

NO. 55217-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ATIF RAFAY,

Appellant.

REC'D

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Appellate Unit

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

FILED

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Charles W. Mertel, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT IN REPLY

Several important facts discussed in the State's brief require correction or clarification. According to the State, Julie Rackley's best estimate is that she heard the murders between 9:45 p.m. and 10:15 p.m. Brief of Respondent, at 29. In fact, her best estimate is 9:56 p.m. 70RP 101, 123-24. This is close to Mark Sidell's estimate, which ranges from 9:10 p.m. to 9:50 p.m. 71RP 66, 108. This may seem like an academic distinction since, even using 10:15 p.m., both neighbors heard the murders at a time when the boys were indisputably somewhere else. But to be accurate, both neighbors' best estimates place the murders in the 9:00 hour, ruling out Sebastian and Atif as the killers.

The State focuses on several facts from the crime scene it contends are consistent with the boys' statements to Haslett and proof they committed the crimes. Brief of Respondent, at 32-34. But prior to the statements, the media had already disclosed these facts, including law enforcement's theory that the boys left the Lion King early, the likely murder weapon, the order of the killings, and that Basma fought back against her attackers. 102RP 81-82; 104RP 46-50; 121RP 48-52; 126RP 117-119; 138RP 36-39.

Haslett confirmed that Sebastian had followed these stories in the media. Exhibit 542, at 9.

The State also discusses other facts – not in the public domain – it considers consistent with Sebastian and Atif's statements to Haslett. The State notes Sebastian's fingerprints found on the overturned box in the downstairs bedroom, claiming the presence of these prints is consistent with his claim that he "moved things around to simulate a break-in." Brief of Respondent, at 31-32 n.20. In fact, however, Sebastian told Haslett that he wore gloves. Exhibit 542, at 47; exhibit 543, at 20. Therefore, Sebastian's "confession" and this physical evidence are directly at odds. And since Sebastian was staying in this very room for several days, it is not surprising his prints were found on the box.

The State also suggests bloodstains within the Rafay home were consistent with Sebastian's story to Haslett. The State notes that on the carpet in the hallway and bedrooms, investigators found "soft, curved patterns" consistent with a shoeless foot tracking blood from room to room and that "Burns told an undercover RCMP officer that he committed the murders wearing only his underwear." Brief of Respondent, at 34. In fact, however, Sebastian also

indicated he wore shoes and disposed of them. Exhibit 542, at 47.

Once again, Sebastian's story and the evidence are at odds.

The State then spends considerable time arguing that the evidence shows only one person in the master bedroom. Brief of Respondent, at 34-36. The State is forced to take this position because the boys told Haslett that Sebastian alone used the bat in the master bedroom and Atif was not present. Exhibit 542, at 18, 31; exhibit 543, 39-40. But the State's own evidence shows otherwise.

Kay Sweeney, who examined the scene for the Washington State Patrol Crime Laboratory, never completed a study of the bloodstains in the bedroom, did not make a formal report, and was unable to offer a complete interpretation of this evidence. 91RP 16-17, 95, 139. Therefore, prosecutors flew in an expert in bloodstain patterns and crime scene analysis from Georgia, Ross Gardner. 92RP 133-34. Gardner has studied pattern analysis since the early 1980s. 92RP 134. He trained under the guidance of Herb MacDonnell, a recognized leader in the field, and received training at Scotland Yard. 92RP 143-44. Among other publications, he co-wrote a textbook on pattern analysis now used to certify other analysts. 92RP 148-49. Gardner was given access

to all investigative materials in the case, including photographs and reports, and spent two days in Bellevue examining the physical evidence. 92RP 136-37.

Gardner's expert opinion was that there were *two* individuals in the master bedroom during the attack, each standing on the opposite side of Tariq Rafay's bed. 93RP 121. Certain evidence in particular supports his conclusion. Blood spatter made it apparent that one individual had been standing on the west side of the bed and striking Tariq repeatedly, causing significant spatter travelling from west to east. 93RP 42-45; see also 93RP 45-47 (in comparison, no "distinct, focused pattern" from east to west). Spatter also revealed that while the first individual continued to strike Tariq from the west side, an individual on the east side of the bed simultaneously moved a pillow off of the bed and placed it on the floor. 93RP 41-42, 57-101, 113-119, 147-151, 184-187. Assuming, as Sweeney had found, there was a void or shadow on the east wall, Gardner testified this added additional support to his conclusion a second person assisted from the east side of the bed. 93RP 178-183, 187.

Although Gardner found cast-off patterns both west and east of the bed, he concluded the stains only made sense if the strikes

came from the west while the second person stood to the east. 93RP 51-52, 131-133, 144-151. Gardner found evidence that whomever had been swinging the bat from the west side of the bed did eventually move to the east side at some point (there were marks where the weapon contacted the carpet), but the weapon was at rest by that time. 93RP 187.

The State nonetheless cites to certain testimony from Sweeney and Gardner to argue there is evidence a single killer struck blows from both sides of the bed. Brief of Respondent, at 35-36. But Gardner made it clear the evidence did not support this conclusion. And Sweeney admitted he was not in a position to offer a complete interpretation. Ultimately, the State is left to argue that Gardner – its own expert and a leading authority in his field – is “likely” wrong because his conclusion is inconsistent with the story Sebastian and Atif provided to Haslett. Brief of Respondent, at 36.

Finally, the State notes that Sebastian told Haslett he was confident police had not found any items associated with the murders “because he had heard that they only searched dumpsters in Bellevue and that they never found the murder weapon.” Brief of Respondent, at 68. To the extent this implies police only checked Bellevue dumpsters, it is incorrect. Sebastian and Atif told Haslett

they had disposed of their clothing and the murder weapon in Seattle dumpsters. Exhibit 542, at 18-20, 29, 48; exhibit 543, at 44-46. In fact, Sebastian claimed he threw the Rafays' VCR in a dumpster just outside Steve's Broiler. Exhibit 543, at 46. Notably, two Bellevue Police Detectives searched the dumpsters in and around Steve's and the Weathered Wall on July 13, 1994, and found nothing associated with the crimes. 72RP 155-160. This is yet another inconsistency between the boys' stories to Haslett and the expected evidence.

B. ARGUMENT IN REPLY

1. ADMISSION OF THE BOYS' COERCED STATEMENTS VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 9 OF WASHINGTON'S CONSTITUTION.

The State agrees the only relevant question is whether the boys' statements were the product of coercion. Brief of Respondent, at 140. That the RCMP conducted its operation on foreign soil is irrelevant. If the Constitution would prohibit the fruits of such an operation conducted in the United States, it prohibits them from operations abroad. The test for admissibility is always the same: "Is the confession the product of an essentially free and unconstrained choice by its maker?" Schneckloth v. Bustamonte,

412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961)). The State also agrees (or at least does not dispute) the ultimate question of voluntariness is a legal issue this Court reviews de novo. Brief of Respondent, at 137-138.

To better understand how Bellevue Police ever believed they could use evidence gained in Project Estate, it is worthwhile to briefly revisit the circumstances of the investigation. In multiple interviews with Bellevue Police, Sebastian and Atif consistently indicated they had nothing to do with the murders. Exhibits 22, 68-72; 17RP 92-93; 30RP 11-12. Even when detectives responded to them with sarcasm and skepticism, neither made any incriminating statements. Exhibits 76, 78. Once back in Canada, the boys made it clear they would not speak further with authorities, and Bellevue detectives recognized the prospect of obtaining additional statements was dim. 14RP 182; 16RP 42; 31RP 79-95; 32RP 84-91.

Just when Bellevue detectives believed they were out of legal options, they were “stunned” and “astonished” to learn the RCMP could obtain incriminating statements in Canada employing techniques unimaginable in the United States. 12RP 87-89; 15RP

89; 30RP 123. Under Canadian law, evidence gathered in Mr. Big operations is always considered voluntary because undercover officers are treated as ordinary citizens. They need not follow any of the protocols required of uniformed officers, even when targets have legal counsel. 14RP 76; 20RP 48; 23RP 115-16. The only legal requirement is that undercover officers' tactics not "shock the public." 21RP 101. Canadian courts have approved "Mr. Big" operations. 11RP 83. Therefore, as explained by RCMP Inspector John Henderson – "cover person" for Project Estate – "on most occasions, you can't break the law" as a Canadian undercover officer. 21RP 101.

When Bellevue detectives learned what was possible, they looked like "a deer in a headlight" and were willing to accept anything the RCMP could provide. 13RP 141-144. The RCMP did not need confessions for Canadian conspiracy or fraud charges. 18RP 160. But Bellevue detectives wanted incriminating statements for use in the United States, and RCMP officers decided to make it their goal. 11RP 51; 12RP 6-8, 139-142, 172-75, 181; 14RP 42-43; 17RP 103-104; 18RP 123. The RCMP wondered, however, whether Bellevue could use the evidence once

gathered, and Bellevue detectives indicated they would find out. 13RP 94-95, 112-14, 160-61; 16RP 47.

King County Deputy Prosecuting Attorney Jeff Baird served as the Bellevue Police Department's legal advisor. 16RP 48; 29RP 55-56. Baird believed the admissibility of any Canadian evidence would turn on the "silver platter doctrine," about which he had only a general understanding. 29RP 62, 89. Baird was busy with several cases at the time and rather than conduct thorough research, he turned to a trusted colleague, who advised him to ensure neither he nor Bellevue police participated in the Canadian operation. 29RP 62-63, 89. Baird and Thompson shared this warning with members of the RCMP. 15RP 98-99; 16RP 54-55, 60-62, 161-62; 20RP 147-48; 21RP 108-09; 29RP 63-65, 74, 88-89. Assuming Bellevue did not actively participate in the RCMP's investigation, Thompson felt there was "a good possibility" all evidence could be used in the United States. 18RP 155-59.

It was within this perceived safety of the silver platter doctrine that the RCMP went to work. Even after Project Estate was well under way, however, there were no incriminating statements. Sebastian explained that he and Atif came home to find the family murdered. 22RP 156; 23RP 145; 25RP 108.

Sebastian suggested the murders might have been hate crimes based on the family's Pakistani heritage. 25RP 110; 26RP 57. Moreover, he made it clear he feared Bellevue Police would fabricate evidence. 25RP 61-64, 112-113. Despite the RCMP's initial efforts, Sebastian repeatedly refused to make incriminating statements. See generally 25RP 106-116, 172-75; 26RP 68.

In an attempt to get Sebastian to say something – anything – incriminating, the RCMP offered him the prospect of the “good life,” including fast cars, pretty women, and significant sums of money. 20RP 18; 21RP 62-63, 71-72; 23RP 121. He was given thousands of dollars and led to believe there could be substantially more – perhaps hundreds of thousands – if he proved himself “solid” and confessed. 20RP 83, 104, 131; 21RP 85-86, 184-186; 22RP 105-109; 23 182-183; 25RP 28-31; 27RP 144-45. Moreover, to erase the usual psychological barriers to confessing murder, Sebastian was led to believe he was in the company of murderers and that being a cold, callous killer like Haslett and Shinkaruk would earn him respect. 24RP 142; 25RP 39.

But when the prospect of making large sums of money was insufficient to elicit anything incriminating, the RCMP also offered to destroy any evidence against him and employed fear – fear the

boys were about to be arrested and charged with murder. The boys were also led to believe that if they were arrested, they would be killed to ensure they did not share with authorities information about Haslett. 20RP 122, 136-37, 146-47; 21RP 54-61, 193-95; 27RP 154-55, 173-185. Their families were even at risk. 22RP 17, 108; 24RP 113; 25RP 41-42, 160.

As discussed in the supplemental brief, all of this was conceded below. Referring to the boys, RCMP officers admitted they “wanted to get into their minds,” grab their attention, and provide “a logical reason for Sebastian Burns to confess.” 13RP 126, 130, 134; 14RP 95; 15RP 108. The RCMP wanted to put the boys in a position where they would have to talk because they had no other option. 21RP 68; 27RP 129. Officers did nothing to dissuade Sebastian from believing Haslett and Shinkaruk were killers. 25RP 141-42; 27RP 106-113; 28RP 42. Haslett even knew that both boys had expressed concern he would have them killed. 28RP 17-18. But continued denials were not accepted. The message was “don’t tell me you didn’t do this because I know you did it and we need to deal with it” immediately because Bellevue is coming to get you and the organization is your only option. 25RP 184-85; 27RP 25, 127-129; 28RP 71-73.

The operation was an unmitigated success. The RCMP did precisely what it set out to do, placing the boys in a position where they had no choice but to incriminate themselves if they wanted to avoid arrest, prosecution, and death. And the prospect of future wealth within the organization provided additional motivation for self-incrimination.

King County Prosecutors and Bellevue Police detectives recognized they could never engage in such tactics in the United States and expect to gain admissible evidence. But they believed so long as there was no joint operation, the silver platter doctrine immunized any statements from constitutional attack.¹ They were mistaken. The silver platter doctrine does not apply to Fifth Amendment claims and whether Bellevue Police were working with the RCMP turned out to be irrelevant.

Citing Chavez v. Martinez, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003), the State claims that whether a Fifth Amendment violation occurs only at trial remains unsettled. Brief of Respondent, at 139-140. This is incorrect. The only issue in

¹ This belief was apparently widespread. Atif's trial attorney was under the same misapprehension. See 36RP 128, 135 (believing there must be a "joint investigation" under Fifth and Fourteenth Amendments).

Chavez was whether the Court would expand the circumstances under which an arrestee can file a § 1983 lawsuit (a civil action for the deprivation of a constitutional right) to include coerced statements where the statement was never used, as the Fifth Amendment requires, in a “criminal case.” Chavez, 538 U.S. at 763. Six of the nine justices (Thomas, Rehnquist, O’Connor, Scalia, Souter, and Breyer) ultimately agreed the Fifth Amendment focuses on *courtroom* use of compelled statements and declined to find an actionable civil claim. See Chavez, 538 U.S. at 767 (plurality opinion); id. at 777 (Souter, J., concurring)(joined by Justice Breyer).

This is fully consistent with the Court’s prior decisions. See Withrow v. Williams, 507 U.S. 680, 692, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (describing Fifth Amendment as “trial right”); United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (constitutional violation occurs only at trial); Schneekloth, 412 U.S. at 308 (Fifth Amendment serves “to protect the fairness of the trial itself”); Kastigar v. United States, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) (Fifth Amendment’s focus on trial evidence). Ultimately, the State does

not argue that Chavez or any other case indicates the silver platter doctrine applies to Fifth Amendment claims.

No longer able to rely on the doctrine, the State is now left only to argue the RCMP's tactics were not coercive. These arguments are not convincing.

The State makes much of Sebastian's attraction to the material rewards associated with membership in the organization and notes that he repeatedly met with Haslett and Shinkaruk. Brief of Respondent, at 142-145, 150-152. But this is hardly surprising. Scenarios were designed to impress. 22RP 47-48. The RCMP knew Sebastian was "financially strapped." 11RP 74-75. Undercover officers intentionally used hundreds of thousands of dollars, fast cars, and pretty women to lure him. Sebastian admitted at trial the money was attractive. 145RP 105-06. And Inspector Henderson recognized these material offerings may have enticed Sebastian to confess. 21RP 85-86. That the RCMP's plan worked as designed makes it *more* certain Sebastian was induced to confess, not less.

In a similar vein, the State notes that "[t]he defendants, especially Burns, met freely and repeatedly with the undercover officers, who thought they would help them destroy evidence and

launch them on a profitable life of crime.” Brief of Respondent, at 128 (emphasis added). This statement’s second clause undermines its first, as the State seems to acknowledge it was the promise of destroyed evidence and financial gain that caused Burns to maintain contact. Inducements under the Fifth and Fourteenth Amendments are not limited to threats; they also include promises. Malloy v. Hogan, 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (no “direct or implied promises” when obtaining a confession); State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008) (examining whether confession was coerced by an express or implied promise of immunity); State v. Streeter, 67 Wn.2d 39, 42-44, 406 P.2d 590 (1965) (same). Again, that RCMP officers successfully lured Sebastian with these promises makes it *more* certain his statements were not the product of free will.

The State also focuses on what it calls “Haslett’s repeated assurances to Burns that all contact would be severed if either one so desired.” Brief Respondent, at 145-46. However, even Haslett conceded that Burns may have imagined he could not, in fact, just walk away because of what he had seen of the organization. 27RP 110. The RCMP made sure Burns did not “so desire” by paying him thousands of dollars and offering the prospect of much more.

They made sure he did not “so desire” by making him believe he would be killed if he were ever arrested because he knew too much about Haslett. And they made sure he did not “so desire” by promising to destroy all evidence in the United States. The RCMP specifically designed the operation to ensure Burns and Rafay would not sever contact.

The State claims its “strongest evidence” the boys were not coerced is their relaxed body language while confessing and Atif’s explanation of a financial motive, which the State claims has “the strong ring of truth.” Brief of Respondent, at 146-147.

Addressing the latter point first, whether a statement seems true is not relevant to whether it was coerced. Rogers v. Richmond, 365 U.S. 534, 540-41, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961) (“in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.”).

As to demeanor, it had been made clear throughout the scenarios this is what Haslett prized: cold-blooded killers, casually willing to harm families to achieve financial gain. It is more than a

bit disingenuous to set this up as the desired model (what Haslett wanted to hear) and then point to the fact the boys followed that very model as proof they were not intimidated. Moreover, by the time RCMP officers had finally coerced these statements, there was greater reason to relax because the promises were about to be fulfilled – no evidence, no charges, no arrest, no death, and the opportunity for wealth in exchange for self-incrimination.

The State – like Judge Mertel – emphasizes the boys were not yet in custody when they incriminated themselves. The State notes that “[i]t is rare that a court has found statements coerced outside the context of custodial interrogation.” Brief of Respondent, at 141 n.61. But no court in this country has ever examined the inherently coercive tactics in a Mr. Big scheme. It would have been far better had Sebastian and Atif been in custody and subject to anything akin to Miranda warnings, alerting them to the dangers associated with false self-incrimination.

Ultimately, however, regardless whether the boys were in custody or out, entitled to warnings or not, the absence of any advisement that they could maintain silence concerning the murders weighs against voluntariness. See Schneckloth, 412 U.S. at 226-27 (“lack of any advice to the accused of his constitutional

rights” a factor in voluntariness analysis even in non-custodial setting); Greenwald v. Wisconsin, 390 U.S. 519, 521, 88 S. Ct. 1152, 20 L. Ed. 2d 77 (1968) (although Miranda inapplicable, “lack or inadequacy of warnings as to constitutional rights” a factor in finding statement not the product of free choice).

The State dismisses all similarities between this case and Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), based solely on the fact Fulminante was in prison when he confessed. See Brief of Respondent, at 149-151. According to the State, “the Court likely would have come out differently had the confession been made in a non-custodial setting.” Brief of Respondent, at 151. The State cites to nothing in Fulminante supporting this argument. Custody was not the Supreme Court’s focus. Rather, it was the presence of a credible threat. Fulminante, 499 U.S. at 287 (“a credible threat is sufficient” to find coercion).

In United States v. McCullah, 76 F.3d 1087 (1996), reh’g denied, 87 F.3d 1136, 1139-1140 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997), the defendant was one of several individuals hired by a large California-based cocaine supplier (the Arvizu organization) to assist in the murder of two individuals suspected of

stealing a large quantity of the drug. Instead, McCullah and others mistakenly killed an innocent third party. *Id.* at 1095-1097. In an attempt to elicit a confession from McCullah, police used a former member of the organization (Lozano) as a police informant. Lozano lied to McCullah, telling him that because he had botched the job, the Arvizu organization wanted him dead. He then offered to intercede on McCullah's behalf if McCullah would "tell him the truth." McCullah then confessed. *Id.* at 1100.

Citing Fulminante, the Tenth Circuit Court of Appeals found McCullah's confession coerced. Although McCullah was never in custody, the Court reasoned:

The circumstances in this case are substantially similar to those in *Arizona v. Fulminante*. In *Fulminante*, the defendant, a prison inmate at the time, was approached and befriended by another inmate who was a FBI informer. The informer told the defendant that he knew the defendant was starting to get some rough treatment from other inmates and offered to protect the defendant from other inmates if the defendant gave him the full facts of the alleged crime. The defendant then made incriminating admissions which were used against him at trial.

The Supreme Court held that the defendant's statements in *Fulminante* were coerced. *Fulminante*, 499 U.S. at 287. "Coercion need not depend upon actual violence by a government agent; a credible threat is sufficient." *Id.* Similarly, in this case, Mr. McCullah's statements to Mr. Lozano were coerced by a credible threat of violence. Mr. Lozano told Mr.

McCullah that the Arvizu organization was out to kill him, a credible threat coming from a former member of the organization. As in *Fulminante*, Mr. Lozano offered to intercede to protect Mr. McCullah from the threat if Mr. McCullah confessed. Indeed, this case presents a stronger example of coercion than *Fulminante* because in this case Mr. Lozano fabricated the threat to Mr. McCullah.

McCullah, 76 F.3d at 1101.

Similarly, Sebastian and Atif faced a far greater threat in Project Estate than *Fulminante* ever faced. *Fulminante* merely faced the possibility of unspecified “tough treatment” from other inmates based on a rumor he was suspected in another case. At no time did Sarivola, the undercover officer, threaten any harm to *Fulminante* if he did not confess; he only offered protection in exchange for *Fulminante* telling him what happened. *Fulminante*, 499 U.S. at 283. Moreover, not once did *Fulminante* indicate he was fearful of other inmates or seek the promised protection. *Id.* at 304-05 (Rehnquist, J., dissenting). Yet, the Supreme Court found *Fulminante*’s will overborne. *Id.* at 287. This is consistent with the principle that “any doubt as to whether the confession was voluntary must be determined in favor of the accused.” *Bram v. United States*, 168 U.S. 532, 565, 18 S. Ct. 183, 42 L. Ed. 568 (1897).

In Project Estate, Haslett and his organization made it clear they could find the boys anywhere, rendering custody a rather moot point. 26RP 48 (“we are a criminal organization with tentacles reaching everywhere”). In fact, the boys were led to believe their only hope was staying *out* of custody. 22RP 107-111; 27RP 149-154. Otherwise, they faced the prospect Haslett would have them killed to ensure their silence. 27RP 155, 173-177; 28RP 42. Haslett offered protection – from himself and Bellevue Police – but only in exchange for confessions. Moreover, using an additional tactic not found in Fulminante or McCullah, Haslett also offered the boys wealth and prosperity as members of the organization if they confessed.

Judge Mertel’s findings on the Fifth and Fourteenth Amendment claims are scant. But he was certainly influenced by the Canadian judicial decisions despite a vastly different legal standard and limited evidence. In fact, King County prosecutors did not bother responding in their written briefs to the voluntariness question, claiming instead it “was squarely decided in the court in Canada” and “[t]here simply were no threats in any way, shape, or form, implied or express” 36 RP 12, 148-149. Judge Mertel

specifically cited the Canadian Court of Appeals when making his own finding on duress. 37RP 23; CP 4582.

Defending Judge Mertel's reliance on the Canadian rulings, the State still maintains that Atif and Sebastian had a full opportunity to present evidence during the Canadian committal hearing. Brief of Respondent, at 147-149. This is incorrect. And to explain why, it is necessary to briefly review Canadian law.²

As previously noted, Canadian undercover officers were extremely confident the fruits of Project Estate were admissible in any Canadian court. See 21RP 101 ("on most occasions, you can't break the law"). Based on the relevant Canadian standard, their confidence was well founded:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. . . ."

