 400 US 841 (1970). (Where a witness expressly confirms that his previous statement accurately records the facts (even though he cannot remember them), he will be allowed to testify to those facts: s 162 (EA). See *R v Carrington* [1969] NZLR 790 in this respect.) Even if the cross-examiner is not able to establish the facts in the witness’s previous statement, the court may, if it is in the interests of justice, give leave for that statement to be admitted into evidence pursuant to s 380(4) (CPC). Also see the paragraph of the main text consisting of notes 83–84.
prescribed guidelines.\textsuperscript{156}

**Position in civil cases**

As s 380(4) (CPC) does not apply to civil cases, the question arises as to whether the previous statement of a witness who is orally examined in court might be admitted in the circumstances set out in that provision. Normally this problem will not arise in civil cases as most witnesses now give their evidence in the form of affidavits.\textsuperscript{157} Therefore, parties can ensure the comprehensiveness of their witnesses’ testimonies. However, the odd situation may arise where a witness has not provided an affidavit and leave is given to examine him in chief in court. What if it is necessary to supplement his evidence with his previous statement or to admit the statement as evidence of facts about which the witness is unable or unwilling to testify? Although the law allows him to refresh his memory\textsuperscript{158} the conditions for this process may not be satisfied, as was the case in *Heah Lian Khin*.\textsuperscript{159} The argument that s 147(3) (EA) would not apply in the situation where there is no testimony in court concerning the facts in the previous statement\textsuperscript{160} is equally applicable to civil cases. Therefore, can a party, who calls a witness unable or unwilling to give evidence of the facts contained in his previous statement, somehow have that statement admitted as substantive evidence? Can an opposing party who wishes to have the witness’s previous statement admitted as substantive evidence (because it assists the opposing party’s case) do so? Such evidence would be hearsay and inadmissible unless provision is made by an exception to the hearsay rule. It had long been accepted in England that, quite apart from the admissibility of a witness’s previous inconsistent statement as evidence,\textsuperscript{161} a party in a civil case could put into evidence a

\begin{itemize}
  \item \textsuperscript{156} Section 381(3) provides in the context of s 380: ‘In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 380, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular — (a) ...; and (b) in the case of a statement falling within section 380, to the question whether or not the person who originally supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.’ An important consideration in assessing weight is the attitude of the witness after the statement is admitted. If he continues to disown the admitted statement, the court will have to decide the extent to which, if at all, the witness’s position should be taken into account.
  \item \textsuperscript{157} Pursuant to s 161 (EA). This provision is set out in note 13.
  \item \textsuperscript{158} See Order 38, rule 2 (Rules of Court, 1997 Rev ed).
  \item \textsuperscript{159} See the former Civil Evidence Act, 1968 (c. 64), s 3. Note that the hearsay rule was abolished in England in civil cases in 1995 by the Civil Evidence Act (c. 38).
\end{itemize}
previous statement of a witness containing information as to the facts in issue (including a proof of evidence) with the leave of the court. This position in civil proceedings was the basis of the Criminal Law Revision Committee’s recommendation that proofs of evidence be allowed in criminal cases. When one considers the special need for reliable evidence in criminal cases, it is paradoxical that although Singapore never adopted the statutory exceptions to the hearsay rule in civil cases, it unhesitatingly accepted the proposals of the Criminal Law Revision Committee which were never implemented in England. Even the Honourable Chief Justice has commented on the ‘irony’ of the situation. Perhaps the time has come to redress this inconsistency in approach to civil and criminal proceedings which cannot be justified in principle.

CONCLUSION

The argument made in this article is that s 147(3) (EA) does not admit a witness’s previous inconsistent statement as substantive evidence where that witness does not testify to facts which are the subject of that statement. The existence of testimony concerning those facts is fundamental to the operation of the section which requires the court to compare the alleged inconsistency between the previous inconsistent statement and the testimony. Such an exercise would be purposeless if the previous inconsistent statement is the only source of evidence available as when the witness disclaims any knowledge or memory of the facts referred to by that statement. Section 147(3) was never intended to allow the previous statement to replace the testimony of the reluctant or forgetful witness. Rather, its purpose is to ensure that testimony in court is properly assessed in the context of what the witness has said about the facts on a previous occasion. The previous inconsistent statement is made evidence by s 147(3) so that the court can consider evidence in addition to what is stated by the witness in court in relation to the facts.