Bourdreau v. The King, [1949] 94 C.C.C. 1, 10 (quoting Ibrahim v. The King, [1914] A.C. 599, 609-610) (emphasis added); Kaufman,

² For the Court's convenience, all referenced Canadian authorities are attached to this brief as an appendix.

The Admissibility of Confessions, Chapter 2, at 18 (Third ed. 1979)

(indicating that Ibrahim introduced the “modern rule”).

The Supreme Court of Canada recently addressed the “person in authority” requirement as a prerequisite to any successful defense challenge to voluntariness:

First, there is an evidentiary burden on the accused to show that there is a valid issue for consideration about whether, when the accused made the confession, he or she believed that the person to whom it was made was a person in authority. A “person in authority” is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused. The burden then shifts to the Crown to prove, beyond a reasonable doubt, either that the accused did not reasonably believe that the person to whom the confession was made was a person in authority, or, if he or she did so believe, that the statement was made voluntarily. The question of voluntariness is not relevant unless the threshold determination has been made that the confession was made to a “person in authority”.

R. v. Grandinetti, [2005] 1 S.C.R. 27, 2005 SCC 5, at ¶ 37.

Thus, the test for a “person in authority” is largely subjective, turning on whether the defendant believed the person with whom he was dealing had the ability to influence the prosecution of the case, although there is also an objective component requiring this belief to be reasonable. Id. at ¶ 38-39; Freedman, Studies in Canadian Criminal Evidence, Chapter 4, at 117-118 (1972). An

individual whom the defendant knows to be a police officer undoubtedly qualifies as a “person in authority.” Freedman, supra, at 118. Likewise, those known to be allied with police, acting on their behalf, or acting in concert with police qualify. Grandinetti, at ¶ 43.

However, absent unusual circumstances, undercover officers do not qualify as “persons in authority” because targets of clandestine investigations do not subjectively believe they are speaking with police officers. Grandinetti, at ¶ 40, 44. Grandinetti itself demonstrates this rule. In an investigation called “Project Kilometer,” RCMP officers posed as members of an international organization involved in drug trafficking and money laundering. After winning the defendant’s confidence, officers encouraged him to confess. In exchange, they would use corrupt police contacts to steer the murder investigation away from him. When the defendant eventually confessed, he was not aware of the officers’ true identities. Grandinetti, at ¶ 7-11.

On appeal, the Supreme Court of Canada affirmed the trial court’s ruling that because the undercover officers could not be

“persons in authority,” the defendant was not entitled to a *voir dire*³ on the issue of voluntariness, and the statements were admissible.

Grandinetti, at ¶ 15, 44-45. The Supreme Court reasoned:

The appellant believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him. When, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state’s coercive power is not engaged. The statements, therefore, were not made to a person in authority.

The accused having failed to discharge the evidentiary burden of showing that there was a valid issue for consideration, a *voir dire* on voluntariness became unnecessary.

Grandinetti, at ¶ 44-45; accord R. v. French, [1997] 161 W.A.C. 265 (regardless of inducements to confess, undercover officers not persons in authority for confession rule); R. v. Rothman, [1978] 42 C.C.C.2d 377 (suppression of statements reversed because undercover officers not persons in authority); R. v. Towler, [1968] 2 C.C.C. 335 (undercover officers posing as jailed criminals not persons in authority).

³ *Voir dire* is the Canadian term for a hearing to determine whether a confession was voluntary. Freedman, supra, at 123.

It was for *this* reason, in Sebastian and Atif's case, the Canadian Court of Appeals agreed with the committal judge who, "[i]n effect . . . said there was no point in leading further evidence on the matter when such evidence could have had no legal relevance and could not result in exclusion of the evidence." CP 830; see also CP 826-827 (finding of duress would require "a significant change in the common law" regarding undercover officers). As a matter of law, there was nothing Sebastian or Atif could do or say in Canada that would have resulted in a finding of duress.

Viewed from another defendant's perspective, had Oreste Fulminante been offered protection in Canada by a Canadian undercover officer – rather than an FBI informant in the United States – he would have been precluded from even raising voluntariness. One of the United States Supreme Court's seminal cases on coerced statements would have been decided quite differently in Canada.

Since this Court's review on voluntariness is *de novo*, the Canadian decisions can now be accorded their proper weight. They are irrelevant. And, in the end, the questions for this Court are relatively simple. Can law enforcement obtain admissible

evidence by offering a suspect wealth and prosperity in exchange for a confession? Can law enforcement obtain admissible evidence by indicating a suspect risks death if he does not confess? And, can law enforcement obtain admissible evidence by promising to destroy all incriminating evidence if the suspect simply confesses? The answer to all three is “no.”

There can be no doubt the RCMP employed a combination of threats and promises, inextricably intertwined, to convince Sebastian and Atif to confess. Therefore, the only remaining issue is whether – under the totality of the circumstances – there was a direct causal relationship between the threats and promises and the statements ultimately obtained. Unga, 165 Wn.2d at 101-102.

The circumstances here are that the RCMP employed tactics usually reserved for criminals with prior records, in an operation spanning several months, against two teenagers, among the youngest ever targeted. And although Sebastian sometimes “talked the talk” when in Haslett and Shinkaruk’s presence – indicating he was up for “anything” – he clearly was not “street smart” and had no prior criminal convictions. 21RP 9-10, 150, 171-72; 24RP 129; exhibit 546, at 47. In the end, the RCMP elicited a confession to murder from an individual who turned pale white at

the mere thought of stealing a car, feared debt collections because they might involve violence, and required the RCMP to stay away from scenarios involving “hard criminal activity” for fear they might scare him away. 23RP 92; 25RP 68-69, 77-78, 158-59; 27RP 79-94; 123RP 157; 126RP129; 139RP 92-93; exhibit 543, at 24-25. The RCMP conceded it may have scared Sebastian with its talk of violence and homicide. 22RP 70.

Prior to Operation Estate, neither Sebastian Burns nor Atif Rafay made *any* incriminating statements, and it was apparent neither wanted to speak further to authorities about the murders. Not until undercover RCMP officers offered them wealth, the destruction of evidence, and assured safety in exchange for confessions did they incriminate themselves. See Brief of Respondent, at 129 (“After reading the fake Bellevue Police Department memo, Burns finally admitted his involvement in the murders.”). There is quite clearly a direct causal relationship between these multiple inducements and the statements ultimately obtained because the combined threats and promises “made it impossible for the defendant[s] to make a rational choice as to whether to confess.” Unga, 165 Wn.2d at 108.

A recent article examined 125 proven false confessions occurring over a 30-year period and summarized the characteristics of those involved: 93% of false confessors were male; the vast majority of false confessions (83%) occurred in homicide cases; surprisingly, almost a third (30%) involved confessions from more than one suspect, often indicating one confession was used to extract another; and most individuals were young (63% of false confessors were younger than 25). Saul M. Kassin, *The Psychology of Confessions*, *Annu. Rev. Law Soc. Sci.* 4:193-217 (2008). Sebastian and Atif meet every one of these criteria. Measured by likelihood to falsely confess, Canadian authorities had the perfect targets.

The RCMP can do as it pleases in Canada, and did so here under a mistaken belief the silver platter doctrine immunized its tactics from constitutional scrutiny. But the Fifth and Fourteenth Amendments to the United States Constitution prohibit the use of evidence gathered in the inherently coercive world of Mr. Big. Because the State failed to prove the statements are “the product of an essentially free and unconstrained choice,” they are inadmissible.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR ALLOWING JURORS TO BE INFORMED THIS CASE DID NOT INVOLVE THE DEATH PENALTY.

“In a first degree murder case, the jury naturally wonders whether the death penalty is involved.” State v. Murphy, 86 Wn. App. 667, 670, 937 P.2d 1173 (1997) (quoting State ex rel. Schiff v. Madrid, 101 N.M. 153, 679 P.2d 821 (1984)), review denied, 134 Wn.2d 1002 (1998). In State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), the Supreme Court imposed a “strict prohibition” against ever informing jurors the death penalty does not apply. “The only exception that allows juries to know about sentencing consequences is in a death penalty trial, and even then the jury is to consider the penalty only after a determination of guilt.” Townsend, 142 Wn.2d at 846. That jurors naturally wonder whether the death penalty applies simply does not justify making them less careful, less attentive, and more likely to convict by informing them the ultimate penalty is not an option. Townsend, 142 Wn.2d at 847; Murphy, 86 Wn. App. at 670.

Since the filing of Atif's opening brief in 2007, the Washington Supreme Court has twice reaffirmed this prohibition. In State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), the Court rejected the notion that when a juror expressly asks about the

death penalty, it is appropriate to instruct jurors the penalty does not apply. The trial judge had reasoned this would benefit the defense because those concerned about the penalty would naturally be pro-defense and remove themselves from consideration if they were not assured of the penalty's absence. State v. Mason, 127 Wn. App. 554, 573, 126 P.3d 34 (2005). Citing Townsend, the Supreme Court found this unpersuasive and faulted the trial court for revealing this information. Mason, 160 Wn.2d at 929-930.

In State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008), the Supreme Court again found deficient performance where defense counsel permitted the court and prosecutor to inform jurors the death penalty did not apply and then referenced the penalty's absence themselves. Hicks, 163 Wn.2d at 482-483. Citing Townsend and Mason, the Hicks Court repeated the applicable rule: "in response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing." Hicks, 163 Wn.2d at 478 (emphasis added).

In summary, in every Washington case – without exception – the decision to inform jurors the death penalty did not apply has been criticized and ultimately rejected on appeal. This is true

whether the court raised the topic, a juror raised the topic, a prosecutor raised the topic, and/or defense counsel raised the topic. Hicks, 163 Wn.2d at 483 (court, prosecutor, defense counsel); Mason, 160 Wn.2d at 929 (juror); Townsend, 142 Wn.2d at 842-43 (court and prosecutor); Murphy, 86 Wn. App. 669 (court).

The State nonetheless argues that defense counsel's decision to inform Atif's jurors they need not apply the level of caution and care befitting a death penalty case was proper strategy. Specifically, the State notes that defense counsel mentioned the death penalty during voir dire and again while cross-examining certain witnesses. According to the State, defense counsel surmised he could not even mention the penalty without an express statement to jurors that it did not apply. In recognition of this inevitable consequence, reasons the State, defense counsel agreed jurors should be told at the outset not to concern themselves with the matter. Brief of Respondent, at 158-159, 161, 174.

While legitimate trial strategy cannot form the basis for an ineffective assistance claim, trial strategy must be just that – legitimate. Whether strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in

criminal law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). The reasons, if any, for counsel's agreement were never discussed on the record. The State's only suggested reason fails, however. Counsel's comments did not open the door. And assuming defense counsel believed otherwise, that belief was not legitimate.

The State claims defense counsel first opened the door by mentioning the death penalty during voir dire. Counsel told jurors that a significant number of individuals ultimately freed from death row had falsely confessed to murder. 59RP 84, 95. Notably, the State does not contend counsel told jurors Atif and Sebastian faced the death penalty. Rather, the State recognizes (as jurors surely recognized) the purpose behind this comment was to ensure careful consideration of the boys' statements using examples from other cases. See Brief of Respondent, at 159-161.

In State v. Hicks, the possibility an innocent person could be executed was also discussed with jurors during voir dire. One juror noted that some individuals who had been executed were later found innocent. Defense counsel did not object when the prosecutor responded by confirming for the juror capital punishment was not at issue. Hicks, 163 Wn.2d at 483. Another

juror, quoting a former law professor, said, “I’d rather see 10 guilty people on the street than one innocent person in the electric chair.” Defense counsel himself responded, “Okay. All Right. Again, we are not heading toward the death penalty in this case, but I understand.” Hicks, 163 Wn.2d at 483. The Supreme Court did not conclude that once potential jurors considered the risk an innocent person could be executed, they were properly told the penalty does not apply. Quite the contrary; the Court found counsel deficient for failing to safeguard the penalty’s absence during voir dire. Hicks, 163 Wn.2d at 488.

The State notes that defense counsel mentioned the death penalty again while examining Detective Thompson, Corporal Comrie, and Jimmy Myoshi. Brief of Respondent, at 162-169. But these discussions did not open the door, either. Counsel wished to emphasize sloppy work on Thompson’s behalf by demonstrating to jurors that he had signed off on an affidavit, supporting the boys’ extradition from Canada, containing mistakes. In support, counsel had Thompson admit that his affidavit “could potentially have exposed both of them to the death penalty[.]” 102RP 69 (emphasis added). The prosecutor interrupted, reminding jurors the death penalty was not at issue and defense counsel agreed. Counsel

then repeated his assertion that when the affidavit was signed, “there was at least the possibility that they could be brought back here and face that penalty” and Thompson answered “yes.” 102RP 69 (emphasis added).

As before, defense counsel never told jurors Atif and Sebastian faced the death penalty. Counsel used words like “potentially” and “possibility.” Counsel was underscoring Thompson’s casual treatment of important subjects while the boys were still in Canada. Jurors would have recognized this rather than misinterpret the exchange as a comment the boys now faced death.

Nor did mentioning the penalty in connection with the RCMP’s interrogation of Myoshi open the door. Counsel simply pointed out that RMCP Corporal Comrie used the *possibility* those involved in the murders could face the death penalty to convince Myoshi he should protect his own interests, distance himself from his friends, and incriminate them.

Counsel asked Myoshi to confirm that when the RCMP interrogated him shortly after his arrest, Comrie told him “the maximum penalty is death . . . I am not saying that is going to happen to them, but if they go for the death penalty, that is what

they're going for." 105RP 150 (emphasis added). Counsel asked Comrie to confirm the same information: that he had tried to intimidate Myoshi with the *possibility* everyone involved *could* face the death penalty. See 138RP 165 (Comrie admits he told Myoshi "I am not saying that is going to happen to them, but if they go for the death penalty . . ."); 138RP 165-166 (counsel asks Comrie if he mentioned penalty "to make sure that [Myoshi] understood what he could potentially be facing if he decided not to cooperate"); 138RP 167-168 (Comrie again asked about intended impact while informing Myoshi his friends "might be executed").

Jurors were never told the penalty applied in this case. Period. References to the penalty did nothing more than tell jurors what they naturally knew – murder *may* lead to the death penalty. Assuming this could open the door to further information on the issue, at most jurors would have been told murder *may not* lead to the death penalty. But that would simply remind jurors what they already knew to be true.

Even if jurors assumed the penalty applied, however, the only consequence is that they would have been particularly careful to listen to the evidence, careful to apply the presumption of innocence, and careful to hold out for acquittal. No reasonable

attorney would agree to make jurors less careful in this regard by expressly informing them the penalty did not apply. To the extent anything had to be said to Atif's jury about the penalty, the Washington Supreme Court has made clear what that must be: "in response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing." Hicks, 163 Wn.2d at 478 (emphasis added). Jurors received this instruction. CP 3153. Nothing more was permitted, much less required.

In its brief, the State contends that Atif has assigned error "only to the decision to notify jurors that this was not a death penalty case, ignoring the fact that the jury received the same information when the defense raised the death penalty" with other witnesses. Brief of Respondent, at 153. The only time jurors received "the same information" was when a prosecutor reminded jurors the penalty did not apply during defense counsel's cross-examination of Detective Thompson. In response, defense counsel agreed it did not apply. See 102RP 68-70. This "reminder" of the court's explicit instruction was part and parcel of the same mistake – agreeing at the outset jurors could be provided

this information – and does not require an additional assignment of error.⁴

The remaining question is prejudice. In arguing that counsel's decision could not have impacted the trial, the State focuses on Burns' hair in the shower, concluding he must be one of the killers because some of his hairs remained on the shower floor after Tariq Rafay's blood was deposited there. Brief of Respondent, at 174-75. It is hard to reconcile this argument with the fact Sebastian showered many times during his stay (including right before he and Atif went out for the evening). Exhibit 76, at 16. It would have been surprising had police *not* found some of Sebastian's hair on the shower floor. More noteworthy is the bloodstain found in that same shower containing a mixture of Tariq Rafay's DNA and that of an unknown individual. 113RP 24-25, 114-122.

⁴ Even if a separate assignment of error were required, this additional reference to the penalty's absence would be properly before this Court. See State v. Olson, 126 Wn.2d 315, 318-323, 893 P.2d 629 (1995) (failure to assign error in opening brief should be overlooked where nature of challenge clear); RAP 1.2(a) (rules liberally construed to facilitate decisions on the merits).

The State also claims Sebastian is obviously the killer because only someone aware that nobody else was coming home would feel sufficiently comfortable taking the time necessary to shower. Brief of Respondent, at 175. The State overlooks the fact that whoever attacked the Rafay family had killed or incapacitated every family member living in the house. Sebastian and Atif were only temporary visitors. There is no evidence whoever killed Atif's family even knew Atif and his friend had arrived in town by bus and therefore no indication they believed anyone else *could* come home. Moreover, given the volume of blood spatter, the killers (certainly the two in the master bedroom) had little choice but to rinse off before leaving the home, even if it required a slightly extended stay and increased risk of discovery.

In deciding the issue of prejudice, the Townsend Court noted that reversal is automatic unless the error was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Townsend, 142 Wn.2d at 848 (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)). Townsend's conviction was affirmed because he did not claim he would have been acquitted had his attorney acted

properly. Rather, he only contested premeditation and there was “overwhelming” evidence on that element (he pointed a gun at the victim and said “God forgive me,” before shooting the victim in the head). The fact jurors knew the death penalty did not apply was quite clearly a trivial point. Townsend, 142 Wn.2d at 848-849.

In Hicks and Murphy, it was apparent the confirmed absence of the death penalty was harmless because jurors did not convict the defendants on the most serious charges (aggravated murder and attempted murder in Hicks and first-degree murder in Murphy). Hicks, 163 Wn.2d at 488-489; Murphy, 86 Wn. App. at 672-673.

In contrast, Atif was convicted of aggravated murder in each count. Moreover, unlike Townsend, the evidence was anything but overwhelming. There was no eyewitness to these crimes. Nobody saw the boys near the house at the time of the murders. Physical evidence suggested unidentified individuals in the home (including hair in Tariq’s bed and mixed blood stains in the shower and garage). The boys’ statements – in addition to being the product of a scam that simultaneously employed fear and the promise of current and future riches – often were internally inconsistent and did not match the crime scene. And, perhaps most notably, two

neighbors independently heard noises associated with the killings when both boys were elsewhere.⁵

Counsel was ineffective for allowing jurors to know the death penalty was not an option. On this alternative ground, the murder convictions should be reversed.

3. EXCLUSION OF ALL EVIDENCE PERTAINING TO DOUGLASS MOHAMMED AND FUQRA DENIED RAFAY HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND A FAIR TRIAL.

a. Atif Had A Constitutional Right To Present The Mohammed And FUQRA "Other Suspect" Evidence.

The opening brief argues that Washington's test for "other suspect" evidence, first articulated in State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932), cannot be interpreted as so restrictive it effectively precludes relevant defense evidence. Otherwise, it violates due process. Brief of Appellant, at 110-116. The State

⁵ The Hicks Court also suggested that evidence jurors did not take their duty seriously may demonstrate prejudice. Hicks, 163 Wn.2d at 488. At Atif's trial, jurors slept through testimony, discussed the evidence prematurely, made improper comments, read a newspaper article about one of the attorneys, had tantrums (banging hand against the wall), and argued with one another over such petty issues as coffee, the labeling of restrooms, ownership of water cups, and air fresheners. 67RP 223, 225; 73RP 147-148, 177-186, 189-196; 77RP 75-81; 82RP 9-10, 17; 109RP 31-32; 128RP 97-98, 109, 171-172.

responds with assurances the test requires nothing more than relevance. Brief of Respondent, at 214-221. This Court need not decide the issue if it finds the defense had a right to present its evidence. Even using Washington's statement of the test, "there is a train of facts or circumstances as tend clearly to point to someone besides the accused as the guilty party." Downs, 168 Wash. at 667.

As an initial matter, the State claims defense counsel did not aggressively pursue this theory of admissibility. See Brief of Respondent, at 202. This is incorrect. Counsel forcefully and repeatedly pursued both defense theories.

Judge Mertel first heard argument on the issues November 18, 2003. The discussion followed on the heels of a ruling allowing the State to demonstrate the thoroughness of the police investigation. See 62RP 98-99 ("The court just made ruling this morning that the State's going to be allowed to show what the police did, and we should be allowed to show what they didn't do."). For that reason, counsel focused on the theory Mohammed and FUQRA evidence was admissible to counter this evidence; i.e., to impeach the State's evidence of a thorough investigation. 62RP 99 ("This is not an other suspects issue. This is a thoroughness of the

investigation issue.”). But counsel argued the evidence *also* met the test for “other suspects.” 62RP 99 (“we meet that test as well”).

Similarly, when argument continued the following morning – and in light of the court’s decision to permit the State to prove a thorough investigation – defense counsel focused primarily on using the defense evidence for impeachment. It was with *this* theory in mind that counsel said, “I think I made it clear yesterday this is not other suspect evidence” and “we’re not offering it for the truth.” 63RP 10, 51. Defense counsel argued Judge Mertel did not have to reach the “other suspect” theory if he allowed the evidence as impeachment. 63RP 32, 37-38.

But counsel was fully prepared to argue “other suspect” and did so. 63RP 38. For the next five transcript pages, counsel discusses the relevant standards, the pertinent cases, and the evidence supporting this theory of admissibility, including motive (religious fanaticism), opportunity (the boys were not home when neighbors heard the murders), unexplained physical evidence (the unidentified hair on Tariq’s bed sheet), information from a reliable FBI informant (Mohammed), and the holdback evidence tying this tip to the Rafay murders (identification of the murder weapon before that information was public). See 63RP 39-44.

Similarly, defense counsel diligently pursued the “other suspect” theory when asking Judge Mertel to reconsider. The written motion contains a separate section devoted to the theory. See CP 4735-4736. And defense counsel spent considerable time arguing both theories. See 70RP 4 (“two completely separate and distinct bases for admitting this evidence.”); 70RP 13-21.

It is inaccurate to claim, as the State does, that defense counsel “appeared to recognize that the ‘other suspect’ standard was not satisfied, and only argued this theory of admissibility when pressed by the court.” Brief of Respondent, at 211. Rather, counsel pressed both theories. Indeed, in the end, it was counsel’s argument on the “other suspect” theory that Judge Mertel found most compelling. He called it a “tougher” question, “not easy,” causing him to “stew and fret,” and he recognized he might be wrong. 70RP 45-46.

The State also claims the evidence provided by Mohammed “was extremely limited.” See Brief of Respondent, at 211. In fact, it was quite detailed. Douglass Mohammed disclosed that a violent, extremist faction in the local Muslim community had specifically targeted Tariq Rafay for assassination based on his religious beliefs. 17RP 53-54, 56; 18RP 5; 31RP 71-74, 149-150, 154; 32RP

10-15; 63RP 29; 70RP 33. He provided names, addresses, and phone numbers for those involved, including the faction's leader. 17RP 53-54; 31RP 73; 32RP 7; 63RP 30-31. Mohammed also explained that a few days after the murders, two brothers, both members of the militant group, came to see him. One was nervous and asked whether he had seen a baseball bat previously kept in a group member's car. 17RP 54-55; 31RP 74, 150-51; 32RP 8; 70RP 40. At the time, Bellevue Police did not even know for certain the murder weapon was a baseball bat. 17RP 56; 18RP 5-6; 31RP 151; 32RP 8. The militant then told Mohammed to "forget about it."⁶ 63RP 30.

The State argues this evidence falls short because no member of the militant group confessed to the murders, there is no

⁶ The State questions reliance on the assertions of counsel concerning Mohammed's information where there was not similar testimony by detectives. Brief of Respondent, at 204 n.76. But it is apparent both prosecutors and defense attorneys were aware of additional information not disclosed by detectives, and both sides referred to it. See 63RP 13 (prosecutor reveals Mohammed had previously provided information useful to FBI); Supp. CP ____ (sub no. 308, at 3, State's Response to Defendant's Motion for Reconsideration) (prosecutors identify militant group leader as Mohammed Al Alab); 63RP 30 (defense counsel reveals that militant told Mohammed to "forget about" bat). Had either side misstated the available evidence, it is reasonable to conclude opposing counsel would have set the record straight.

evidence someone in the group was near the Rafay home during the murders, and no evidence the group had taken “any step” to commit the murders. Brief of Respondent, at 212. But there is no confession requirement. And the local group’s stated goal to murder Tariq Rafay, combined with its possession of, and concern over, an item used to kill three people inside the Rafay home, more than satisfies the State’s proximity and “step” criteria.

The State attempts to minimize the significance of Mohammed’s correct identification of the murder weapon, pointing out that as early as July 20, 1994, a newspaper reported a bat may have been used. Brief of Respondent, at 212. But Mohammed alerted the FBI to his information within a few days of the July 12 murders. Even his later conversation with Bellevue Police occurred before the newspaper article, on July 18, 1994. 17RP 52.

The State also argues defense counsel acknowledged that one could have reasonably inferred the weapon was a baseball bat even before police made the information public. See Brief of Respondent, at 212 (citing 63RP 30). Undersigned counsel has reviewed the cited comment and does not share the State’s view. Rather, defense counsel was stressing the *strength* of this

holdback evidence. The “inference” he mentions is the inference that Mohammed was indeed talking about the murder weapon.

The State also argues the defense had no evidence rebutting the detectives’ view that Mohammed was unreliable. Brief of Respondent, at 204 n.75, 212-13. But Douglass Mohammed was exactly what he claimed to be – an FBI informant. 17RP 120; 31RP 153; 32RP 9. The defense contended, and the State conceded, he had provided useful information to law enforcement in the past. 63RP 13, 28; CP 4736 at n.1. Even Judge Mertel recognized the FBI had previously found him reliable. 70RP 15.

Finally, the State argues that Mohammed’s information was hearsay. Brief of Respondent, at 221-22. The State made this same argument below concerning both the Brar tip and the Mohammed tip. CP 4597; Supp. CP ____ (sub no. 308, State’s Response To Defendants’ Motion for Reconsideration, at 2, 5-6); 63RP 18, 49-50; 70RP 24-25, 29-32, 52. Judge Mertel rejected it. At no time did he ever find the evidence inadmissible based on hearsay. Rather, he excluded the Mohammed evidence as too “speculative.” Had he decided the Mohammed tip satisfied the foundation for “other suspect” evidence, there is every indication he

would have allowed the evidence through law enforcement officers, just as he did with the Brar tip. See 63RP 59-64; 70RP 52-53.

By raising this objection again, despite losing on the issue below, the State essentially offers an alternative ground to affirm Judge Mertel. But to prevail on an alternative theory, the record must support that theory. State v. Rohrich, 149 Wn.2d 647, 656-659, 71 P.3d 638 (2003). It does not.

The State notes that defense counsel did not intend to call Mohammed or Seattle Detective Detmar (regarding the FUQRA tip) as trial witnesses. Brief of Respondent, at 221. The State may be correct. In light of Judge Mertel's ruling on the Brar tip (allowing the defense to present evidence through the State's witnesses), there was no perceived need to call these individuals. Had Judge Mertel precluded the defense evidence based on hearsay grounds, however, the defense would have been forced to do so. But Judge Mertel was simply not concerned about this, and the State cannot show the defense would not have called these witnesses had it become necessary. Therefore, its alternative ground fails for lack of factual support.

Jurors properly heard about the murder contract put out against an East Indian⁷ family that had moved from Vancouver to Bellevue. 138RP 64, 67. Atif was also entitled to present evidence that a local radical group had targeted his father for death and a member of the group nervously asked about a baseball bat before this was identified publicly as the murder weapon. This, and the evidence concerning FUQRA, support Atif and Sebastian's claims they had nothing to do with these crimes. Atif had a constitutional right to present evidence that someone else killed his family.

b. The Evidence Was Also Admissible To Rebut the Prosecution's Claim That It Conducted An Exhaustive and Thorough Investigation.

The State does not dispute that it filled many court days with the minutiae of its investigation to demonstrate extreme care, thereby bolstering jurors' confidence that law enforcement had correctly identified the killers. Judge Mertel acknowledged he would permit prosecutors to strengthen its case in this manner. 61RP 17. Yet, when the defense argues for an equal opportunity to rebut this evidence, the State labels this effort "improper

⁷ The State contends the Rafays were Pakistani and not Indian. Brief of Respondent, at 206 n.77. But Tariq Rafay was born in India. 98RP 16-18. Even Bellevue Detectives considered the Rafay family East Indian. 32RP 21.

impeachment on a collateral matter.” See Brief of Appellant, at 223-24.

The thoroughness of a police investigation is not collateral. See, e.g., Kyles v. Whitley, 514 U.S. 419, 446, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); United States v. Crosby, 75 F.3d 1343, 1346-47 (9th Cir. 1996); Commonwealth v. Reynolds, 429 Mass. 388, 708 N.E.2d 658, 662 (1999). And it is certainly not collateral when the State plainly makes the issue a centerpiece in its case.

The State argues the defense evidence was unnecessary because police “made no attempt to hide the fact that they quickly focused on Burns and Rafay as suspects in these murders” and that the detectives were immediately suspicious of the boys. Brief of Respondent, at 227. But detectives’ early impressions were not the sole target of the defense impeachment effort. They sought to impeach the State’s portrait of the investigation that followed – that police were so thorough they collected dryer lint, cookware, and doorknobs; they examined hundreds of hairs and fingerprints with no evidentiary value; and produced so many photos, diagrams, and other objects related to their efforts that the clerk had to label items with descriptions like 425FFFF. The defense had the right to rebut

this with evidence that police never bothered to follow up on evidence inconsistent with its theory of the crimes.

As defense counsel repeatedly pointed out, if admitted for impeachment, jurors would not be considering the evidence for its truth, i.e., that Mohammed Al Alab and his followers had successfully killed Tariq Rafay and his family with a baseball bat or that FUQRA was involved in the murders. Rather, its purpose was to demonstrate that police did nothing with the FUQRA tip and nothing with Douglass Mohammed's information despite the fact he was a reliable FBI informant with very specific information. 62RP 98-101; 63RP 23-28; 70RP 4-21, 39-44. "[I]ndications of conscientious police work will enhance probative force and slovenly work will diminish it." Kyles, 514 U.S. 419 n.15. The State recognized and made great use of the first maxim at trial. It is still ignoring the second one.

Defense counsel agreed jurors could receive a limiting instruction restricting their consideration of the evidence to this purpose. 70RP 42. When defending trial evidence *it* offered, the State's brief contains repeated references to the presumption jurors follow the court's instructions regarding consideration of evidence. See Brief of Respondent, at 351, 363, 368. But when, as here, the

defense seeks admission, the State loses all confidence jurors could have followed such an instruction. See Brief of Respondent, at 223 (calling this a “back-door” method of introducing “other suspect” evidence).

The State claims the defense must identify “what specific testimony provided by [Detectives Thompson and Gomes] would be impeached” with their failure to follow-up on the Mohammed and FUQRA tips. Brief of Respondent, at 227. But defense efforts were broader than impeaching one or two police witnesses. Prosecutors had used an assortment of witnesses, over many days, to broadly portray the investigation as thorough and trustworthy, and the defense sought to rebut this extensive presentation and demonstrate bias. Thompson and Gomes were necessarily the means for presenting this evidence because they controlled the investigation.

In a footnote, the State challenges the notion defense counsel truly sought to rebut the thoroughness of the investigation because counsel argued this theory before the State had presented any witnesses. Brief of Respondent, at 228 n.79. In fact, however, when this argument was first made, it was already clear to counsel

that Judge Mertel was going to allow the State's investigation evidence. See 62RP 98-99.

The State also cites three cases in support of its position – one from Washington and two from foreign courts. All three are easily distinguished.

In State v. Rehak, 67 Wn. App. 157, 159, 834 P.2d 651 (1992), the defendant was accused of murdering his wife. Division Two held that Rehak had no right to impeach the State's murder investigation with evidence it failed to pursue a tip involving an unidentified third party who had made threats against *Mr. Rehak*. Rehak, 67 Wn. App. at 163-164. Had Atif merely offered evidence that *he* had once been threatened by an unknown individual, he would not have had a right to present that evidence, either, since its probative value would not satisfy even a minimum threshold under ER 401. But law enforcement's failure to investigate detailed information, where there was a specific threat against *the murder victim*, plus knowledge of holdback evidence, is highly probative on the issue of thoroughness.

In United States v. Patrick, 248 F.3d 11, 21-22 (1st Cir. 2001), the defense sought to undermine the adequacy of the police investigation by questioning the lead detective on his failure to

follow up on several tips suggesting other individuals might have killed the victim. There were several problems with this evidence, however. Many of the tipsters were anonymous and did not identify themselves, and often the tips involved only a person's first name, making follow up difficult. Patrick, 248 F.3d at 21. Moreover, the defense never established that police failed to investigate the information. The detective would have testified that although he did not specifically recall what action he took on each of the tips (it had been six years), it was his usual practice to follow up on every tip. Patrick, 248 F.3d at 23 n.10. Not surprisingly, the Court of Appeals found this "speculative evidence" properly excluded under the federal equivalent of ER 401 and 403. Patrick, 248 F.3d at 23-24.

Finally, the State relies on United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998). McVeigh's lawyers sought to undermine the quality of the government's investigation in his case by demonstrating the FBI and ATF had failed to investigate other potential suspects once they focused on McVeigh. McVeigh, 153 F.3d at 1192. But there was no factual or legal basis for this line of questioning. Rather, reports demonstrated that federal agents actively pursued the leads and continued to do so well after

McVeigh became the primary focus. McVeigh also failed to demonstrate how the evidence (even assuming factual support) would undercut the State's case at trial. McVeigh, 153 F.3d at 1192.

In contrast, there was significant factual support for Atif's claim: specific evidence, from a trustworthy FBI information and Seattle Police Detective, including holdback evidence from a group that had targeted Tariq Rafay for elimination. Moreover, unlike Atif's case, there is no indication in Rehak, Patrick, or McVeigh, that the government so prominently showcased the thoroughness of its investigation. This opened the door to contrary evidence.

Under both theories – substantive evidence of another suspect or evidence undermining the State's portrayal of a thorough and reliable investigation – Atif had a constitutional right to present his evidence concerning Mohammed and FUQRA.

4. MISCONDUCT BY SEVERAL WITNESSES DENIED RAFAY A FAIR TRIAL.

a. Opinions On Guilt/Veracity

As discussed in the opening brief, there were eight comments on the boys' guilt or veracity. In combination, they denied Atif a fair trial. See Brief of Appellant, at 155-162. The State argues these comments were harmless because Judge Mertel recognized they should not have been made, sustained defense objections, and instructed jurors to disregard them. Brief of Respondent, at 314-15, 326-328.

The State fails to acknowledge that some comments cannot be fixed in this manner. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Moreover, in dismissing the impact of these comments, the State does not distinguish among them. While acknowledging the "comments at issue here may have been improper," it deems all of them insignificant. Brief of Respondent, at 326-328. Some of the comments in particular, however, were very serious.

Gomes' comments that instead of contacting his family about the loss of his parents and sister, Atif "was just chillin' with

his buddy” and he “was watching videos, movies, he was reading” sent a clear message that in Gomes’ professional opinion, Atif was not acting like an innocent son should. See 95RP 40; 96RP 210. These comments are no different in effect than those in State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973), where a witness testified that the defendant’s reaction to his wife’s death was unusually “calm and cool.”

Gomes’ testimony about the results of his lighting recreation test in the master bedroom was the most direct violation of the prohibition against opinions on guilt. Consistent with innocence, Atif explained that he discovered his father’s body in the master bedroom. Describing the scene, he said he could see a large amount of blood on the wall and the head of the bed. Exhibit 72, at 54-65; exhibit 78, at 2. There was evidence to support this. A Bellevue Police Officer confirmed the blood on Tariq Rafay’s body and on the wall was clearly visible without enhanced lighting. 68RP 135-37.

Hoping to undermine Atif’s version of events, Detective Gomes testified that he and others recreated the lighting in the room the night of the murders to determine whether Atif had “fabricated” his story. 95RP 66. Gomes then shared his opinion

that Atif had indeed lied, testifying, “I don’t believe he saw what he said he saw.” 95RP 66. If there is any meaningful difference between this comment on Atif’s guilt and the comments in Carlin⁸ (defendant had a “guilt scent”) and Black⁹ (victim suffered “rape trauma syndrome”), the State does not explain it. Gomes offered a direct opinion on Atif’s veracity on a major point. If Atif lied about this circumstance, if he did not discover his father’s body after the murders, he was guilty. Jurors would have interpreted Gomes’ remark as intended.

b. Violations Of Motions In Limine

Similarly, some violations of the court’s in limine rulings were particularly egregious. Those involving Detectives Gomes and Thompson stand out.

Judge Mertel granted a defense motion to preclude any testimony about the boys’ involvement in criminal activities. CP 2423. Yet, both detectives – aided by prosecutor Konat and his air quotations – implied that Atif and/or Sebastian had a history of

⁸ State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994).

⁹ State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

criminal conduct. Every time either detective was asked to confirm the boys had no criminal convictions, they emphasized (under the guise of clarification) that the focus was merely “convictions” as opposed to any other criminal conduct. 95RP 106; 101RP 21-22; 102RP 4-5, 10.

The State appears to blame defense counsel for this evidence. See Brief of Respondent, at 348-49 (“It was the defense attorney who chose to pursue the inquiry.”). But defense counsel did nothing to elicit this crafty testimony. On direct examination, the State had Gomes confirm that he went to British Columbia to investigate “whether the boys were involved with law enforcement in a negative way.” 95RP 60. Unfortunately, there was no follow up question making it clear neither boy had a criminal conviction. 95RP 63.

On cross-examination, defense counsel attempted to replace ambiguity on this point with clarity, simply asking Gomes to confirm the boys had no convictions. Although the question only called for a one word answer – “correct” – it was Gomes who converted this into an opportunity to sully the boys by clarifying he was only conceding there were no formal “convictions.” 95RP 106. And defense counsel certainly had nothing to do with the

subsequent exchange between prosecutor Konat and Detective Thompson, where Thompson took his cue from Konat's air quotes and reemphasized he was only conceding an absence of "convictions" and nothing more. 101RP 21-22; 102RP 4-5, 10.

The State points out that jurors did not know the precise nature of the other criminal activities. Brief of Respondent, at 349. This is true. But this does not diminish the prejudicial effect. Jurors were left to their imaginations to decide what other crimes two boys now charged with three counts of aggravated murder may have committed. Defense counsel offered two suggestions, either one of which would have cured the problem. First, counsel sought to elicit that the boys had no criminal charges, either. 102RP 4-6. Second, counsel asked the court to instruct jurors they should not infer from the State's witnesses or prosecutor Konat's conduct that the boys had engaged in any criminal behavior. 102RP 10-11. Both requests were denied, leaving jurors free to assume the worst. 102RP 10-11.

The other most serious violation occurred when Detective Thompson improperly undermined all evidence concerning Jesse Brar and the Dosanjh group. The court made it clear this information was off limits. 143RP 80-83. Yet, during his

examination by the State, Thompson told jurors the Dosanjh group limited its activities to drug trafficking and, in any event, the group had disbanded prior to the Rafay murders. 144RP 44, 47.

The State dismisses the notion of prejudice by once again pointing out the remarks were stricken. Brief of Respondent, at 350. But this testimony undermined a critical component of the defense case. Jurors did not know Thompson's remarks were based on hearsay. Nor did they know that a defense investigation of the Dosanjh group revealed contrary information. See 136RP 80, 93. Jurors perceived that a trained police detective had confirmed the Dosanjh group had nothing to do with the Rafay murders, once again leaving Sebastian and Atif as the only suspects. This is not the type of information cured by an instruction telling jurors to simply forget it ever happened. This was a blatant effort to improperly undermine the defense case.

5. PROSECUTORIAL MISCONDUCT ALSO DENIED RAFAY A FAIR TRIAL.

a. Konat Compares Atif and Sebastian To Islamic Terrorists Who Beheaded an American

The State offers several reasons this Court should overlook this flagrant misconduct. None are persuasive.

First, citing State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006), the State points out that prosecutors may refer to the horrible nature of a crime. Brief of Respondent at 354, 357-358. This is literally true. In Borboa, the Washington Supreme Court rejected an argument the prosecutor had engaged in misconduct by describing a crime as “horrible” during closing argument. Borboa, 157 Wn.2d at 123. Had Mr. Konat said “this was a horrible crime,” he would have been on firm ground. Instead, he compared the boys to terrorists who filmed the beheading of an American civilian.

Second, the State points out that the defense refused a curative instruction. Brief of Respondent, at 354. Citing State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), the State argues that counsel’s failure to request an instruction means counsel did not honestly feel the argument was prejudicial. Brief of Respondent, at 362. In making this argument, the State forgets that defense

counsel moved for a new trial based on this remark. See 148RP 124-25. And because counsel moved for a new trial, Swan supports the defense, not the State.

In Swan, defense counsel failed to object to a remark challenged on appeal. In finding the remark harmless, the Supreme Court said:

in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. . . .

Swan, 114 Wn.2d at 661 (emphasis added). That defense counsel moved for a mistrial at the first opportunity in Atif's case demonstrates counsel correctly perceived the misconduct as "critically prejudicial." He also recognized this was one of those acts that could not be cured with a jury instruction.

Third, the State notes that after Konat tainted the trial with his comparison to violent Middle-Eastern terrorists, defense counsel referred to the North Korean Government's 1968 seizure of the USS Pueblo. Brief of Respondent, at 357. The State's discussion of this is little more than a passing notation. The State

does not contend this somehow justified Mr. Konat's prior statements. Nor could it. Defense counsel's point was simply that things are not always as they initially appear. North Korea had required captured sailors to confess to spying. They did so, but the confessions were false. See 150RP 11. There was nothing objectionable about this argument. It bears no similarities to Konat's misconduct.

Fourth, the State argues Konat's discussion was "brief" and at the very beginning of a very lengthy closing argument. Brief of Respondent, at 354-55, 362. But the discussion was not brief. When Konat began comparing the boys to terrorists, defense counsel interrupted with an objection. Apparently emboldened when the judge overruled the objection, Konat continued at length with the comparison. See 148RP 37-38. Moreover, jurors were more likely to remember this stunning comparison coming as it did at the very beginning of argument rather than somewhere in the middle.

Finally, the State points out that although the rest of Atif's family was Muslim, Atif was not. According to the State, this diminishes the prejudicial impact of Konat's statements. Brief of Respondent, at 358. But Konat's comparison would be outrageous

regardless of Atif's family background. That Atif comes from a country associated with violent extremism, however, makes the misconduct even worse because it increases the odds jurors would associate him with well-known, despised terrorists. That Atif is not a practicing Muslim is beside the point.

Jurors were instructed that the attorneys' remarks, statements and arguments were intended to help them understand the evidence and apply the law. CP 3152. When Judge Mertel overruled the defense objection to Mr. Konat's unfavorable comparison between the boys and Middle-Eastern terrorists, telling jurors "this is argument," he signaled to jurors they were free to consider the comparison when evaluating the case. This lent an aura of legitimacy to the misconduct. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Given that the trial court legitimized the prosecutor's argument, its general instruction to "[d]isregard any remark, statement or argument that is not supported by the evidence" could not cure the prejudice.

This was serious error, and nothing short of a mistrial was sufficient.

b. Discrediting Jennifer Osteen

The State argues Konat's improper reference to Osteen's sobriety was harmless because Osteen was unimportant to the State's case. Brief of Respondent, at 369. Mr. Konat did not see it this way; he was willing to violate well-established rules to undermine her credibility.

Osteen confirmed that Bellevue Police were biased against the boys and interpreted all evidence in a manner consistent with that bias. Bellevue police challenged her recollection of when the boys arrived at Steve's Broiler and, although still very early in the investigation, told her the boys had killed three people. 144RP 100-01. Moreover, Bellevue Police believed that Sebastian had showered *right after* the murder and *immediately before* leaving the Rafay home for Steve's Broiler. Regardless of whether Sebastian had showered earlier that same day, Osteen's description of Sebastian as "grubby" was problematic. See 144RP 83. It was inconsistent with Bellevue's version of events.

This reference to evidence outside the record was another act of misconduct that could not be fixed by Judge Mertel simply telling jurors to forget what they had heard.

c. Konat Shares Recent Death of His Father

Citing a case from Arkansas, the State argues it is not error for a prosecutor to share the death of his father with jurors. Brief of Respondent, at 372 (citing Price v. State, 365 Ark. 25, 223 S.W.3d 817 (2006)). Whatever the law in Arkansas, in Washington prosecutors may not refer to matters outside the record. Belgarde, 110 Wn.2d at 507-08.

Moreover, Price is easily distinguished. In Price, the prosecutor revealed the death of his father during the sentencing phase of the case; it was not used during the guilt phase. Price, 223 S.W.3d at 826. Moreover, the Arkansas prosecutor did not use the experience as a divisive tool to separate those who suffered a similar loss and grieved appropriately (Konat and jurors) from individuals like Sebastian Burns and Atif Rafay. Rather, he simply noted that sitting in jail for the rest of one's life – a sentence Price faced – paled in comparison to losing a loved one, as he had. Price, 223 S.W.3d at 821, 826.

The State also contends that the defense invited Mr. Konat's argument. Brief of Respondent, at 373. Specifically, the State points out that during the defense closing, counsel referred to personal experiences with eyeglasses, young children who are

afraid of the dark, and a conversation he had with a friend about jurors' biases. Brief of Respondent, at 370-71. The State did not object to any of these remarks – likely because they did not draw on jurors' passions or prejudices. Nor did they create an “us” versus “them” dichotomy. Judge Mertel did not think defense counsel's innocuous remarks justified Mr. Konat's misconduct. He had precluded any mention of this personal matter and made no finding that Konat's argument was a fair response. 150RP 205-07.

Jurors are free to consider their own life experiences during deliberation. They are not free to consider the prosecutor's personal experiences, particularly when they align jurors with the prosecution and against the defendants based on a shared experience. In combination with the other misconduct, this also warrants a new trial.