A more lax construction of s 147(3) (EA) would render it a dangerous weapon in the hands of any party, who would be able to rely on the full substantive effect of an unverified and potentially unreliable out of court statement by merely having to show that his witness is not responsive in court. Indeed, by making the admission of the previous statement

162 See the former Civil Evidence Act, 1968 (c. 64), ss 2(2) (statements) and 4(2) (statements in records). In the 4th edition of his work on ‘Evidence’ (1974), at p 423, Sir Rupert Cross commented that the requirement of leave in these provisions was in response to the ‘lax practice’ whereby a witness’s proof of evidence, once verified by the witness, would replace his examination in chief. Note that the hearsay rule was abolished in England in civil cases in 1995 by the Civil Evidence Act (c. 38).

163 See clauses 32(3) and 34(5) of the CLRC Report. (Although the formulation by the CLRC was different to that expressed in the Civil Evidence Act.)


165 The potential unreliability of such a statement is considered in the main text at notes 17–22.
mandatory rather than discretionary (in contrast, admissibility pursuant to s 380(4) (CPC) is discretionary), the assumption in s 147(3) is that the two contradictory sources of evidence (the testimony concerning the facts and the previous statement of those facts) offer the court a sufficiently reliable basis on which to make the proper finding as to the facts. Where, however, the court does not have the luxury of competing sources of evidence – as when the witness’s previously recorded statement is the only source of evidence available concerning the facts to which it refers (the position in *Heah Lian Khin*) – particular caution is necessary as revealed by the safeguards in the statutory provisions governing the admissibility of hearsay evidence. If such a statement has been recorded by someone acting under a duty and the witness has personal knowledge of the facts, it is s 380 (CPC) which applies rather than s 147(3) (EA). Section 380 (CPC) admits the recorded statement of the witness as an exception to the hearsay rule on the basis of specific conditions which establish a standard of reliability. Where the statement is in the form of a proof of evidence or ‘a document setting out the evidence which a person could be expected to give as a witness’, a general rule of exclusion applies and the *leave of the court* is required for its admission. This discretionary element ensures that the court can take into account the reliability of the statement, and thereby accentuates the distinction between the scope of s 147(3) (EA) and s 380(4) (CPC). The application of s 147(3) in these circumstances would amount to a refutation of the policy and safeguards underlying s 380. Accordingly, the court may, in its discretion, admit such a statement where a witness is unable or unwilling to give evidence of facts contained in his previous statement.

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166 Section 147(3) states: ‘the statement shall by virtue of this subsection be admissible as evidence of any fact stated therein’.

167 The leave of the court is required by this provision for the admission of a previously recorded statement if it is in the form of a proof of evidence or ‘a document setting out the evidence which a person could be expected to give as a witness’. See main text, under ‘Section 380(4) of the Criminal Procedure Code’.

168 Including the witness’s demeanour in the course of examination.

169 Subject to appropriate weight to be attributed pursuant to s 147(6) (EA).

170 See main text at notes 71 to 75 and see notes 72–75.

171 CPC, s 380(1) and (2)(a). See main text, under ‘Section 380(4) of the Criminal Procedure Code’.

172 Section 380(4) states that such a document ‘shall not be given in evidence’. See the main text at notes 138 and 139.

173 CPC, s 380(4).

174 Due weight will be accorded pursuant to s 381(3) (CPC).

175 As when he is incapable of refreshing his memory. See s 380(2)(c)(iv) (CPC), which specifies forgetfulness as a ground of admissibility.

176 CPC, s 380(4). Therefore, this provision should have been applied in *Heah Lian Khin*. See above, ‘Section 380(4) of the Criminal Procedure Code’.

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