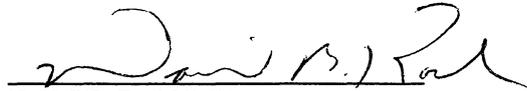
C. CONCLUSION

The Fifth and Fourteenth Amendments to the United States Constitution prohibited use of Sebastian and Atif's coerced statements at trial, defense counsel was ineffective for permitting jurors to learn that the death penalty was not an option, Atif was denied his right to present a defense, and recurring misconduct denied Atif a fair trial. For the foregoing reasons, and those contained in Atif Rafay's opening and supplemental briefs, his convictions must be reversed.

DATED this 20th day of February, 2009.

Respectfully submitted,

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APPENDICES

R. v. Boudreau
CANADIAN CRIMINAL CASES

ANNOTATED

A SERIES OF REPORTS OF IMPORTANT DECISIONS IN
CRIMINAL AND QUASI-CRIMINAL CASES IN CAN-
ADA UNDER THE LAWS OF THE DOMINION AND
OF THE PROVINCES THEREOF, WITH SPE-
CIAL REFERENCE TO DECISIONS UNDER
THE CRIMINAL CODE OF CANADA
IN ALL THE PROVINCES; WITH
ANNOTATIONS, TABLE OF
CASES REPORTED AND
A DIGEST OF THE
PRINCIPAL
MATTERS.

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CORRIGENDUM.

Hartley v. Institute of Chartered Accountants of Manitoba, 93 Can. C.C. 345. — On page 350 delete line 15 and substitute "c. 188 of R.S.M. 1940, which is as follows:"

Canadian Criminal Cases

Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada.

ROUDREAU v. THE KING.

Supreme Court of Canada, Rinfret C.J.C., Kerwin, Taschereau, Rand, Kellock, Estey and Locke JJ. April 12, 1949.

Evidence V A, B—Whether confession by one in custody must be preceded by caution — Controlling question one of voluntariness — Applicability of rule re confessions to statement supplying motive for offence—

It is not the law that a confession or an incriminating statement made by a person in custody to a person in authority is necessarily inadmissible against him unless preceded by a caution or warning. The controlling question in all cases where confessions or incriminating statements of an accused person are offered in evidence against him is whether they were freely and voluntarily made, and the presence or absence of a warning is merely one of the relevant considerations which in the light of all surrounding circumstances governs the exercise of the trial Judge's discretion on the issue of voluntariness and, hence, of admissibility.

Where accused was held in custody as a material witness at an inquest into the death of L with whose murder he was later charged and while so held was questioned without being warned and admitted that he had illicit relations with L's wife, held (Taschereau J. and Rinfret C.J.C. dissenting), this admission was not exculpatory but, in supplying a motive for the killing, was an incriminating fact and hence its admissibility depended on its voluntariness. *Held*, Estey J., dissenting, the statement admitting intimacy with L's wife and a subsequent statement, preceded by a warning, and confessing to the killing of L were properly admitted in evidence against accused. In any event the second statement confessing to the killing incorporated what was said in the first statement and was voluntarily made.

Per Taschereau J., Rinfret C.J.C. concurring: There was nothing in the first statement that could influence the second one and be an inducement for accused to make it so as to render the second statement inadmissible despite the warning which preceded it.

Cases Judicially Noted: *Goch v. The King*, [1948], 2 D.L.R. 417, S.C.R. 250, 79 Can. C.C. 221, *expid*; *Ibrahim v. The King*, [1914] A.C.

599; *Prosko v. The King*, 66 D.L.R. 340, 37 Can. C.C. 199, 63 S.C.R. 226; *R. v. Voisin*, 13 Cr. App. R. 89, apud; *Sankey v. The King*, [1927], 4 D.L.R. 245, S.C.R. 436, 48 Can. C.C. 97, *reid to*.

APPEAL by accused from a judgment of the Quebec Court of King's Bench, Appeal Side, 93 Can. C.C. 55, 224, affirming his conviction of murder. Affirmed.

Hon. Lucien H. Gendron, K.C., for appellant.

Noel Dorion, K.C., for respondent.

RINFRET C.J.C. concurs with TASCHEREAU J.

KERWIN J.:—The first statement has been treated by the majority of the Judges in the Courts below as exculpatory and I understand that that is also the view in this Court of my Lord the Chief Justice and my brother Taschereau. There is no doubt, however, that the statement affords a possible motive for the murder, and in my opinion that would be sufficient to warrant applying the rule, if it exists, that once a person is under arrest any statement given by him in answer to questions by those in authority is inadmissible unless preceded by a proper warning. It was argued that such a rule was laid down by this Court in *Gach v. The King*, [1943], 2 D.L.R. 417, S.C.R. 250, 79 Can. C.C. 221. Mr. Justice Taschereau, who spoke for the majority in that case, is of opinion that the decision does not apply but that is because, in his view, the first statement given by Boudreau was exculpatory. For the reason given, I am, with respect, unable to concur and it therefore becomes necessary to consider the *Gach* decision.

I believe it is agreed that it was sufficient for the disposition of that appeal to decide that the statement there in issue was given as a result of a threat and that the following statement, at pp. 420-1 D.L.R., p. 225 Can. C.C., p. 254 S.C.R., was therefore unnecessary for the actual decision: "There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority."

This statement is couched in very broad terms and, if read in its widest sense, would prevent, for instance, the placing

in evidence of any incriminating answers to questions put by a police officer to a person arrested at the scene of a crime immediately after its commission. It has been construed to change the law as it was considered to be prior to *Gach*,—by the Court of Appeal for Saskatchewan in *R. v. Scory*, [1945] 2 D.L.R. 248, 83 Can. C.C. 306, and by the dissenting Judge in the Court of Appeal in the present case and is really the basis of the appeal to this Court.

Again with great respect, I think it advisable that it should now be stated clearly what this Court considers the law to be. My view is that it has not been changed from that set out in *Ibrahim v. The King*, [1914] A.C. 599, and *Prosko v. The King* (1922), 66 D.L.R. 340, 37 Can. C.C. 199, 63 S.C.R. 226. The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.

In the present case the accused gave a second statement in which is repeated the admissions of his intimacy with the deceased's wife contained in the first statement but, in addition, contained an admission of the slaying. The second statement was made after a proper warning. The trial Judge admitted both in evidence and notwithstanding that he admitted the first because of his view that it was exculpatory, I am not prepared to disagree with his conclusion as to either. The police were not compelled to tell the accused specifically that notwithstanding his first statement he was not obliged to make another, and the first contains nothing that is not incorporated in the latter.

The appeal should be dismissed.

TASCHEREAU J.:—The appellant Gaston Boudreau was charged with the murder of Joseph Laplante, and on September 26, 1947, he was found guilty and condemned to be hanged. This conviction was upheld by the Court of King's Bench, Province

of Quebec (93 Can. C.C. 55, 224), Bissonnette J. dissenting, on the ground that certain confessions made by the appellant were illegally admitted in evidence.

The main facts leading to these alleged confessions which are impugned, may be briefly stated as follows:

On the morning of May 29, 1947, the body of Laplante was found on the highway, leading to Lake Castagnier, a small municipality near Amos, Abitibi, P.Q. The police authorities started immediately to investigate, and the Coroner's inquest, originally fixed for May 29th, was adjourned *sine die* by Coroner Brousseau until further evidence could be obtained. It was resumed on June 6, 1947.

At first, Constable Lefebvre, Sergeant Dupont, Sergeant Massue, Detective Oggier and Dr. Roussel, legal-medico expert for the provincial Government, who had come from Amos and Montreal to try and solve the mystery of Laplante's death, which was obviously a brutal murder, had but very scant clues leading to the discovery of the author of this crime.

On Sunday, June 1st, Lefebvre, Oggier and Dr. Roussel went to Laplante's house where the body was exposed. There, they saw amongst others, Mrs. Laplante and Gaston Boudreau, the appellant in the present case. As Boudreau looked nervous, he was asked by Oggier to follow him, and was brought the same evening to Amos to the police headquarters. He was there put under the supervision of the jailer, in the constable's room, and Sergeant Massue telephoned the Coroner to obtain the necessary authorization to detain him as an important witness. This authorization was given verbally on Sunday night, and the next morning, Massue received by mail a written authorization to detain Boudreau.

On that morning, Massue summoned Boudreau in his office and told him that he was held as an important witness. In view of the fact that Boudreau's friendship with Mrs. Laplante was publicly known, it was decided to ask him a few questions, and on Tuesday evening, at about 8.30, Massue questioned him on his movements during the week of the murder. Without being warned, Boudreau said that he had left the previous Tuesday to go hunting at a place called Canton Vassel, and that he had taken with him a shot gun. He explained his run in the bush where he had sprung his traps, his return on foot

the following Saturday to one Therrien's house, and then to his home in a taxi with one Carpentier. He also gave some information concerning his firearms, his cartridges and the result of his hunt. Massue then pursued further his investigation, and asked him about his relations with Mrs. Laplante. Boudreau freely told the circumstances in which he had met her, and the fact unknown to the police, that she was his mistress.

Boudreau was then asked if he was willing to repeat his statement so that it could be taken in writing, and he agreed without hesitation. Mr. Z. Bacon, secretary at the police headquarters, took down word for word Boudreau's statement. As the sheet of paper on which the answers were to be typewritten bore the regular warning, it was read to the accused before anything was committed to writing. Upon completion, the whole document including the warning, was read to the appellant who signed it after having been sworn by a Justice of the Peace.

Oggier continued his investigation. It was discovered that the pellets found in Laplante's skull were BB gauge, shot very likely from a 12-gauge shotgun, the same calibre as the one found in Aubuchon's house and belonging to Boudreau. The cartridges he had in his house were also BB. This new evidence strengthened the detective's suspicions which at first were very slight, but were, nevertheless still quite insufficient to charge Boudreau with murder. There was no direct evidence to link him with the commission of the crime.

On June 5, when Oggier returned from Lake Castagnier with Massue, it was decided to call Boudreau back to obtain from him additional information. Massue told him that he was held as an important witness concerning Laplante's death, and warned him that he was not obliged to talk, but that if he wished to say anything, it could be used as evidence before the Court. Boudreau then volunteered to give further information. He gave additional details concerning his intimacy with Mrs. Laplante, and while he was talking, Massue left the office to get a glass of water, and the accused spontaneously admitted to Oggier, without any question being put to him: "I may as well tell you, I killed him." Oggier called Massue back, and in the presence of Oggier and Massue Boudreau

told the whole story of how he killed Laplante. This statement was typewritten by an employee of the police, and sworn to by Boudreau.

The learned trial Judge ruled that these statements were admissible in evidence, and the majority of the Court of Appeal agreed with him.

The law concerning the admissibility of statements made to persons in authority, finds its application only when these statements are of an incriminating nature. The first statement made by the appellant on June 2nd to Massue, was not in my opinion of that character, and nothing can be found in it, which directly or indirectly tends to connect the appellant with Laplante's murder. In fact, Boudreau denied all participation in the offence, by telling all that he had done in the course of his hunting trip. His statement was exculpatory. The admission of his intimacy with Mrs. Laplante may at the most constitute a possible motive, but cannot in itself be considered as evidence of guilt. It does not show in the remotest way that the appellant was involved in Laplante's death.

Counsel for the appellant has cited the case of *Gack v. The King*, [1943], 2 D.L.R. 417, S.C.R. 250, 79 Can. C.C. 221. I do not think that the present case can be governed by that case, where the accused had made confessions of an incriminating nature. The Court held that in view of the circumstances revealed by the evidence, the accused was entitled to the same protection, before being questioned by a person in authority, as if he had been in custody.

As to the second statement made on June 5th, it is said in the dissenting judgment of Bissonnette J. that it was a logical sequence of the first one, and therefore became illegal, notwithstanding the warning by the police officers. With due respect, I do not agree with this contention. I fail to see anything in the first statement that could in any way influence the second one, and be an inducement for Boudreau to make it to the police. Boudreau spoke freely after having been warned, and I have no doubt that it is without fear and without a hope of advantage from the detectives, that he made the minutely detailed recital of this premeditated crime. The spontaneity of that part of the confession, dealing with the actual killing, establishes clearly its voluntary character, and this, with all

the other circumstances shown at the trial, leaves no doubt in my mind, that the conclusions reached by the learned trial Judge on the *voir dire*, were right.

I would dismiss the appeal.

RAND J.:—The appellant Boudreau was convicted of murder and the point of dissent on which he comes to this Court is the improper reception of two written statements, the first containing an admission of intimacy with the wife of the murdered man and the second, in addition to a repetition and an elaboration of the first admission, a full confession of the deed itself. At the time of making them he was being held under a coroner's warrant as a material witness. There was no more than a suspicion against him when in the first conversation with police officers in which questions were asked him he purported to detail his movements on the two or three days before the death and admitted the intimacy. Having consented to make the statement in writing, a Justice of the Peace was summoned and the statement made out, signed and sworn to by him. Before the signing, the Justice read out the words of the usual warning which happened to be printed across the top of the paper. Two days later, after a formal warning, a further discussion took place with two officers and while one of them was momentarily out of the room and after a reference had been made to his mother, Boudreau suddenly burst out with the words "j'aime autant vous le dire; c'est moi qui l'a tué." This was followed by details. He then, as in the first case, consented to have the statement put in writing, and a like course was followed as before.

The objection is that the first oral admission, without warning, of what, in my opinion, was, in the circumstances, an incriminating fact, nullified both statements: that, having committed himself so far, what followed was its compulsive sequence, unless, which was not the case, the warning on the second occasion had so specifically dealt with the previous statement as to efface any effect that might then have remained on his mind.

In support of this position, *Gack v. The King*, [1943], 2 D.L.R. 417, S.C.R. 250, 79 Can. C.C. 221, is cited. Mr. Gendron argued that what was formerly a rule of practice under which the trial Judge could and almost invariably did but was not

It would be a serious error to place the ordinary modes of investigation of crime in a strait-jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the Court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.

I do not mean to imply any right on the part of officers to interrogate or to give countenance or approval to the practice; I leave it as it is, a circumstance frequently presented to Courts which is balanced between a virtually inevitable tendency and the danger of abuse.

The appeal must therefore be dismissed.

KELLOCK J.:—This appeal comes to this Court upon the basis of the dissenting judgment of Bissonnette J. in the Court below, which affirmed the conviction of the appellant by the Superior Court on a charge of murder. The questions raised involve the admissibility of two statements made by the appellant to police officers during the course of questions put to him by them on two different occasions. On the first occasion the usual warning was not given until the appellant had completed his verbal answers but it was given before his statement was committed to writing and signed by him. This statement contained a circumstantial account of the movements of the appellant for some days before and after the day upon which the crime was committed, which indicated that he could not have been concerned in the crime. It also contained admissions, however, with respect to relations existing between the appellant and the wife of the murdered man.

The second statement reiterated the substance of the first, but added a complete and circumstantial account of the commission of the crime by the appellant. Mr. Justice Bissonnette treated the first statement as having been made without a warning and he considered it inadmissible on the ground that it had been laid down by this Court in the case of *Geach v. The King*, [1943], 2 D.L.R. 417, S.C.R. 250, 79 Can. C.C. 221, that lack of warning in any case rendered a statement inadmissible

bound to rule out confessions resulting from questions put to a person under arrest by one in authority without a warning has, by that decision, been converted into an inflexible rule of law; and it is pointed out that that view of it has been taken by the Court of Appeal for Saskatchewan in *R. v. Scory*, [1945] 2 D.L.R. 248, 83 Can. C.C. 306. The particular language from which this conclusion is drawn is that of Taschereau J. in the following paragraph [pp. 420-1 D.L.R., p. 225 Can. C.C.]: "There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority."

As the reasons of both Kerwin J. and Taschereau J. show, there was in the case clear evidence of a threat on the part of the officer, and the facts which might have called for such an examination of the rule as is suggested were not present. Construed as it was urged upon us, then, it would be *obiter*: but I am bound to say that I cannot take the language as intended to do more than to state the existing rule. It is, therefore, I think, a misinterpretation of this decision to treat it as having effected a significant change in the character of the rule, and the point as put to us by Mr. Gendron falls.

The cases of *Ibrahim v. The King*, [1914] A.C. 599, *R. v. Vosem*, [1918] 1 K.B. 531, and *Prosko v. The King*, 66 D.L.R. 340, 37 Can. C.C. 199, 63 S.C.R. 226, lay it down that the fundamental question is whether the statement is voluntary. No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. The underlying and controlling question then remains: Is the statement freely and voluntarily made? Here the trial Judge found that it was.

as a matter of law. He was also of the opinion that the inadmissibility of the first statement rendered the second inadmissible, as in his view, the appellant ought to have been pointedly warned that notwithstanding he had made the first statement he need not say anything. The question is therefore raised as to whether or not, assuming the warning with respect to the first statement to have been insufficient, either statement was thereby rendered inadmissible as a matter of law, even although the learned trial Judge, upon a consideration of all the relevant circumstances, was of opinion that in each instance the appellant had spoken voluntarily.

The governing principle is stated by Lord Sumner in *Ibrahim v. The King*, [1914] A.C. 599 at pp. 609-10, as follows: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg. v. Thompson*, [1893] 2 Q.B. 12."

At p. 613 Lord Sumner refers to the decision of the Court of Criminal Appeal in England in *R. v. Knight & Thayer* (1905), 20 Cox C.C. 711, and quotes from the judgment of Channell J. at p. 713, where the latter said with respect to answers to questions put by a constable after arresting: "'When he has taken any one into custody . . . he ought not to question the prisoner . . . I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence.'"

On the same page Lord Sumner refers to an excerpt from the judgment of Channell J. in *R. v. Booth & Jones* (1910), 5 Cr. App. R. 177 at p. 179, where the latter said: "'The moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does

ask a question it is inadmissible; what happens is that the judge says it is not advisable to press the matter.'"

Lord Sumner concludes: "And of this Darling J., delivering the judgment of the Court of Criminal Appeal, observes the 'principle was put very clearly by Channell J.'"

Lord Sumner at p. 614 refers to this view of the law as "a 'probable opinion' of the present law, if it is not actually the better opinion", although their Lordships say that the final declaration as to the law on the subject should be left to the "revising functions of a general Court of Criminal Appeal".

In *R. v. Colpus*, [1917] 1 K.B. 574, a decision of the Court of Criminal Appeal in England, in delivering the judgment of that Court Viscount Reading C.J., said at 579: "We do not propose to say more in this case than that the principle laid down in *Reg. v. Thompson*, [1893] 2 Q.B. 12, and approved in *Ibrahim v. Rex*, [1914] A.C. 599, is the principle which is to be applied in the present case."

The case before that Court involved statements made by the appellants before a Military Court of inquiry. These were admitted although there had been no warning, the Court being of opinion that on all the evidence they were voluntary statements.

In the following year in *R. v. Voisin*, [1918] 1 K.B. 531, again a decision of the Court of Criminal Appeal, the appellant, in response to a request by the police, went to a police station where he made a statement which was taken down in writing. He was then asked whether he had any objection to writing down certain words, and upon his stating he had no objection, he wrote them. He was not cautioned at any time. It was contended at the trial that the words which he had written were inadmissible on the ground that the writing was obtained by the police without having first cautioned the appellant and while he was in custody. The writing was, however, admitted. The Court followed the judgment of Lord Sumner in *Ibrahim's* case. At p. 538 A. T. Lawrence J. said: "The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter

of law that the absence of a caution makes the statement inadmissible."

I do not think it possible to regard this case as other than a case of a statement obtained from a person in custody as the result of questioning by the police and it was so dealt with by the Court. There is, in my opinion, no room for distinction whether there be one or more than one question asked.

In 1922 the question came before this Court in *Prosko v. The King*, 66 D.L.R. 340, 37 Can. C.C. 199, 63 S.C.R. 226. In that case the appellant was in the custody of two American detectives for the purpose of being brought before the American immigration authorities. A warrant for his arrest on a charge of murder had been issued in this country.

The appellant was told by the immigration officers that they were going to take up his case with the United States immigration officials and have him deported to Canada, whereupon he said: "I am as good as dead if you send me there." Upon the officers asking "why", he gave the statement which was in question. No warning had been given to him. The Chief Justice, Idington, Anglin and Brodeur JJ., followed and applied the principle laid down in *Ibrahim v. The King*, *R. v. Colpus* and *R. v. Voisin*. In this case but a single question was asked. The case was treated by all the members of the Court as one of answers made to questions by persons in authority without a warning having been given. It was held that the evidence was admissible. The Court considered that the basic question to be answered was as to whether or not the statement had been voluntarily made. At p. 347 D.L.R., p. 207 Can. C.C., p. 237 S.C.R., Anglin J. said: "The two detectives were persons in authority. The accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him.

"While these facts do not in themselves suffice to exclude the admissions, as Duff J. appears to have held in *R. v. Kay*, (1904), 9 Can. Cr. Cas. 403, they are undoubtedly circumstances which require that the evidence tendered to establish their voluntary character should be closely scrutinised."

In *Gach v. The King*, [1943], 2 D.L.R. 417, S.C.R. 250, 79

Can. C.C. 221, the appellant was charged with having unlawfully received certain ration books, knowing them to have been stolen. Certain police officers called upon the appellant and told him that one Nagurski had stated that he had sold ration books to the appellant, that he could be prosecuted, and that in any event it would be better for him to hand them over. At the end of the conversation they told him that he was to accompany them to the police barracks to talk to an inspector. The inspector there told the appellant that he would, in all probability, be charged. He was then asked certain questions and made certain answers. No warning was given. The admissibility of these answers was challenged.

Kerwin J., who delivered the judgment of himself and Sir Lyman P. Duff C.J.C., referred to *Ibrahim v. The King*, [1914] A.C. 599, and *Sankey v. The King*, [1927], 4 D.L.R. 245, S.C.R. 436, 48 Can. C.C. 97, and held the evidence inadmissible as having been made after appellant had been told by the police that it would be better if he made a statement.

The judgment of Taschereau J., with whom Rinfret J., as he then was, and Hudson J. agreed, reached the same result. The judgment of the majority is based upon the judgments in *Reg. v. Thompson*, [1893] 2 Q.B. 12, *R. v. Knight & Thayre*, 20 Cox C.C. 711, *Lewis v. Harris* (1913), 24 Cox C.C. 66, and *R. v. Crowe & Nyerscough* (1917), 81 J.P. 288.

As already mentioned, the first two of the above four authorities are referred to by Lord Sumner in *Ibrahim's* case. In *Reg. v. Thompson* there is no suggestion that any warning had been given. The statement, however, was not rejected on that ground but on the ground that the Crown had not satisfied the burden resting on it of establishing that the statement had been made voluntarily. That is all that the case is cited for by Taschereau J. Had the mere lack of warning been regarded as rendering the statement inadmissible, the strong Court which decided *Reg. v. Thompson*, would undoubtedly have said so. They did not.

Again in *R. v. Knight & Thayre*, 20 Cox C.C. 711, the statement which the Crown tendered had in fact been preceded by a warning. It is not therefore in itself a decision as to admissibility or inadmissibility where no warning is given. Taschereau J. quotes from the reasons for judgment of Channell

whatever the answer may be he will arrest the person to whom he is speaking, to ask that person an incriminating question. The law does not say that the answer must be excluded and that it is not evidence, but it has been frequently held that if that rule is infringed then the judge in his discretion may reject the evidence, and it is tolerably certain that if there is any sign that the evidence was unfairly obtained he would reject it. The true rule is that nothing must be done to hold out an inducement to a person, and no threat must be used to induce a person, to make an incriminating statement."

The last case to which Taschereau J. refers is *R. v. Crows & Nyerscough*, 81 J.P. 288, a decision of Sankey J., as he then was. The question involved was as to the admissibility of a statement in answer to questions put by the police made by the appellant Nyerscough before arrest and before the police had determined to arrest her. After she had made the answers orally, the appellant signed a written statement in which she said that: "This statement has been read over to me. It is made quite voluntarily and is true." Sankey J. admitted the statement on the grounds, (1) that it had been made when she was not under arrest; (2) before it had been decided to arrest her; and (3) that she herself had said it had been made voluntarily. In the course of his judgment Sankey J. said what is quoted by Taschereau J., viz.:

"If a police constable has determined to arrest a person, or if a person is in fact in custody, then he should ask no questions which will in any way tend to prove the guilt of the person in custody from his own mouth."

It is to be noted that Sankey J. does not say that if this rule is disobeyed and a statement is made, it is inadmissible as a matter of law.

It is clear therefore that in none of the cases referred to in the judgment of the majority in *Gock's* case, is it laid down that a statement made by a person in custody in answer to questions put by a person in authority, is, as a matter of law inadmissible. On the contrary, the question is in all cases as to whether the Crown, as stated in *Reg. v. Thompson, supra*, has satisfied the onus that the statement has in fact been made voluntarily. While there may be expressions in the judgment of the majority in *Gock's* case, taken apart from the context,

J. at p. 713, including: "When he has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so." [p. 421 D.L.R., p. 226 Can. C.C.]

Channell J. immediately adds, however, what is included in that which is quoted by Lord Sumner in *Ibrahim's* case [(1914) A.C. at p. 613]:

"I am not aware of any distinct rule of evidence, that if such improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answer to be given in evidence, and in my opinion that is the right course to pursue."

That is not to say that the rule is that all such answers are inadmissible, but that as a matter of discretion the Judge may refuse to admit. That this is the correct view of what the learned Judge says is shown by that part of his direction in *R. v. Booth & Jones*, 5 Cr. App. R. 177 at p. 179, quoted by Lord Sumner in *Ibrahim's* case at p. 613:

"The moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question, it is inadmissible; what happens is that the judge says it is not advisable to press the matter."

In *R. v. Booth & Jones*, as in *R. v. Knight & Theyre*, the statement tendered had in fact been preceded by a warning.

In *Lewis v. Harris*, 24 Cox C.C. 66, the headnote to which is quoted by Taschereau J., a constable had observed a child coming out of a store on a Sunday, and finding out from her that she had made a purchase of candy, he went back into the store with her and asked the proprietor certain questions, the admissibility of which was in question on the appeal. In that case the fact was that the appellant was not in custody and the constable had not made up his mind to lay a charge. The case is therefore not in *pari materia* with the case at bar. In the course of his judgment Darling J. said at p. 71:

"A constable ought not, if he has made up his mind that

which might appear to extend the decisions, as pointed out by Atkinson J. in *Lorentzen v. Lydden & Co.*, [1942] 2 K.B. 202 at p. 210: "Again and again judges have been told by the Court of Appeal and the House of Lords that words used in previous cases must be interpreted with reference to the facts before the court and the issues with which it was dealing."

In *Gach's* case it is plain from the judgment of the majority that the statement sought to be used in evidence had been made by the appellant after the officers had said to him "that it would be better for him to hand them over". In these circumstances all the members of the Court were of opinion that it could not be said that the statement was voluntary.

I do not consider therefore that it can be said that anything said in *Gach's* case can be taken as inconsistent with the previous decision in *Prosko's* case by which the Court was bound, even though it could be said that the Court was not also bound to follow what was termed by Lord Sumner in *Ibrahim's* case as a "probable opinion" of the present law, if it is not actually the better opinion."

In the case at bar the second statement, which included the substance of the first, was held by the trial Judge to have been voluntarily made. I think therefore that the appeal must be dismissed.

ESTRY J. (dissenting).—The appellant's conviction for the murder of Joseph Laplante was affirmed by a majority in the Court of King's Bench (Appeal Side) in Quebec [93 Can. C.C. 55, 224]. Mr. Justice Bissonnette dissented on the bases as set out in the formal judgment:

"1. L'illégalité dans l'obtention et la production de la première confession;

"2. L'illégalité dans l'obtention et la production de la deuxième confession, particulièrement en raison de l'illégalité de la première;

"3. L'inadmissibilité de la preuve des aveux ou confessions."

Mr. Justice Bissonnette was of the opinion that the first statement or confession was not exculpatory as the learned trial Judge had construed it, and because no warning had been given it was in his opinion improperly admitted. He summarized his conclusions relative to the second statement under three headings, as follows:

"Le premier, c'est que j'estime que la mise en garde sur la deuxième confession, même si elle a été faite, ne constituait pas, sous les circonstances de cette cause, un avertissement suffisant, car ce jeune homme ne pouvait alors ignorer qu'il avait déjà fait certains aveux et que tout ce qu'on lui demandait ce soir-là, c'était de circonstancier ce qu'il avait déjà dit. Il s'attache donc une présomption très forte que l'appelant pouvait se croire tenu, obligé, contraint de parler.

"Le deuxième motif c'est que les deux confessions sont si intimement liées, que l'exclusion de l'une entraîne celle de l'autre, car le jury ne pouvait certes pas se détacher complètement de l'impression que la lecture de la première pouvait avoir dans son esprit, dans la considération du mobile du crime.

"Comme troisième motif, je dirai, à la suite de M. le juge en chef Anglin dans l'affaire *Starkley*, que si l'interrogatoire que l'on fait subir à un prévenu n'est pas, *per se*, illégal, il faut, d'autre part, bien s'assurer que la Couronne s'est acquittée de son obligation de prouver que les aveux son libres, nullement entachés d'une contrainte physique ou morale quelconque. Et cette preuve, ajoutait le juge en chef Anglin, ne peut qu'exceptionnellement ressortir du seul fait du serment des officiers de police que l'inculpé a parlé librement."

The murder occurred Thursday, May 29, 1947, at Lac Castagnier about 24 miles from Amos in the Province of Quebec.

Detective Oggier arrived at Amos on Saturday, May 31st. He acquainted himself with the information already gathered by the provincial police and on Sunday he and Constable Lefebvre proceeded to Lac Castagnier. At Mrs. Laplante's they found a number of people, including Boudreau. Detective Oggier desired to question Boudreau "sur ses allées et venues," and "parce que j'avais des soupçons," and requested him to accompany them to Amos. At Amos the coroner was communicated with and Boudreau detained at the jail. On Monday morning, June 2nd, Detective-Sergeant Massue had Boudreau brought in to his office and there informed him that he was held as a material witness. Boudreau said nothing when so informed and was taken back into custody. In fact no questions were asked and no statement made by Boudreau until Tuesday night,

the reason for which is explained by Detective Oggier in the course of his evidence:

"Q. Vous avez pas jugé à propos de lui parler de ses allées et venues?"

"R. Non, mon enquête était pas complète."

"Q. Pourquoi pas commencer à le questionner?"

"R. J'avais pas assez d'informations sur la cause et j'ai cru bon de continuer mon enquête."

Detective Oggier continued his inquiries at Lac Castagnier and returned to Amos on Tuesday, June 3rd. That evening about 8.30 Boudreau was brought into the office of Detective-Sergeant Massue where Massue and Oggier questioned him. No warning was given and the conversation lasted about an hour. The statements made by Boudreau were in reply to questions, for the most part by Detective-Sergeant Massue. Boudreau there admitted ownership of a .12 gun as well as a revolver and told the police that he had left his home about midday on Tuesday, May 27th, to go into the woods to check over his traps, and returned on Saturday, when he heard of the murder of Laplante. He also stated that he had visited and worked at Laplante's place. When questioned he admitted intimate relations with Mrs. Laplante but when pressed with regard thereto "il paraissait un peu gêné".

The officers acknowledged that his information relative to his relations with Mrs. Laplante, apart from some details, only corroborated that which they had already received. In fact as regards the entire interview Oggier deposed that they had received no new information of consequence but their suspicions were strengthened. As yet, however, they concluded that they did not have sufficient to justify the laying of an information and complaint.

Boudreau, after making these verbal statements to the officers, consented to make a statement in writing. Bacon, the secretary of the provincial police, was called to take down the statement and when completed Tessier, Deputy Prothonotary, was called. He ascertained that Boudreau could read, handed to him a copy of the statement which he followed as Tessier read it aloud. Boudreau thereafter signed it and pledged his oath thereto before Tessier.

Detective Oggier returned on Wednesday and Thursday to

Lac Castagnier where he continued his investigation and returned again to Amos Thursday evening about 8 or 8.30. He and Detective-Sergeant Massue had further conversation and decided to again question Boudreau. Oggier's own explanation is as follows:

"R. On a décidé tous les deux ensemble. J'ai rencontré le sergent Massue à son bureau et je lui ai fait part de mon enquête additionnelle au Lac Castagnier et on a décidé de le faire venir, de le mettre sur ses gardes et de voir s'il était décidé de nous donner d'autres informations."

"Q. Vous croyiez avoir une preuve contre lui et vous vouliez avoir une déclaration de lui?"

"R. Oui, parce que je voyais que sa première déclaration n'était pas complète."

Boudreau was brought into Massue's office at about 11 o'clock that night and there remained until about 1 o'clock in the morning. On this occasion prior to any questions being asked Massue warned Boudreau. As to why the warning was given Massue deposed: "Parce que nous étions plus convaincus que le mardi soir." Immediately he had given the warning Massue asked the appellant "s'il avait des informations nouvelles à nous donner". Oggier deposed: "Il s'est assis et il a pensé et il a commencé à conter la même histoire que la fois d'avant." He also deposed: "Le sergent Massue a posé plusieurs questions concernant les armes à feu et madame Laplante." The appellant's gun used in committing the murder, his revolver and some cartridges were shown to him during this interview. The sack and the box found near the scene of the murder may or may not have been shown to him. It was at this interview that Boudreau stated: "Messieurs, vous le savez pas combien que j'aime cette femme-là." At some time during the interview the appellant became and remained very nervous. After about half an hour Massue left his office to obtain a glass of water. As to what happened in his absence Oggier deposed:

"Je lui ai dit que j'avais vu son père et sa mère et là il a dit: 'J'aime autant vous le dire, c'est moi qui l'a tué.' J'ai lâché un cri et j'ai dit: 'Viens t'en de suite.'"

In reply to their further questions Boudreau gave them the details of the murder and consented to give a written statement. Then, as on Tuesday evening, Bacon was called, later Tessier,

before whom the statement was signed and appellant pledged his oath thereto.

The learned trial Judge admitted the first statement in evidence because, in his opinion, it did not implicate the appellant but was rather exculpatory in character. It did contain an alibi and an admission that appellant owned a .12 gun. The greater part, however, described his relations with Mrs. Laplante, from which the jury might well find the motive that prompted the murder. In this aspect the statement implicated the appellant in the commission of the offence.

"If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well": *Per Duff C.J.C.* in *R. v. Barbour*, [1939] 1 D.L.R. 65 at p. 67, 71 Can. C.C. 1 at pp. 19-20, [1988] S.C.R. 465 at p. 469.

See also Lord Atkinson in *R. v. Ball*, [1911] A.C. 47.

Then when both statements are read together the alibi is but a contradiction of his subsequent confession and to that extent is evidence that would be prejudicial to the appellant should any question of credibility arise in the mind of the jury. The learned trial Judge, with respect, misdirected himself as to the significance of this statement as evidence against the appellant.

On Thursday evening Massue and Oggier again had the appellant, who was still under arrest, brought into the former's office, ". . . de voir s'il était décidé de nous donner d'autres informations . . . parce que je voyais que sa première déclaration était pas complète."

The important issue the learned trial Judge had to determine was whether the confession "J'aime autant vous le dire, c'est moi qui l'a tué", made to Oggier was free and voluntary within the meaning of the authorities. These words are not in the written statement that followed. It is, however, what led up to the making of this confession that is vital in determining the issue, was it freely and voluntarily made. If in determining whether a confession is freely and voluntarily made the trial Judge does not misdirect himself in law his finding should be accepted by an Appellate Court. It appears that in this case the learned trial Judge, apart from his misdirection with regard to the first statement already dealt with, has misdirected himself

in not considering the warning as given in relation to all the circumstances leading up to the making of this confession, including those before as well as those after the warning was given, and particularly as to whether, under all the circumstances, the effect of the warning as given had not been destroyed. It is the sufficiency of the warning under all the circumstances, the association of or connection between the two statements and the effect of the questions asked that are raised in the dissenting opinion of Bissonnette J.

The oft-quoted statement of the law by Lord Sumner in *Ibrahim v. The King*, [1914] A.C. at pp. 609-10, reads as follows: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

In the *Ibrahim* case the accused was in custody when Major Barrett came up to him and without any thought of a prosecution asked: "Why have you done such a senseless act?", to which the accused replied: "Some three or four days he has been abusing me; without a doubt I killed him." Nothing more was said and no warning or caution had been given. This confession was held to have been freely and voluntarily made and therefore admissible. In this connection it is important to observe the remarks of Lord Sumner relative to the question as asked [p. 608]: "In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service."

In *R. v. Voisin* (1918), 13 Cr. App. R. 89, no warning was given and yet the evidence was admissible. There the murdered party had not been identified. The police had a parcel containing a portion of the remains on which appeared the words "Bladie Belgium". Several persons, including the accused, were held for questioning. At the request of the police the accused wrote the words "Bladie Belgium" in handwriting

that resembled and spelling identical with that on the parcel. Lawrence J. at pp. 94-5 stated: "In this case the appellant wrote these words quite voluntarily. The mere facts that they were police officers, or that the words were written at their request, or that he was being detained at Bow Street do not make the writing inadmissible in evidence... if the writing had turned out other than it did and other circumstances had not subsequently happened it is certain that he, like others who were similarly detained, would have been discharged."

In *Prosko v. The King*, 66 D.L.R. 340, 37 Can. C.C. 199, 63 S.C.B. 226, the accused was held in custody by the United States immigration officials who explained to the accused that they were taking proceedings for his deportation to Canada. The accused then said: "I am as good as dead if you send me over there." A constable asked why and the accused in the course of his explanation included the confession tendered and admitted at his trial. No warning was given and yet the statement was held to be freely and voluntarily made and admissible in evidence.

These cases are illustrative of the principle that the statement must in every case be voluntary. The mere fact that the confession was made by one in custody in response to a question by one in authority without a warning given does not make it inadmissible.

Then there are the cases such as *E. v. Knight & Theyre*, 20 Cox C.C. 711, where a detective after warning the accused questioned him for nearly 3 hours. Throughout the first 2 hours the accused denied any knowledge of the fraud but during the last hour made the confession tendered as evidence. Chanell, J. stated, at p. 714: "The questioning was continued for a very long period, the man's denials were not accepted, and the impression conveyed by Shinner to the prisoner's mind may well have been this: 'You will have to tell me that you did this thing, because I shall not let you go till you do so.' This certainly cannot be said to be making a statement voluntarily. It may well be that an admission made immediately after a caution had been given by the person in authority would be admissible, but it does not follow that a suspended person can be cross-examined until the person putting the questions is satisfied."

These cases emphasize that whether the warning has or has not been given it must be determined under all the circumstances of each case if in fact the statement has been freely and voluntarily made.

There has developed a rule of practice that when the police or others in authority have either arrested the accused or made up their minds that he is the party whom they will prosecute then before being questioned he should be cautioned or warned in a manner that will explain his position much as a Justice of the Peace or Magistrate does to an accused at the conclusion of the Crown's evidence at a preliminary inquiry under s. 684(2) *Cr. Code.* In *Gack v. The King*, [1943], 2 D.L.R. 417, S.C.R. 250, 79 Can. C.C. 221, it was the view of the majority of this Court that the warning under the circumstances of that case should have been given. The general language used has been construed to effect a change in the law: *R. v. Scory*, [1945] 2 D.L.R. 248, 83 Can. C.C. 306. The general language construed as effecting a change in the law was unnecessary to that decision. Moreover, that case does not purport to overrule *Prosko v. The King*, *supra*, nor any of the cases in which a statement has been received as voluntary although no warning had been given, nor does it purport to hold that a statement should be held to be voluntary where the warning has been given. In each case the confession must be affirmatively proven by the Crown to have been freely and voluntarily made before it can be received in evidence. The fact a warning has been given as well as its content is an important circumstance to be considered: *Reg. v. Thompson*, [1893] 2 Q.B. 12.

The circumstances from the outset pointed to Boudreau and as the police stated, caused them to be suspicious that he had committed the murder. He was taken into custody on Sunday but not questioned until Tuesday evening, when in reply to their questions he explained that at the time of the murder he was in the woods caring for his traps and did not hear of Laplante's death until he returned Saturday morning. He admitted ownership of a .12 gun and his relations with Mrs. Laplante. The following Thursday evening the appellant was again brought into Massue's office to see if he had decided to give them further information and because, as Oggier stated, he did not think his first statement was complete.

The events of Thursday evening in these circumstances cannot be segregated from those of Tuesday evening. The questions asked on Tuesday evening, his alibi, his admission to ownership of a .12 gun and his relations with Mrs. Laplante, the reasons why he was again questioned on Thursday evening, as well as the questions asked, and all the incidents of that evening are important factors. At the outset Thursday evening appellant was warned and immediately asked by Massue the question already stated, "s'il avait des informations nouvelles à nous donner," which directed the appellant's mind at once to what he had said Tuesday evening. Then what is of the greatest importance in this issue—apart from this first question, the showing of the equipment used in the commission of the murder to the appellant, the reference to his parents, the fact that other questions relative to the gun and his relations with Mrs. Laplante were asked, and the nervous condition of the appellant, the evidence does not disclose what further questions were asked or what transpired in that office immediately prior to the appellant's confession. The events prior to and of that evening, including the actual words of the confession, "J'aime autant vous le dire, c'est moi qui l'a tué," were important factors in the circumstances.

The passage already quoted by Lord Sumner in the *Ibrahim* case is an indication of the importance of the nature and character of the actual questions asked. The three authorities, *Ibrahim*, *Voisin*, and *Prosko*, *supra*, as well as *Sankey v. The King*, [1927], 4 D.L.R. 245, S.C.R. 436, 48 Can. C.C. 97, all emphasize the importance of considering the details leading up to a confession.

I do not subscribe to the view pressed by counsel for the appellant that the warning necessarily should have included such words, as would have informed the appellant that, notwithstanding that he had already made one statement, no matter what it contained he need not now make another or any statement. Had such words been included they, of course, would have been a factor. It is not, however, desirable that separate and distinct requirements should be specified designed to cover specific situations; rather the issue to be determined should remain in all cases, was the confession freely and voluntarily made. The existence of a previous statement and the circumstances

under which it had been made may well be important in determining the issue in a particular case. It was important here because the same officers were present on each occasion. Immediately the warning was given the question asked directed the appellant's attention to his previous statement and appellant himself began by repeating the same history he had related on Tuesday evening. It was from this beginning on Thursday evening that events led up to the confession. A warning under such circumstances, when already he had given information in reply to questions and when immediately after the warning he is further questioned by the same parties in a manner that directed his mind to the information already given, is quite different in its effect from a warning given before any questions are asked.

The events of the two evenings upon all the facts of this case were intimately associated by the officers themselves as well as by the appellant and cannot be separated in considering the admissibility of the statements made on these respective occasions. The Courts have under such circumstances always insisted that such confessions be received with care and caution. The statement of Chief Justice Anglin in *Sankey v. The King*, *supra*, at p. 270 D.L.R., p. 101 Can. C.C., p. 441 S.C.R., is appropriate: "It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the Court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown: *Rez v. Bellos*, [1927] 3 D.L.R. 186, S.C.R. 258, 48 Can. C.C. 126; *Prosko v. The King* (1922), 37 Can. C.C. 199, 66 D.L.R. 340, 63 S.C.R. 226. That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily."

The learned trial Judge's misdirection relative to the first statement caused him to eliminate and not to consider what transpired prior to the warning on Thursday evening. That which took place after the warning should have been placed be-

fore the learned trial Judge in greater detail. As Chief Justice Anglin stated in *Sankey v. The King, supra*: "We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he 'interviewed' the prisoner."

The learned trial Judge in proceeding to find that the Crown had discharged the onus of proof and established that the statement was freely and voluntarily made without these further details, in particular the questions asked, the incidents surrounding the showing of the equipment used in the commission of the murder, as well as all the other incidents of that half hour, constituted a failure to direct himself as to that caution and care with which evidence in such cases should be scrutinized.

The appeal should be allowed and a new trial directed.

LOCKE J. concurs with KELLOCK J.

Appeal dismissed.

REX v. SCOTT.

Ontario Court of Appeal, Robertson C.J.O., Laidlaw and Aylesworth J.J.A., March 28, 1949.

Trial III B—Unlawful wounding—Cr. Code, s. 273—Intent—Sufficiency of charge—Failure to object—Effect—

Where in his charge to the jury on a charge of unlawful wounding with intent to do grievous bodily harm, the trial Judge omitted to put the question of intent to the jury, *held*, on appeal, that there being no reason for doubt as to the intent of the attackers and no question raised in regard to it or objection made to the Judge's charge, the appeal should be dismissed. While in a criminal case a failure to object at the proper time does not preclude the question being raised on appeal, this is not the case where, as here, the objection sought to be taken is wholly technical and of no substance.

Cases Judicially Noted: *R. v. Linton*, 93 Can. C.C. 97, [1949] O.R. 100, distd.

APPEAL by accused from conviction and leave to appeal from sentence on a charge of unlawful wounding contrary to s. 273 of the *Cr. Code*. Affirmed.

G. A. Martin, K.C. and G. B. Bagwell, K.C., for appellant.

T. F. Forestell, K.C., for the Crown.

The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on his trial before His Honour Judge Fuller and

a jury, in the General Sessions of the Peace of the County of Welland, on December 11, 1948, on the charge that he did, on June 24, 1948, at the Township of Wainfleet, in the County of Welland, with intent to do grievous bodily harm, unlawfully wound Clodmire Beaudin, Charles Gervais and John Missen, contrary to s. 273 of the *Cr. Code*.

In the early morning of June 24, 1948, and before daylight, Clodmire Beaudin, Charles Gervais and John Missen, with others, were being taken by motor truck along certain highways in the County of Welland, with the intention of being employed upon a vessel then passing, or expected to pass, through the Welland Canal, when they were waylaid and set upon by a body of men armed with clubs, and forcibly taken out of the motor vehicle in which they were travelling, and severely beaten by the men who had waylaid them. The appellant was convicted as one of the persons who waylaid the men travelling in the motor truck to join the vessel.

There is no room for doubt of the occurrence of the offence. The appellant says that he was not concerned in the attack on these men, and was not at the place where it occurred at the time of the offence, but was at a place some miles distant. This defence was supported by his own evidence and the evidence of several other witnesses. For the Crown, there was the evidence of two of the men who were in the party of men being transported by motor truck to join the vessel, and who gave evidence that the appellant was one of their attackers.

The trial Judge very carefully charged the jury in respect to the evidence of identification, and that the jury considered the question of identification with care appears from the fact that another accused person tried with the appellant, and as to whom the evidence of identification was not so clear, was acquitted. It was a matter for the jury to determine whether they should accept the evidence of identity given by the witnesses for the Crown, or the evidence of the witnesses for the defence who said that the appellant was elsewhere at the time of the offence in question.

The jury having found the appellant guilty, and there being substantial evidence to support their finding, it is out of the question that this Court should interfere with that finding.

In the course of his charge to the jury the learned trial Judge

Chapter 2, Evolution

*Chapter 3, Persons in Authority
(relevant portions)*

The ADMISSIBILITY of CONFESSIONS

by

The Honourable
FRED KAUFMAN
One of the Judges of the
Quebec Court of Appeal

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EVOLUTION

Legal rules can be found in the text books, but true comprehension requires some knowledge of history. Lord Sumner laid down the law on confessions in one famous sentence,¹ but it is better understood if we know its judicial forbears. And since external factors frequently leave their mark on the case law, they, too, must be considered.

In the evolution of the law on confessions, a number of milestones divide the past: *R. v. Rudd*,² which marked the awakening conscience; *R. v. Warickshall*,³ which first laid down the proper basis for exclusion; *R. v. Baldry*,⁴ which brought a sense of proportion to the law; *R. v. Thompson*,⁵ with its strictness concerning the burden of proof; *Ibrahim v. R.*,⁶ which introduced the "modern" rule, and now, in Canada, *Piché v. R.*,⁷ which at last abolished the artificial distinction between inculpatory and exculpatory statements. Some of these cases correspond with eras of history: the free use of torture, the pangs of conscience, the "old toriyism", followed by a "liberalism" which eventually "ran wild" and had to be corrected.⁸

Interrogation as a method of investigation is not new. Adam is asked "Hast thou eaten of the tree?" and replies "The woman whom thou gavest to be with me, she gave me of the tree, and I did eat". Cain is asked "Where is Abel thy brother?" and he replies evasively "Am I my brother's keeper?"⁹

1 *Ibrahim v. R.* [1914] A.C. 599 at 609 (P.C.); the full quotation may be found on p. 22, *infra*.

2 (1775), 168 E.R. 160.

3 (1783), 168 E.R. 234.

4 (1852), 169 E.R. 568.

5 [1893] 2 Q.B. 12 (C.C.R.).

6 [1914] A.C. 599.

7 [1970] 4 C.C.C. 27 (S.C.C.). For a discussion of this case, see Chapter 1, *supra*.

8 Baker, *The Hearsay Rule* (1950), p. 54.

9 Genesis 3:11 and 4:9-10. The Harvard L.R. 1966, vol. 79, p. 938, suggests that "The nature of a typical response by those subject to interrogation does not seem to have changed much over time", and it invites the reader to compare Adam's reply with Escobedo's, "I didn't shoot Manuel, ... [DiGerlando] did it": *Escobedo v. Illinois* (1964), 378 U.S. 478 at 483.

The practice of submitting an accused to a compulsory examination, which frequently included the use of torture, was familiar to both the Greeks and the Romans. In Greece, it was thought to be the only way to have the truth from a slave:

[T]he true reason for this extraordinary rule has been stated by some contemporary Greek orators to be the experience that evidence given under torture is always true, whereas evidence given freely is often false. Nevertheless, torture was not applied to freeborn citizens; but the evidence given by slaves under torture was held more reliable than evidence given by citizens without torture. The psychology underlying this remarkable proposition is that a man — and more particularly a slave — will tell all sorts of stories in order to avoid being tortured; but if he persists in his story under torture, it must surely be true.¹⁰

The Romans did not permit slaves to testify, save in a few cases. But when they did, "their examination was normally by torture".¹¹

In England, the rack was occasionally employed until the reign of Charles I,¹² and "even Lord Coke was prepared to wink at, if not to justify, its use, while Lord Bacon did not hesitate, as Attorney-General, to superintend, in person, the torture of an aged clergyman".¹³ In Scotland the use of torture was not abolished until 1709.¹⁴

Gradually, however, the practice was discontinued, and the emphasis shifted from torture to threats. But it was not until 1775 that a court of law stated a rule which bears any resemblance to the modern one. This was in *R. v. Rudd*,¹⁵ where Lord Mansfield C.J. referred to "confessions under threats or promises".¹⁶

Strictly speaking, this was a *dictum*, a statement of fact. But here, possibly for the first time, did a court connect the exclusion of confessions with the use of threats or promises. A seed was planted and it quickly took root. And so, eight years later, we find a statement of the law in *R. v. Warickshall*.¹⁷

10 Cohn, *Tortures and Confessions*, Scripta Hierosolymitana, Hebrew University, cited by Freedman, *Admissions and Confessions*, Studies in Canadian Criminal Evidence (1972), p. 98.

11 Buckland, *A Text-Book of Roman Law* (1950), p. 637.

12 1625-1649. See also Jardine, *Use of Torture in the Criminal Law of England* (1836), and Lowell, *Judicial Use of Torture* (1897), 11 Harvard L.R. 220. Both authors suggest that the last instance of torture in England occurred in 1640, but Wigmore (III Chadbourn rev. 1970, §818) points to *Tong's Trial* (1664), 6 How. St. Tr. 259, where the accused is reported to have said: "I confess I did confess in the Tower, being threatened with the rack." Perhaps it was only the threats which remained, and not the actual use of the rack.

13 Taylor, vol. 1, p. 605.

14 The Treason Act, 1708 (U.K.), c. 21, s. 5.

15 (1775), 168 E.R. 160.

16 *Ibid.* at 161; the full quotation may be found on p. 1, *supra*.

17 (1783), 168 E.R. 234.

Jane Warickshall was charged with receiving stolen goods. She confessed, and as a result of this confession the goods were found in her bed. The evidence at trial showed that this confession had been obtained by a promise of favour (the report does not give details) and Eyre C.B. refused to admit it. Counsel then argued that

as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of the fact ought also be rejected; for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction.¹⁸

But the court disagreed:

It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory, and would be dangerous in practice as it is repugnant to the general principles of criminal law. *Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit.*

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.¹⁹

Despite this clear enunciation of the law, the trend — for the next fifty years or so — was so completely in favour of the accused that at least one judge somewhat ruefully remarked:

I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree . . . that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy.²⁰

Such tenderness was not without cause, and a number of reasons have been suggested:²¹

¹⁸ *Ibid.*

¹⁹ *Ibid.* (italics added).

²⁰ *Per Parke B. in R. v. Baldry* (1852), 169 E.R. 568 at 574. Earle J. agreed, but thought the sacrifice had been "at the shrine of guilt", rather than "at the shrine of mercy".

²¹ Three of the five reasons cited are suggested by Wigmore (III Chadbourne rev. 1970, §820a), the other two by T.D. Macdonald and A.H. Hart, *The Admissibility of Confessions in Criminal Cases* (1947), 25 Can. Bar Rev. 823. Much of the language used has been borrowed from these two sources.

1. The character of persons usually brought before the judges on charges of crime involved a mental condition to which the courts were hesitant to apply the test of a rational principle. Social cleavages and the feudal survivals of the period also were taken into consideration, as was the fact that the offenders came chiefly from the "lower classes" and were characterized by "subordination, half respectful and half stupid, towards those in authority over them";

2. The absence at the time of the right to appeal;²²

3. The handicap placed upon the accused at common law in the shape of his inability either to testify for himself or to have counsel to defend him;²³

4. The harshness of the punishment then in effect;²⁴

5. Lack of means on the part of the prisoner which, in some cases, prevented him from calling witnesses. In such a position, any gamble upon a promise or half-promise of forbearance or mercy was not an unreasonable choice.

The last — and most important — of the cases heard in this period was *R. v. Baldry*,²⁵ already referred to, in which Pollock C.B. put an end to the judges' habit of seizing upon the slightest pretext in order to exclude a confession. However, let it be said at once that some of the rigors of penal law had by then been eased by a series of statutes.²⁶

In *Baldry* the "inducement" had been a constable's warning to the accused that "what he did say would be taken down and used as evidence against him".

The argument for the defence, which reflected the "high tide of sentiment in favour of accused person",²⁷ was this:

[I]f any inducement — of the slightest description — whereby any worldly advantage to himself as a consequence of making the statement, be held out to

²² For all practical purposes, appeals in criminal matters were not allowed until 1907, when the Court of Criminal Appeal was established by the Criminal Appeal Act, 1907 (U.K.), c. 23.

²³ Persons charged with an offence were entitled to make a statement from the dock, but they could not be sworn. The modern rule was introduced by the Criminal Evidence Act, 1898 (U.K.), c. 36. With the exception of treason and misprision of treason, persons tried for felonies were not permitted "to make full answer and defence by counsel learned in the law" until the Trials for Felony Act, 1836 (U.K.), c. 114. See also Chapter 6, *infra*.

²⁴ Prior to 1820, 222 offences were punishable by death. This was gradually reduced until, in 1861, the law (with some exceptions) reached the present stage: Barnes and Teeters, *New Horizons in Criminology* (1953), 2nd ed., p. 375.

²⁵ (1852), 169 E.R. 568 at 573 & ff.; see also n. 20, *supra*.

²⁶ Notably by the Indictable Offences Act, 1848 (U.K.), c. 42 and the Crown Cases Act, 1848 (U.K.), c. 78.

²⁷ T.D. Macdonald and A.H. Hart, *The Admissibility of Confessions in Criminal Cases* (1947), 25 Can. Bar Rev. 823 at 826.

a prisoner, the law presumes the statement to be untrue ... The law assumes that a man may falsely accuse himself upon the slightest inducement ... The law will not measure the force of the inducement; and the law supposes that there are circumstances in which a man will make false accusation against himself ... The law is suspicious in the highest degree of confessions; it suspects that it does not get at the truth as to the way in which they are obtained.²⁸

But Pollock C.B. disagreed, and after reviewing some of the older decisions he observed that

The question now is, whether the words employed by the constable ... amount either to a promise or a threat? *We are not to torture this expression, or to say whether a man might have misunderstood their meaning, for ... the words are to be taken in their obvious meaning.*²⁹

During the next fifty years the law changed little, but *R. v. Thompson*³⁰ made two points abundantly clear: (1) that the prosecution can at no time escape the burden of proving that a confession was free and voluntary, and (2) that judges still had strong reservations about the use of confessions.

Then, in 1914, Lord Sumner managed to state the law with a clarity hitherto unexpressed, and while *Ibrahim v. R.*³¹ by no means settled all the problems, it went a long way towards ending the confusion. The rule was this:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.³²

In Canada, in *Prosko v. R.*,³³ the Supreme Court quickly "adopted" *Ibrahim* and this has been the rule since then. However, in 1943, the court appeared to say that a warning was necessary,³⁴ and so, in 1949, Kerwin J. thought it "advisable that it should now be stated clearly what this Court considers the law to be". In his view, it had not changed from that set out in *Ibrahim* and *Prosko*:

²⁸ 169 E.R. at 569.

²⁹ *Ibid.* at 573 (italics added).

³⁰ [1893] 2 Q.B. 12 (C.C.R.).

³¹ [1914] A.C. 599.

³² *Ibid.* at 609. But see the continuing debate about the scope of this rule, which is discussed in Chapter 5, *infra*.

³³ (1922), 37 C.C.C. 199.

³⁴ *Gach v. R.* (1943), 79 C.C.C. 221; see also Chapter 5, *infra*.

The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.³⁵

In the years which followed *Boudreau* many points were clarified.³⁶ Perhaps the most important of these is found in the judgment of the Supreme Court of Canada in *Piché v. R.*,³⁷ which abolished the distinction hitherto made between inculpatory and exculpatory statements.³⁸ This was in sharp contrast with some earlier pronouncements, including the statement by Taschereau J. in *Boudreau v. R.*³⁹ It is, of course, healthy that in matters of criminal law the court is willing to change.

A word of caution may be in order. Despite the fact that Canadian courts have consistently followed the rule in *Ibrahim*,⁴⁰ the application of that rule frequently differs from the practice in England. It is not surprising that this should be so. For instance, there are no Judges' Rules⁴¹ in Canada, and even though these rules do not have the force of law, they provide guidance not only to the police, but, in some measure, to the courts as well. Also, in Canada, there is a greater proliferation of courts. Each province and each territory has its own court of appeal — twelve in all — and there is no good reason why all the judges of all courts should always agree, even on questions of law. As Freedman C.J.M. recently wrote, "on controversial questions honourable men may honourably differ".⁴²

Sometimes a conflict will lie unresolved, and one can see how this might happen, for not every case can reach the Supreme Court of Canada. The reasons for this are diverse, but two stand out above the others. The first is a matter of costs. Appeals are expensive, and while the resolution of

³⁵ *Boudreau v. R.* (1949), 7 C.R. 427 at 433.

³⁶ See, for instance, *DeClercq v. R.* (1968), 4 C.R.N.S. 205 (S.C.C.); *R. v. Wray*, [1971] S.C.R. 272; *R. v. Gauthier* (1975), 33 C.R.N.S. 46 (S.C.C.); *Powell v. R.* (1976), 33 C.R.N.S. 323 (S.C.C.); *Boulet v. R.* (1976), 34 C.C.C. (2d) 397 (S.C.C.); *Erven v. R.* (1978), 6 C.R. (3d) 97 (S.C.C.); *Horvath v. R.* (1979), 7 C.R. (3d) 97 (S.C.C.); *Ward v. R.* (1979), 7 C.R. (3d) 153 (S.C.C.). However, it is fair to add that, with the possible exception of *Gauthier*, each of these cases engendered further discussion, and the term "clarified", as used above, may therefore put the case too strongly.

³⁷ (1970), 12 C.R.N.S. 222.

³⁸ See pp. 4 & ff., *supra*.

³⁹ (1949), 7 C.R. 427 (S.C.C.). The exact quotation may be found on p. 7, *supra*.

⁴⁰ See n. 1, *supra*.

⁴¹ See Chapter 5, *infra*, and Appendix.

⁴² Admissions and Confessions, Studies in Canadian Criminal Evidence (1972), p. 95.

conflicts is of interest to the lawyers, it often is not nearly as important to the litigants. Secondly, the great majority of cases require leave to appeal and this is not lightly given.⁴³ A good example is *DeClercq v. R.*,⁴⁴ which dealt with the question of whether an accused may be asked on the *voir dire* if his statement is true. This important issue was first raised in Canada in 1945.⁴⁵ It was again considered more than a decade later,⁴⁶ but it was not until *DeClercq* that it finally reached the highest court, leave to appeal not being needed because of a dissent below.⁴⁷

Many other questions remain to be resolved. Perhaps the most important of these deal with the application of the Canadian Bill of Rights.⁴⁸ A start has been made. Can further steps be far behind?⁴⁹

43 S. 418 of the Criminal Code sets out which appeals may be brought before the Supreme Court of Canada *de plano*. All others require leave to appeal, and these are in the great majority.

44 (1968), 4 C.R.N.S. 205 (S.C.C.).

45 *R. v. Weighill* (1945), 83 C.C.C. 387 (B.C. C.A.).

46 *R. v. LaPlante* (1957), (1958) O.W.N. 80 (Ont. C.A.), which allowed the question, and *R. v. Aheidah* (1958), 29 C.R. 347 (Sask. S.C.), where Hall C.J. refused to follow *LaPlante*. Leave to appeal *LaPlante* had been sought, but was refused by the Supreme Court of Canada: [1957] S.C.R. ix.

47 See n. 43 *supra*.

48 See Chapter 6, *infra*.

49 Some recent proposals deserve serious thought. See, in particular, the Evidence Code prepared by the Law Reform Commission of Canada, Report on Evidence (1975), pp. 22 and 61, which, *inter alia*, would exclude evidence "if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute" (s. 15). These proposals are discussed by Schiff, Evidence in the Litigation Process (1978), p. 924. See also Retushny, Self-incrimination in the Canadian Criminal Process (1979), p. 405, where the author recommends that "All statements purportedly made to police officers by the accused prior to trial should be inadmissible in evidence at trial". However, this proposal is part of "a comprehensive and inter-related 'package', and it should be read in that light.

3

THE BURDEN OF PROOF

An extra-judicial statement made by an accused is either admissible or it is not. If admissible, it becomes evidence both for and against the prisoner;¹ if not, it is to be treated as non-existent, and nothing more ought to be heard of it.² Two consequences flow from this: (1) the issue of admissibility must be decided *before* any mention of a statement is made within the hearing of the jury; and (2), where a statement is not admitted, no questions may be put to the accused about it should he decide to testify.

In the light of these rules, it is clear that Crown counsel must refrain from making any reference to the existence of a declaration in his opening speech. It is good sense that this should be so. As Galt J. said in *R. v. Willis*:³

[T]he admissibility of a confession is hedged about with many difficulties, for it has been found in practice that confessions have been extracted from prisoners which were subsequently found to have been erroneous in many particulars, and, in some cases, absolutely without foundation in fact. I only mention this for the purpose of shewing that every confession is attended with a certain amount of difficulty. This is so well understood by lawyers that counsel for the Crown, even when relying upon a confession which he feels sure of having admitted in evidence, is not allowed, in opening his case to the jury, to disclose what the confession is until after it has been decided to be admissible in evidence by the Judge.⁴

The point was also stressed by the Ontario Court of Appeal in *R. v. Truscott*,⁵ where Crown counsel, in opening his case, told the jury that while they would "not hear of any confessions at all or anything like that", he would call witnesses "to show, or try to show, falsehoods told by him [the accused] during that period [of interrogation]". He continued:

1 *R. v. Harris* (1946), 86 C.C.C. 1 (Ont. C.A.).
2 *R. v. Treacy* (1944), 30 Cr. App. R. 93 (C.C.A.).
3 (1913), 21 C.C.C. 64 (Man. S.C.).
4 *Ibid.* at 67. It should be noted, however, that these remarks were *obiter*.
5 (1960), 32 C.R. 150.

4

PERSONS IN AUTHORITY

It should not be a matter of surprise that by far the largest number of confessions offered in evidence are statements obtained by the police. The principal reason for this is quite clear: throughout the country, more policemen investigate crime than any other group of persons. It is also true that it is generally less difficult for the prosecution to establish that statements so obtained were free and voluntary, and that they were not prompted "either by fear of prejudice or hope of advantage held out by a person in authority".¹

Regrettably, time and again, the police — many of whom must be considered experts in the art of giving evidence — will present so united a front against the accused that some suspicion may be justified. This was alluded to by Humphreys J. in *R. v. Nowell*,² when he noted that at one time there had been frequent complaints "that one policeman was likely to back up the view of another, and that the position was unfair to the person accused".³

1 *Ibrahim v. R.*, [1914] A.C. 599 at 609 (P.C.).

2 (1948), 32 Cr. App. R. 173 (C.C.A.).

3 *Ibid.* at 176. See also the remarks of Byrne J. in *R. v. Bass* (1953), 37 Cr. App. R. 51 at 58 (C.C.A.): "The officers' notes were almost identical. They were not made at the time of the interview. One officer made his notes after the appellant had been charged, and the other officer made his an hour later. Mr. Crowder suggested to the officers in cross-examination that they had collaborated. They denied that suggestion. This court has observed that police officers nearly always deny that they have collaborated in the making of notes and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper than two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory." Most recently, Professor Glanville Williams again referred to this tendency (which has clearly continued) and wrote: "When irregularities are committed by one police officer, a defendant has no chance of persuading another officer to testify to them, even if the latter was not personally involved. The spirit of *esprit de corps* is too strong. The work of the police involves them in danger and isolates them from the rest of the community. There is, therefore, a

THE TEST

That police officers are persons in authority *vis-à-vis* an accused has never been challenged.⁴ However, in cases where confessions are received by persons other than policemen, it often becomes a matter of vital importance to determine whether or not such persons possessed authority, actual or otherwise, with respect to the accused. Joy's disposed of the problem with ease:

The master or mistress, or prosecutor of a prisoner, as well as a magistrate or constable, is considered a person in authority.

In principle, this rule remains unaltered, but where Joy confined his definition to four distinct classes of persons, modern writers prefer to speak in broader categories. Thus, Phipson defines a person in authority as "someone engaged in the arrest, detention, examination or prosecution of the accused".⁶ However, as will be shown below, his definition is at once too narrow and too broad. Not everyone engaged in the accused's detention, for instance, can be considered a person in authority; nor, on the other hand, will everyone outside this list escape the classification.

The true test, it is submitted, is highly subjective: *Did the accused truly believe, at the time he made the declaration, that the person he dealt with had some degree of power over him?* In other words, did the accused think that the person to whom he confessed (or as a result of whose intervention he confessed) could either make good his promise or carry out his threats? If so, such person should be treated as a person in authority; if not, the rules which attach to persons in authority need not be applied, even though the person, from a purely objective point of view, was in a position of undoubted authority. This view is found throughout the cases, but at times it has been either overlooked or misunderstood. Thus, in *R. v. Frewin*,⁷ it was held that where a promise is made by a person who does not, in fact,

powerful sense of solidarity which leads the police to back each other up. When the culprit is a senior officer, he is in a position to influence the promotion prospects of others". Authentication of Statements to the Police, [1979] Crim. L.R. 6 at 13.

4 But see *R. v. Morris* (1977), 3 C.R. (3d) 74 (N.B.C.A.), where the court concluded that two uniformed policemen, who had answered a call for an ambulance, were not then persons in authority because "they were not investigating a crime and there is no suggestion they suspected a crime had been committed", per Limerick J.A. at 84. The Supreme Court of Canada (1979) 27 N.R. 313 disagreed with this proposition, but found that even though a *voir dire* should have been held before "admitting in evidence the brief exculpatory statement made by the appellant", no substantial wrong or miscarriage resulted and that this was "an appropriate area in which to invoke the provisions of s. 613(1)(b)(iii) of the *Criminal Code*", per Ritchie J. at p. 318.

5 P. 4.

6 Phipson on Evidence, 12th ed. (1976), para. 805.

7 (1855), 6 Cox C.C. 530.

have authority, the confession is admissible although the prisoner, from his knowledge of the position of the promisor, may reasonably suppose he has such authority. That is no longer the law. What is the law, is that those who, by their actions or otherwise, cause the accused to believe that they possess some degree of authority, must be considered to fall within this legal term of art. As a result, confessions induced or received by them should be subjected to the same stringent tests as those obtained by the police.

This principle is illustrated by two Canadian cases. The first is *R. v. Todd*,⁸ a Manitoba case decided at the turn of the century; the other *Menitenko v. R.*,⁹ a judgment of the Quebec Court of Appeal.

The facts are important.

In *Todd*, two individuals were retained by the police to associate with a suspect and to report on his movements and utterings to the chief of police. At no time was *Todd* aware of the true nature of their mission and, in fact, he looked upon these two informers as potential partners-in-crime. As final proof of his "integrity", *Todd*, who was eager to join the select band of criminals to which they claimed to belong, confessed that he had murdered a man — the crime of which he was suspected. The trial judge (Killam C.J.) admitted his statements.

On appeal, *Dubuc J.*, in upholding this ruling, considered the question from the accused's point of view. Had he employed an objective method, he would have been obliged to conclude that the two informers were, in fact, policemen *ad hoc*, and thus persons in authority.

Contrast with this the case of *Menitenko*, where two newspaper reporters, in the presence of a detective and a constable, interviewed the accused in a cell at detective headquarters in Montreal. Whether or not the two officers were within hearing was in dispute, but they were certainly within sight of both the accused and his interrogators. Before the interview began, the reporters told the accused that any information which he might give them would be preserved until after the trial. With this assurance, *Menitenko* confessed that he had killed his half-brother.

At trial, the defence drew an admission from a detective-lieutenant that, prior to the accused's interrogation by the reporters, he had "kind of pushed him around". Nevertheless, despite the adverse atmosphere which this might have created in the prisoner's mind, the trial judge admitted the confession obtained by the press. But the Court of Appeal condemned this practice and quashed the conviction. The reasons were put succinctly by *Bissonnette J.*:

[The accused] is quite rational when he affirms that he consented to receive

⁸ (1901), 4 C.C.C. 514 (Man. C.A.). This case is cited with approval by the Privy Council in *Dokinanan v. R.*, [1969] 1 A.C. 20 at 32.
⁹ (1951), 101 C.C.C. 312 (C.A.).

these two persons because he feared that if he did not do so he would be assaulted and beaten again.

In the present case, have we the right to presume that the two journalists would repeat to the police authorities the words that might have fallen from appellant's lips? Anyone who might maintain that they would have kept to themselves any confession made by appellant would indeed be naive. If, then, these two journalists, voluntarily or not, played the game of detective, or even if they represented themselves as such in their conversation with appellant, were they not, in some way, officers *ad hoc*? Can it not be said, as regards appellant, that they were, *in his mind*, persons in authority?¹⁰

The very fact that the accused may have been in fear of another assault might well have been sufficient to exclude the confession, but the court did not rest there. It reaffirmed, in clear and simple language, what had been said before but frequently forgotten: *subjectivity must be the test*.

So too, in *R. v. Towler*,¹¹ where the British Columbia Court of Appeal held that it was

clear in reason and common sense that the matter must be considered subjectively from the point of view of the effect on the mind of the appellant. It can not be said that his mind was affected by inducements held out by persons in authority when he does not think that the persons who make the inducements are persons in authority.¹²

While doubts are still expressed from time to time,¹³ recent cases clearly favour the subjective test. Thus, in *R. v. Pettipiece*,¹⁴ *Branca J.A.* put the matter as follows:

It has been held repeatedly that where police officers or others in the employ of the police pretend to be criminals or assume a character other than their own, which is unknown to the accused, and such persons gain the confidence of the accused as a result of which the accused makes incriminating statements, the statements are perfectly admissible as the pretending officer or other person cannot be classed as one in authority and hence no confession in the true sense of the word is involved and there is no need to hold a voir dire: see *Regina v. Towler* and also *Regina v. Stewart*, 9th March 1972 (not yet reported), both decisions of this Court.¹⁵

This paragraph was cited with approval by *Spence J.* in *Perras v. R.*,¹⁶ where he said this:

¹⁰ *Ibid.* at 317 and 320 (italics added).

¹¹ [1969] 2 C.C.C. 335 (B.C. C.A.).

¹² *Ibid.* at 339, per *McFarlane J.A.* (italics added).

¹³ See, for instance, *R. v. Collins* (1975), 29 C.C.C. (2d) 304 (Alta. S.C.).

¹⁴ (1972), 18 C.R.N.S. 236 (B.C. C.A.). For another aspect of this case, see p. 239, *infra*.

¹⁵ *Ibid.* at 249-9.
¹⁶ (1973), 22 C.R.N.S. 160 (S.C.C.).

Turning now to whether Dr. Demay was a person in authority, a question which, as I have said, ought to have been determined upon a voir dire, I do not think it can be said as a rule applicable to all cases that a medical doctor examining a person is not a person in authority. As was pointed out by Branca J.A. in *Régina v. Pettipiece*, supra, whether or not a person is to be considered a person in authority must be determined by a subjective test to determine what was the effect on the mind of the accused in the particular case. Branca J.A. was considering statements made to a police officer who had disguised himself as a fellow inmate of the jail, and he came to the conclusion that when a person does not know that the one holding out the inducement is a person in authority, then the authority of that person can have no effect on the mind of the accused making a statement. Two illustrations occur, firstly, the one from *Régina v. Pettipiece* of a police officer disguising himself as an inmate of a jail where the accused could not be considered to have made a statement to a person in authority, and, on the other hand, a person having no authority whatsoever clothing himself in the guise of a police officer and vehemently asserting authority. In the latter case, in my view, unless the statement were voluntary in the legal sense, it was not admissible despite the true utter-lack of authority of the person who received it.¹⁷

Even more recently, in *R. v. Rothman*,¹⁸ which involved the use of an undercover agent, the Ontario Court of Appeal adopted the subjective test, Jessup J.A. holding that "the police officer in the present case was not a person in authority because he was not regarded as such by the respondent".

These are strong voices, and there is now good reason to believe that, for Canada, at least, the question has been settled.

It is, of course, one thing to state the test, and quite another to translate it into practice. No one but the accused can know just what went through his mind, and even he — prepared though he may be to tell the truth — may find it difficult to reconstruct the scene. As a result, it is the judge who must decide, on the facts of each case, whether or not it would have been reasonable for an accused to fear the threats or put faith in the promises, which may have been made.

MASTER AND SERVANT

The question of authority is one which arose quite early, but most of the cases dealt with the authority of masters over servants, a problem

¹⁷ *Ibid.* at 170. This was a dissent, though not on this question. For an English point of view, see the editorial in [1979] Crim. L.R. 337.

¹⁸ (1978), 42 C.C.C. (2d) 377 at 380 (Ont. C.A.). See also *R. v. Misie* (1974), 22 C.C.C. (2d) 487 (N.S. C.A.); *R. v. Berger* (1975), 27 C.C.C. (2d) 357 (B.C. C.A.); *Downey v. R.* (1976), 38 C.R.N.S. 57 (N.S. C.A.); *R. v. Postman* (1977), 3 Alta. L.R. (2d) 139 (C.A.); *R. v. Bélanger* (1978), 40 C.C.C. (2d) 335 (Ont. S.C.).

clearly more important than now. The cases are numerous,¹⁹ and they leave no doubt that masters were at all times considered persons in authority over their servants, provided the offence was one against the person or property of the master or of someone under his care. This was accepted in Canada. A distinction was made, though, where the offence did not directly concern the management of the household. Thus, in *R. v. Moore*,²⁰ a case which would now be classified as infanticide, a confession made as the result of an inducement held out by the prisoner's mistress was duly admitted.

The master-servant rule was soon extended, and it was recognized that others connected with the household may, in fact, have as much authority as the master himself. The master's wife was high on the list, but the line was drawn in *R. v. Sleeman*,²¹ where the inducement was held out by the master's married daughter who did not live in her father's house.

A further expansion of this rule came with the recognition that some wives may, on occasion, interfere with their husband's affairs. Therefore, on an indictment for stealing the goods of two persons in partnership, a confession made as the result of an inducement held out by the wife of one of the partners, although in the absence of both, was not admitted.²² The wife of a constable, however, is neither expected nor entitled to meddle in her husband's business, and she will not be considered a person in authority.²³ Nor will the rule be extended to the wife of a prisoner. This was held in *R. v. McLaren*,²⁴ where the accused confessed after a telephone conversation with his wife. The court found it "not improbable that what she said to him had something to do with his making the confession but she was not a person in authority".

CIVILIANS AIDING POLICE

It is now necessary to consider the case of civilians who may be called upon to help the police.

In *R. v. Winsor*,²⁵ a woman employed in a jail as a "searcher" of female prisoners, but who had no other duties, was considered a person in authority, and an inducement, even though it was intended merely to

¹⁹ See, for instance, *R. v. Richards* (1832), 172 E.R. 993; *R. v. Taylor* (1839), 173 E.R. 694; *R. v. Hearn* (1841), 174 E.R. 431; *R. v. Hewitt* (1842), 174 E.R. 623; *R. v. Rue* (1876), 13 Cox C.C. 209; *R. v. Jackson* (1898), 2 C.C.C. 149 (N.S. S.C.).

²⁰ (1852), 5 Cox C.C. 555.
²¹ (1853), 6 Cox C.C. 245.

²² *R. v. Warrington* (1851), 169 E.R. 575.
²³ *R. v. Hardwick*, unreported; cited in footnote at 171 E.R. 1118.

²⁴ (1949), 7 C.R. 402 at 406 (Alta. C.A.). For the case of a mother-in-law, see *R. v. Collins*, n. 13, supra.
²⁵ (1864), 176 E.R. 599.

soothe the prisoner, was held sufficient to exclude a confession. So, too, in *R. v. Eroch*,²⁶ where a constable, about to attend the inquest on the body of a murder victim, placed a female with the accused to prevent her from running away or committing suicide. As soon as the constable had left, the woman said to the prisoner that "she had better tell the truth". Parke J. refused to admit the confession which had resulted, holding that the woman must be deemed, *pro tempore* at least, a person in authority over the prisoner.

In *R. v. Vernon*,²⁷ however, a female friend of a female accused was asked by police to accompany the prisoner to a toilet. While there, the accused confessed. At trial, evidence concerning the confession was admitted, the court holding that the friend had not had any authority over the prisoner. The same principle was applied by the Privy Council in *Deokinanan v. R.*,²⁸ where the police permitted a "trusted friend" to visit the accused while the latter was in custody. At trial, the friend testified that the accused had confessed to a murder after he, the friend, had promised to help the prisoner recover the money which he had stolen from his victim. The confession was admitted, and this was confirmed by the Judicial Committee. The mere fact that at the time the friend was a possible witness for the prosecution did not make him a person in authority.

Viscount Dilhorne put the matter as follows:

Sir Kenneth Stoby, Chancellor, based his judgment in the Court of Appeal primarily upon the ground that Balchand (the friend) was not and could not have appeared to the appellant to be a person in authority. Cumming J.A., in his dissenting judgment, said that Balchand must have appeared to the appellant from the part he played in the search to have been "close to the police" and "someone who perhaps in the mind of the accused could influence the course of investigation by virtue of his position." He thought that Balchand "could reasonably in the mind of the accused have been regarded as a person in authority."

Their Lordships do not agree. In their opinion the evidence shows clearly that the appellant did not so regard him. He thought that Balchand was his friend. If he had not thought that and had thought that Balchand was "close to the police," it is not likely that he would have asked Balchand to become in effect an accessory after the fact. He cannot have thought Balchand when he met him in the lockup at Whim a person in authority.

Mr. Kellock argued that a person in authority meant a person who could fulfil the promise made and that as Balchand could have done what he promised, he was a person in authority. He contended that in the cases where confessions induced by promises made by persons in authority had been excluded, the promisor always had power to fulfil the promise.

²⁶ (1833) 172 E.R. 1089.

²⁷ (1872) 12 Cox C.C. 153.

²⁸ [1969] 1 A.C. 20.

If this be the case, it does not follow that that is the meaning to be given to the words "person in authority." The fact that a person could have kept his promise may show the reality of the promise and that it was a real inducement, but it is not a definition of those words. Mr. Kellock was unable to cite any case in support of his contention. In their Lordships' opinion his contention cannot be sustained.²⁹

Nevertheless, "friends" who exhort an accused to tell the truth may, under certain circumstances, become persons in authority. This is illustrated by *R. v. Demenoff*,³⁰ where a group of detained Doukhobors — all members of the radical Sons of Freedom sect — were visited by one Lebedoff, who was described as "an adviser of the sect at this time". Lebedoff told the prisoners³¹ that the best thing they could do was to tell the truth and hope for the best". What happened next is described in the minority opinion of Davey J.A.:

Demenoff says that he was induced to make his confession by the prophecy of emigration through gaol; by Lebedoff's urging that the prisoners make statements concerning the bombings, and his warning that those who did not would perish in Canada; by the statements of Lebedoff and Constable Huska that those who did not make statements would lose their visiting privileges; and by Huska's statement that harm would come to him if he did not make a statement. It may be said at once, as Demenoff himself said and the learned trial Judge found, that Demenoff's confession was induced in a material degree by the persuasion of his fellow prisoners, but the attitude of the other prisoners was no doubt determined by Lebedoff's influence.

There seems no reason to disbelieve Demenoff when he says that one of the things that induced him to make the confession was Lebedoff's reference to the prophecy of emigration through the gaols. But the fulfilment of the prophecy was only incidentally connected with the charge, and was not a matter to be granted or withheld by civil authority.

It is not without significance that Demenoff was held in the Nelson gaol for about a week before he confessed, and that after he confessed he was taken along with others, under escort, to a funeral, and that he was allowed to visit a dentist, and home on several occasions, without an escort. And it is not without significance that the influences at work induced Demenoff to falsely accuse Markin, and Markin to make a false confession.³²

In the light of these circumstances, Mr. Justice Davey found himself quite unable to say that the Crown witnesses proved that the confessions were not materially induced by hopes of material advantage engendered by the

²⁹ *Ibid.* at 31.

³⁰ [1964] 1 C.C.C. 118 (B.C. C.A.).

³¹ It was a question of fact whether or not the accused had heard Lebedoff's remarks, but for the purpose of the case the Court of Appeal presumed that he had.

³² [1964] 1 C.C.C. 118 at 128-130.

police and by Lebedoff with their acquiescence, and proved that the confessions were voluntary in the legal sense. The fact that those hopes may have been aroused, in part, indirectly is no answer: see *R. v. De Mesquita*;³³ *R. v. Murakami*.³⁴

Nor is it any answer to say that the confessions were mainly induced by other influences that would not vitiate them. Once it is established that the improper influence may have been a material inducement, it cannot be said that the confessions have been proven to be voluntary, and they must therefore be excluded.³⁵

Bird and Wilson J.J.A. disagreed and found no evidence that Lebedoff was in any way a person in authority. However, it is clear from the report that the majority accepted the trial judge's rejection of the evidence of the accused and his co-accused on the basis of credibility.

It may therefore be said that a person who accompanies the police — friend of the prisoner though he may be — may, by the actions of himself or those who are with him, assume, in law, the status of a person in authority.

PRESENCE OF PERSON IN AUTHORITY

What about the mere presence of a person in authority?

As Phipson points out, "a confession made to but not induced by a person in authority or someone in his presence is admissible".³⁶ In an earlier edition, the author had added that, conversely, "a confession induced by, though not made to, such a person will be rejected".³⁷ This proposition was dropped in subsequent editions, but it would still appear to be basically sound.

For instance, in *R. v. Ermele*,³⁸ a person under arrest freely confessed to a friend. At the *voir dire*, the defence succeeded in showing that, at the very time the confession was made, the accused was under duress from the police, though no officer was physically present at the time. The court came to the conclusion that the confession was free and voluntary and therefore admissible.

However, chances are that the court would have reached a different conclusion had a person in authority actually been present when the confession was made. Thus, in the old case of *R. v. Luckhurst*,³⁹ it was held

33 (1915), 24 C.C.C. 407 (B.C. C.A.).

34 (1951), 100 C.C.C. 177 (S.C.C.).

35 [1964] 1 C.C.C. at 132.

36 Phipson on Evidence, 12th ed. (1976), para. 806.

37 9th ed. (1952), para. 268.

38 (1940), 74 C.C.C. 76 (Sask. C.A.). See also p. 169, *infra*.

39 (1853), 6 Cox C.C. 243.

that "one who puts questions to an accused in the presence of a prosecutor is a person in authority". This view is not unreasonable, since the very presence of a police officer, prosecutor or private complainant induces an atmosphere prejudicial to the accused — an atmosphere less favourable than mere detention which, in itself, will not exclude confessions given to persons *not* in authority. A fellow prisoner, therefore, who urges an accused to confess, will not be considered a person in authority so long as he does not do so in the presence of guards.⁴⁰ And even where a fellow prisoner has been instructed by police to "keep his ears open" and to repeat whatever the accused may say, the confession will still be received.⁴¹

In Canada, the principle established by *Luckhurst, supra*, was reaffirmed in 1915, when it was held that the master of a servant, when accompanied by a police constable, becomes a person in authority, presumably with respect to all offences, and not merely those committed against him or his household.⁴²

This principle is also illustrated in *R. v. Bahrey*,⁴³ where the accused's father, in the presence of a policeman, said to his son: "You had better tell everything." He also promised to engage a lawyer and to look into the circumstances to see whether anyone else had induced the accused to commit the murder with which he was about to be charged. Bahrey confessed, but the statement was admitted since the language used by the father, when considered as a whole, did not constitute "such a threat, on the one hand, or promise, on the other", as would have vitiated the confession.

On the other hand, where a relative becomes the "willing agent" of the police, the result may be different. This is illustrated by a recent American case⁴⁴ where the facts were as follows:

During the third week of trial, the People called a witness, one Barbara Rozell, a sister of defendant, Carol Taylor. Her testimony as to direct conversations with her sister, and also based upon her eavesdropping on a telephone call between both defendants, could have been considered by the jury as being extremely prejudicial to defendants, which in addition to testimony from other witnesses, of no small value, could very well have been a solid factual base, although entirely circumstantial, upon which a guilty verdict might have been voted by the jury.

Nevertheless, during the direct examination by the People of the

40 For a contrary view, see *R. v. Parker* (1861), 8 Cox C.C. 465.

41 *R. v. Barrs* (1946), 86 C.C.C. 9 (Alta. C.A.).

42 *R. v. De Mesquita* (1915), 24 C.C.C. 407 (B.C. C.A.). See also *R. v. Moore* (1852), 5 Cox C.C. 555.

43 [1934] 1 W.W.R. 376 (Sask. C.A.). See also *R. v. Cleary* (1963), 48 Cr. App. R. 116 (C.C.A.), and *R. v. Moore* (1972), 56 Cr. App. R. 373 (C.A.).

44 *N. Y. v. Taylor* (1978), Indictment No. 1833/76, Supreme Court of New York, County of Queens. I am indebted to Justice Harold Hyman for a transcript of the proceedings.

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defendant, Carol Taylor's sister, Barbara Rozell, it was adduced that on August 12, 1976, after the defendants had been arrested and had been given their Miranda Warnings and were still in police custody, that Barbara Rozell was solicited by a police detective and was driven to the precinct by the police officer to ostensibly talk to her sister Carol for the purpose of having Carol cooperate with and unburden herself to the police, since they could not solicit any information from her, themselves.

While defendants remained in police custody, Detective Sergeant Gregory returned to Barbara's place of business. He then asked Barbara if she would speak to Carol about the entire matter, and if she could obtain Carol's cooperation with the police, that such cooperation by Carol would be taken into consideration by the prosecutor's office.

Barbara agreed and immediately went in Detective Sergeant Gregory's car to the precinct, spoke to Carol alone, and as part of said conversation, elicited the statement in issue from Carol and, before she, Barbara, left the precinct, she conveyed that statement to Detective Sergeant Gregory.

The facts also show that the police knew at the time that counsel had already been retained by the accused, and this became a factor.⁴⁵ However, the principal ground for rejecting the statement was put as follows:

This Court finds that the activity of Barbara and her advising the police of the statement elicited by her from Carol, had its base in the police solicitation of Barbara to become their agent; that Barbara did become a willing agent of the police seeking to help her sister; that Barbara's questioning of Carol, although innocent of possible guilt on her part, and in an attempt to assist her sister, Defendant Carol, resulted in her becoming such a willing agent and her ultimately informing the police of the statement made by Carol which was prejudicially incriminating; that such activity, as agent is binding upon her principal, the police and therefore the prosecution; and, since it was obtained in violation of Carol's substantive Constitutional Rights ... the statement should be and hereby is suppressed.

Finally, even where a person of undoubted authority is present when someone *not* in authority induces a confession, the confession will be admitted if it can be shown by affirmative proof that the person in authority did not understand the conversation between the accused and those without authority. This was the case in *R. v. Hoo Sam*,⁴⁶ where the accused, a Chinese, talked in a Chinese dialect to a friend before making certain admissions. The local chief of police was present throughout this conversation, but the Crown established that he could not understand what was said and the court received the confession.

⁴⁵ For a discussion of the right to counsel, see Chapter 6. *infra*.

⁴⁶ (1912), 19 C.C.C. 259 (Sask. C.A.).

VICTIMS OF CRIME

Informants and prosecutors, both public and private, have always been considered persons in authority,⁴⁷ and this includes victims of crime. Even relatives and neighbours of a prosecutor may be so regarded, particularly when they act officiously.⁴⁸

The rule is illustrated by the English case of *R. v. Wilson*,⁴⁹ where the victim of a burglary, impatient with the work of the police, decided to see what he could do himself. His inquiries met with success, and in due course he confronted one of the accused and told him that he was concerned to get his property back. He also offered a reward for information. After some argument about the price to be paid, the accused produced part of the stolen merchandise and received a cheque from the victim. The balance of the reward was to be paid some days later upon delivery of the remaining goods. However, the accused disappeared, and the victim went back to the police.

At trial, the judge admitted these conversations, saying that

what was taking place here was in the nature of a commercial transaction, perhaps of a rather dubious kind, between the accused Wilson and Captain Birkbeck, the object of Captain Birkbeck manifestly being to get his property or so much of it as he could recover back, the object of Wilson being to get as much money as he could in respect of stolen property with which he was connected, and well knew it, which was of a kind that it was practically impossible to dispose of with safety.⁵⁰

In the Court of Appeal (Criminal Division), Lord Parker C.J. found that the trial judge should first have directed himself to the question whether Captain Birkbeck, the victim, could properly be said to be a person in authority within the principle. Instead, he had "really left it to the jury, indicating strongly his view that Captain Birkbeck was not such a person".⁵¹

The Lord Chief Justice found no authority which "clearly defines who does and who does not come within that category", but

on the facts of this case, Captain Birkbeck was and was known to be the owner of the house that had been broken into, and the owner of the property concerned, in other words the loser and the person most interested in the matter. It is true that in these days it would probably be impossible for him to stultify a prosecution that had been brought or to prevent a prosecution that had not yet been brought from being instituted, but nevertheless, in the

⁴⁷ *R. v. Partridge* (1836), 173 E.R. 243.

⁴⁸ *R. v. Simpson* (1834), 168 E.R. 1323.

⁴⁹ (1967), 51 Cr. App. R. 194 (C.A.).

⁵⁰ *Ibid.* at 198.

⁵¹ *Ibid.* at 200.



SUPREME COURT OF CANADA

CITATION: R. v. Grandinetti, [2005] 1 S.C.R. 27, 2005 SCC 5

DATE: 20050127

DOCKET: 30096

BETWEEN:

Cory Howard Grandinetti

Appellant

v.

Her Majesty the Queen

Respondent

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 62)

Abella J. (McLachlin C.J. and Major, Bastarache, Binnie,
LeBel, Deschamps, Fish and Charron JJ. concurring)

R. v. Grandinetti, [2005] 1 S.C.R. 27, 2005 SCC 5

Cory Howard Grandinetti

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Grandinetti

Neutral citation: 2005 SCC 5.

File No.: 30096.

2004: October 15; 2005: January 27.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for alberta

Criminal law — Evidence — Confessions — Admissibility — Person in authority — Accused admitting crime to undercover police officers — Whether undercover police officers “persons in authority” — Whether inculpatory statements properly admitted at trial without voir dire to determine their voluntariness.

Criminal law — Evidence — Possible involvement of third party in commission of offence — Accused charged with first degree murder — Trial judge

excluding evidence suggesting that victim might have been killed by third party — Whether evidence should have been admitted— Whether sufficient connection between third party and crime.

Significant circumstantial evidence linked the accused to the murder of his aunt. To obtain additional evidence against him, the police began an undercover operation. Several officers, posing as members of a criminal organization, worked at winning the accused's confidence. To encourage him to talk about the murder, they suggested that they could use their corrupt police contacts to steer the murder investigation away from him. The accused eventually confessed his involvement in the murder. At no time was he aware of the true identities of the undercover officers. After a jury trial, the accused was convicted of first degree murder. The trial judge ruled that the accused's inculpatory statements to the undercover officers were admissible, holding that the undercover officers could not be persons in authority and that no *voir dire* on voluntariness was necessary. She also ruled that evidence of the possibility that a third person might have committed the murder should be excluded, finding that there was insufficient evidence of a link between the third party and the murder. A majority of the Court of Appeal upheld the rulings and the accused's conviction.

Held: The appeal should be dismissed.

To ensure fairness and to guard against improper coercion by the state, statements made out of court by an accused to a person in authority are admissible only if the statements were voluntary. The question of voluntariness is not relevant unless there is a threshold determination that the confession was made to a "person in

authority". A "person in authority" is generally someone engaged in the arrest, detention, interrogation or prosecution of an accused. Absent unusual circumstances, an undercover officer is not usually viewed, from an accused's perspective, as a person in authority. In this case, the accused failed to discharge the evidentiary burden of showing that there was a valid issue for consideration, namely, whether, when he made the confession, he believed that the person to whom he made it was a person in authority. The accused believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him. Where, as here, an accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state's coercive power is not engaged. The statements, therefore, were not made to a person in authority and a *voir dire* on voluntariness was unnecessary. [34-45]

Evidence of the possible involvement of a third party in the commission of an offence is admissible if it is relevant and probative. The evidence is relevant and probative if there is a sufficient connection between the third party and the crime. Here, the trial judge made no error in excluding from the jury the theory that P might have killed the accused's aunt. With respect to motive, P's threats against the victim relating to drug dealings were not sufficiently connected to the murder. The threat incident took place over a year before the murder and there was no evidence that P contacted the victim after this incident. In addition, the victim had stopped selling drugs eight months before she was murdered. The other two possible motives relied on by the defence were based on speculation, not evidence. On the issue of opportunity, while P was released from remand three days before the victim was killed, this opportunity evidence, standing alone, is an insufficient link between P and

the murder. Similarly, absent some connection to the murder, the evidence of P's bad character and propensity for violence is inadmissible. [46-61]

Cases Cited

Applied: *R. v. Hodgson*, [1998] 2 S.C.R. 449; **referred to:** *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38; *Rothman v. The Queen*, [1981] 1 S.C.R. 640; *R. v. Todd* (1901), 4 C.C.C. 514; *R. v. Berger* (1975), 27 C.C.C. (2d) 357; *R. v. McMillan* (1975), 7 O.R. (2d) 750, aff'd [1977] 2 S.C.R. 824; *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27; *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.

APPEAL from a judgment of the Alberta Court of Appeal (Côté, Conrad and McFadyen J.J.A.) (2003), 339 A.R. 52, 312 W.A.C. 52, 178 C.C.C. (3d) 449, [2003] A.J. No. 1330 (QL), 2003 ABCA 307, upholding the accused's conviction for first degree murder. Appeal dismissed.

Patrick C. Fagan and Gregory R. Dunn, for the appellant.

Goran Tomljanovic, for the respondent.

The judgment of the Court was delivered by

1 ABELLA J. — The appellant, Cory Grandinetti, was convicted of first
degree murder following a jury trial. There are two issues arising out of the trial that
form the basis of this appeal. The first is whether inculpatory statements made by the
accused were properly admitted without holding a *voir dire* to determine their
voluntariness. The statements were made by the accused to undercover police officers
pretending to be members of a criminal organization. The second is whether evidence
that a third party might have committed the murder should have been admitted. In my
view, the trial judge did not err in connection with either issue, and the appeal should
be dismissed.

I. Background

2 Connie Grandinetti was Mr. Grandinetti's aunt. She was found dead in a
ditch outside Fort Saskatchewan on April 10, 1997. She had been shot twice in the
back of her head at close range.

3 Significant circumstantial evidence linked Cory Grandinetti to the murder.
In July 1996, Connie Grandinetti hired a lawyer to enforce payment of child support
from her ex-husband Jeff Grandinetti, Cory Grandinetti's uncle. On January 15, 1997,
her lawyer applied to the court for arrears of \$12,000 and ongoing child support of
\$1,000 per month. Jeff and Connie Grandinetti were unable to reach a settlement and
the child support action was adjourned until April 18, 1997, eight days after the
murder.

4 At the end of February 1997, Jeff Grandinetti asked a friend to lend him \$10,000. He travelled from Edmonton to Calgary to pick up the cash.

5 Cory Grandinetti told his ex-girlfriend in March 1997 that his uncle Jeff Grandinetti wanted Connie Grandinetti killed. He also told her that his uncle had obtained the money, and that he, Cory, planned to kill his aunt with an overdose of heroin.

6 On April 4, 1997, Cory Grandinetti travelled to Calgary. He was carrying two vials of heroin and a gun. On the evening of April 9, 1997, he borrowed his grandfather's truck and said he was going to visit his Aunt Diane. Instead, he picked up Connie Grandinetti at approximately 8:00 p.m. in front of her apartment building. He is the last known person to see her alive.

7 In July 1997, with few leads to investigate but suspicious that Cory Grandinetti was involved, the RCMP began an undercover operation, Project Kilometer, in an attempt to obtain additional evidence against him. Several police officers posed as members of a criminal organization and worked at winning Cory Grandinetti's confidence. Mr. Grandinetti thought the criminal enterprise he was dealing with was a large international organization involved in drug trafficking and money laundering. He was led to believe that this organization was moving to Calgary, that he had been chosen as its Calgary contact, and that he could potentially make hundreds of thousands of dollars by participating in the organization's criminal activities.

8 As part of Project Kilometer, the police engaged Mr. Grandinetti in criminal activities, including money laundering, theft, receiving illegal firearms, and selling drugs. A number of police officers were involved in this operation, including Constable Keith Pearce, known to the appellant as “Mac”, Corporal Gordon Rennick, known as “Dan”, and Constable Robert Johnston, known as “Zeus”. “Mac” posed as the head of the criminal organization. At no time was the appellant aware of the true identity of the undercover officers.

9 From the beginning, the undercover officers encouraged Mr. Grandinetti to talk about his aunt’s murder, but he consistently refused to do so. By late October, the undercover officers decided a new tactic was necessary. They began trying to convince the appellant that they had contacts in the police department who were prepared to act unlawfully, and that they had been able to use those contacts in the past to influence an investigation. On October 30, 1997, the undercover officers convinced Mr. Grandinetti that they had managed to have a murder charge against “Dan” reduced to aggravated assault by using their police connections to relocate a witness and retrieve incriminating photos. They reinforced the perception that they had corrupt police contacts on November 13, 1997, when “Mac” told Mr. Grandinetti that he had easily learned the name of the investigator on the Connie Grandinetti murder investigation.

10 To further encourage Mr. Grandinetti to talk about Connie Grandinetti’s murder, the undercover officers suggested to him that they could use their corrupt police contacts to steer the Connie Grandinetti murder investigation away from him. When he continued to balk at talking about the murder, they told him that he might be a liability to their organization because of the ongoing murder investigation. They

forcefully suggested he “come clean” with them to protect the organization from possible police interference.

11 This led Mr. Grandinetti to confess his involvement in the murder, provide details to the undercover officers, and take them to the location where Connie Grandinetti was killed. The confessions were recorded. On the basis of his confessions to the undercover officers, Mr. Grandinetti was arrested on December 9, 1997.

12 At trial, Nash J. made two rulings that form the core of this appeal: first, she ruled that Mr. Grandinetti’s inculpatory statements to the undercover officers were admissible; and second, she excluded evidence of the possibility that a third person might have committed the murder.

13 The defence position at trial was that the undercover officers were “persons in authority” because Mr. Grandinetti believed they could influence the investigation into the murder of his aunt through the corrupt police officers they claimed to know. This, the defence argued, shifted the burden to the Crown to prove either that Mr. Grandinetti did not reasonably believe the undercover officers were persons in authority, or that the statements were made voluntarily. The Crown, on the other hand, argued that the undercover officers could not be persons in authority because the accused must believe that the recipient of a confession can influence the investigation or prosecution by aiding, not thwarting, the state’s interests.

14 The trial judge held a *voir dire* to determine the threshold issue, namely whether Mr. Grandinetti had met his evidentiary burden of showing that there was a

valid issue about whether the undercover officers were or could be persons in authority. For this purpose, the defence called three witnesses: Corporal Rennick, Constable Johnston, and Mr. Grandinetti.

15 The trial judge ruled that the undercover officers could not be persons in authority, that no *voir dire* on voluntariness was necessary, and that the statements were admissible. She found that Mr. Grandinetti was totally unaware of the true identity of the undercover officers, and, in fact, had a collegial relationship with them. She emphasized that the “person in authority” test is largely a subjective one, based on the reasonable beliefs of the accused. She concluded that logic and reason required that the definition of “person in authority” be limited to people the accused believes are acting in collaboration with the authorities. In her view, the undercover officers could not be considered persons in authority because Mr. Grandinetti viewed them not as acting for or in collaboration with the interests of the state, but rather against those interests.

16 The second disputed ruling of the trial judge was her decision, after two *voir dire*s, to exclude defence evidence suggesting that Connie Grandinetti may have been killed by a third party, Rick Papin. The two *voir dire*s were held to assess the relevance and probative value of the evidence.

17 During the first *voir dire*, the defence tendered evidence of threats made to Connie Grandinetti by Rick Papin. The only witness was Dustin Grandinetti, Connie Grandinetti’s son. He testified that his mother sold cocaine from 1995 to 1996, but that she had stopped selling drugs by the spring of 1996. Ms. Grandinetti had once paid her son \$100 to drive her to a location where she sold cocaine. Dustin Grandinetti

testified that this incident was the only personal knowledge he had of his mother's drug dealing. Although he had met Rick Papin once or twice, he never saw him deliver drugs to his mother.

18 Most of Dustin Grandinetti's testimony consisted of hearsay statements. He testified that Connie Grandinetti told him she had stopped using Mr. Papin as her drug supplier, and had begun selling drugs for someone else for less than Mr. Papin charged. She also told him that she became afraid of Mr. Papin in early 1996.

19 The second *voir dire* on this issue was much more extensive than the first. The trial judge considered not only the testimony of those who gave evidence on the *voir dire*, but also the evidence Cory Grandinetti gave at trial. In the presence of the jury, Mr. Grandinetti had testified that he picked up his aunt at approximately 8:00 p.m. on April 9, 1997, and that she was looking for cocaine. He said they went to several bars. Ms. Grandinetti went inside each bar for a few minutes while her nephew waited outside. Mr. Grandinetti and his aunt also went to a corner store, but left after waiting for twenty minutes. According to Mr. Grandinetti, his aunt was looking for someone, but did not tell him who the person was. Later, they drove to a house where they talked. Ms. Grandinetti told him about the problems she had had in the last year with Rick Papin, who was both her former lover and former cocaine supplier. She told Mr. Grandinetti that when the relationship ended, so did the cocaine sales. She said that she felt she was not allowed to sell cocaine for anyone else. Mr. Grandinetti's evidence was that he dropped Ms. Grandinetti off at a bar just after midnight.

20 Mr. Grandinetti testified on the *voir dire* as well. He stated that Connie Grandinetti told him that Rick Papin had beaten up some of her customers, broken into her home, held a knife to her throat, and threatened to kill her. According to him, she had also indicated that she was gathering information to expose Rick Papin as an informant, and that she was afraid of Mr. Papin.

21 Lawrence Berlinguette, Connie Grandinetti's boyfriend at the time of her death, testified on the second *voir dire* that Mr. Papin, along with his associate, Calvin Dominique, broke into their apartment on March 21, 1996. Mr. Dominique hit Mr. Berlinguette in the face and broke his nose. Mr. Papin had a hunting knife and put the blade to Connie Grandinetti's throat, ordering her to stay away from his customers. Mr. Papin also told Ms. Grandinetti that he did not want her dealing drugs in town, and slapped her in the face a few times. Mr. Papin and Mr. Dominique claimed that Connie Grandinetti owed them money, and accused her of informing on them to the police. The incident lasted approximately ten minutes.

22 Calvin Dominique and Rick Papin were charged with several offences arising out of this incident, but the Crown entered a stay of all proceedings on November 26, 1996. The day after the assault, Mr. Berlinguette and Ms. Grandinetti moved from their apartment to the other side of the city.

23 Mr. Berlinguette's evidence was that although he and Connie Grandinetti sold cocaine for Mr. Papin from February 8, 1996 until March 21, 1996, neither of them had any contact with Mr. Papin or Mr. Dominique after March 21, 1996. He also stated that Ms. Grandinetti had stopped using and selling drugs eight months before her death.

24 Elaine McGilvery, Rick Papin's common-law spouse from January 1995 until February 1996, also gave evidence on the second *voir dire*. She testified that during their relationship, Mr. Papin was involved in cocaine trafficking and Connie Grandinetti was his runner. In late February or early March 1996, she said, Mr. Papin believed Connie Grandinetti had ripped him off and informed on him to the police. She was unaware of any contact between Ms. Grandinetti and Mr. Papin after March 21, 1996, but by that point, her relationship with Rick Papin had ended. Ms. McGilvery also testified that after the break-in, Connie Grandinetti told her she was afraid of Rick Papin.

25 According to Ms. McGilvery, Mr. Papin was physically and verbally abusive to her. He held a knife to her throat in February 1996, and threatened to kill her a few times in 1996. On January 18, 1997, he choked and threatened her while she was in a bar because he was angry at her because he had hidden a gun at her place and wanted it back. Ms. McGilvery testified that she had no personal knowledge that Mr. Papin carried a gun, and that she had never seen him with a gun. She did, however, say that she found a gun in her residence which she believed was placed there by Mr. Papin. She reported the January 18 incident to the police, resulting in Mr. Papin being arrested and charged with several offences, including assault. As a result of the charges arising from the January 18 assault on Ms. McGilvery, and a separate charge of threatening Ms. McGilvery, Mr. Papin was held in custody from January 18, 1997 until April 7, 1997.

26 During the summer of 1996, Ms. McGilvery became involved with Ricky Whitford, who was in the Remand Centre with Mr. Papin from January to April 1997.

Ricky Whitford had known Mr. Papin since 1985. Ms. McGilvery said she told Mr. Whitford that Mr. Papin was a police informant, and that Mr. Whitford wanted to expose Mr. Papin.

27 Mr. Whitford's evidence on the second *voir dire* was that one to two weeks before Connie Grandinetti's death, he told his cousin, Calvin Dominique, that Connie Grandinetti could get information to establish that Mr. Papin was a police informant. Mr. Whitford planned to show the documentation establishing that Mr. Papin was an informant to everyone at the Remand Centre in the hopes that Mr. Papin would be stabbed or beaten up. He also said that Ms. McGilvery told him that Ms. Grandinetti was afraid of Mr. Papin.

28 Mr. Whitford testified that although Mr. Papin used to assault people at parties regularly, the last time he had seen him exhibit violent behaviour was in 1993. He also said that he had seen Mr. Papin with a nine-millimetre handgun and a .357 Smith and Wesson.

29 Mr. Whitford's evidence was also that Mr. Papin was angry at Ms. McGilvery and blamed her for his incarceration.

30 Terry Garnett, the deputy director of security for the Edmonton Remand Centre, testified on the *voir dire* that Rick Papin was detained from January 18, 1997 to April 7, 1997 at the Remand Centre. According to him, the records showed that neither Mr. Dominique, Ms. McGilvery, nor Ms. Grandinetti visited Mr. Papin while he was in custody.

31 Constable Dennis Hartl, who also gave evidence on this *voir dire*, arrested Connie Grandinetti on January 7, 1997 on a charge of selling cocaine to an undercover police officer on March 1, 1996. She was never formally charged. The sale was made on behalf of Rick Papin. After her arrest, Ms. Grandinetti provided information about a number of drug dealers, but she did not provide any information about Mr. Papin. She also told Constable Hartl that she was not afraid of Mr. Papin and was willing to testify against him on the break-and-enter charge arising from his 1996 assault in her apartment.

32 The trial judge, after conducting the two *voir dire*s, ruled that there was insufficient evidence of a link between Rick Papin and the murder of Connie Grandinetti, and excluded the evidence.

33 The jury found Cory Grandinetti guilty of the murder of his aunt. Mr. Grandinetti appealed his conviction to the Alberta Court of Appeal ((2003), 339 A.R. 52). The majority (McFadyen and Côté JJ.A.) upheld the rulings and dismissed the appeal. Conrad J.A. dissented, holding that it was possible to conclude that the undercover police officers were persons in authority, therefore necessitating a voluntariness *voir dire*, and that there was a sufficient link between Rick Papin and Connie Grandinetti's murder to make the evidence admissible. The basis of this appeal is a challenge to the rulings of the trial judge admitting the confessions and excluding the evidence that Rick Papin might have committed the murder.

II. Analysis

A. *The Admissibility of the Inculpatory Statements*

34 The confessions rule ensures that statements made out of court by an accused to a person in authority are admissible only if the statements were voluntary. The relevant principles were canvassed by this Court in *R. v. Hodgson*, [1998] 2 S.C.R. 449, and *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38. In *Oickle*, at paras. 47-71, the Court set out the factors relevant to the voluntariness inquiry. The issue argued on this appeal by the appellant was whether the impugned statements were made to a “person in authority” within the meaning of *Hodgson*, and not whether they were free and voluntary within the meaning of *Oickle*.

35 The rule, the policies supporting it, and the definition of “person in authority”, were all considered in *Hodgson*. Cory J. expressed the rule’s rationale as follows:

The rule is based upon two fundamentally important concepts: the need to ensure the reliability of the statement and the need to ensure fairness by guarding against improper coercion by the state.

...

It cannot be forgotten that it is the nature of the authority exerted by the state that might prompt an involuntary statement. . . . In other words, it is the fear of reprisal or hope of leniency that persons in authority may hold out and which is associated with their official status that may render a statement involuntary. . . . This limitation [i.e., the person in authority requirement] is appropriate since most criminal investigations are undertaken by the state, and it is then that an accused is most vulnerable to state coercion. [paras. 48 and 24]

The underlying rationale of the “person in authority” analysis is to avoid the unfairness and unreliability of admitting statements made when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state. In *Hodgson*, although explicitly invited to do so, the Court refused to eliminate the

requirement for a “person in authority” threshold determination. As Cory J. stated, were it not for this requisite inquiry,

all statements to undercover police officers would become subject to the confessions rule, even though the accused was completely unaware of their status and, at the time he made the statement, would never have considered the undercover officers to be persons in authority. [para. 25]

36 There is no doubt, as the Court observed in *Hodgson*, at para. 26, that statements can sometimes be made in such coercive circumstances that their reliability is jeopardized even if they were not made to a person in authority. The admissibility of such statements is filtered through exclusionary doctrines like abuse of process at common law and under the *Canadian Charter of Rights and Freedoms*, to prevent the admission of statements that undermine the integrity of the judicial process. The “abuse of process” argument was, in fact, made by Mr. Grandinetti at trial, but was rejected both at trial and on appeal, and was not argued before us.

37 In *Hodgson*, the Court delineated the process for assessing whether a confession should be admitted. First, there is an evidentiary burden on the accused to show that there is a valid issue for consideration about whether, when the accused made the confession, he or she believed that the person to whom it was made was a person in authority. A “person in authority” is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused. The burden then shifts to the Crown to prove, beyond a reasonable doubt, either that the accused did not reasonably believe that the person to whom the confession was made was a person in authority, or, if he or she did so believe, that the statement was made voluntarily. The question of voluntariness is not relevant unless the threshold determination has been made that the confession was made to a “person in authority”.

38 The test of who is a “person in authority” is largely subjective, focusing on the accused’s perception of the person to whom he or she is making the statement. The operative question is whether the accused, based on his or her perception of the recipient’s ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.

39 There is also an objective element, namely, the reasonableness of the accused’s belief that he or she is speaking to a person in authority. It is not enough, however, that an accused reasonably believe that a person can influence the course of the investigation or prosecution. As the trial judge correctly concluded:

[R]eason and common sense dictates that when the cases speak of a person in authority as one who is capable of controlling or influencing the course of the proceedings, it is from the perspective of someone who is involved in the investigation, the apprehension and prosecution of a criminal offence resulting in a conviction, an agent of the police or someone working in collaboration with the police. It does not include someone who seeks to sabotage the investigation or steer the investigation away from a suspect that the state is investigating.

(Alta. Q.B., No. 98032644C5, April 30 1999, at para. 56)

40 Although the person in authority test is not a categorical one, absent unusual circumstances an undercover officer will not be a person in authority since, from the accused’s viewpoint, he or she will not usually be so viewed. This position is supported by precedent. As Cory J. explained in *Hodgson*:

The receiver’s status as a person in authority arises only if the accused had knowledge of that status. If the accused cannot show that he or she had knowledge of the receiver’s status (as, for example, in the case of an

undercover police officer) . . . , the inquiry pertaining to the receiver as a person in authority must end. [para. 39]

See also *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 664; *R. v. Todd* (1901), 4 C.C.C. 514 (Man. K.B.), at p. 527.

41 The appellant conceded that undercover officers are usually not persons in authority. His position is that although undercover officers are not usually persons in authority, when an undercover operation includes as part of its ruse a suggested association with corrupt police, who the accused is told could influence the investigation and prosecution of the offence, the officers qualify as persons in authority.

42 However, under the traditional confession rule,

a person in authority is a person concerned with the prosecution who, in the opinion of the accused, can influence the course of the prosecution.

(*R. v. Berger* (1975), 27 C.C.C. (2d) 357 (B.C.C.A.), at p. 385, cited in *Hodgson*, at para. 33)

43 This, it seems to me, is further elaborated in *Hodgson* by Cory J.'s description of a person in authority as someone whom the confessor perceives to be "an agent of the police or prosecuting authorities", "allied with the state authorities", "acting on behalf of the police or prosecuting authorities", and "acting in concert with the police or prosecutorial authorities, or as their agent" (paras. 34-36 and 47). He amplified this theory as follows:

Since the person in authority requirement is aimed at controlling coercive state conduct, the test for a person in authority should not include those whom the accused unreasonably believes to be acting on behalf of the state. Thus, where the accused speaks out of fear of reprisal or hope of advantage because he reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her, then the receiver of the statement is properly considered a person in authority. In other words, the evidence must disclose not only that the accused subjectively believed the receiver of the statement to be in a position to control the proceedings against the accused, but must also establish an objectively reasonable basis for that belief. . . .

. . .

. . . there is no catalogue of persons, beyond a peace officer or prison guard, who are automatically considered a person in authority solely by virtue of their status. A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, but their status, or the mere fact that they may wield some personal authority over the accused, is not sufficient to establish them as persons in authority for the purposes of the confessions rule. . . . [T]he person in authority requirement has evolved in a manner that avoids a formalistic or legalistic approach to the interactions between ordinary citizens. Instead, it requires a case-by-case consideration of the accused's belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities. [paras. 34 and 36]

44 The appellant believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him. When, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state's coercive power is not engaged. The statements, therefore, were not made to a person in authority.

45 The accused having failed to discharge the evidentiary burden of showing that there was a valid issue for consideration, a *voir dire* on voluntariness became unnecessary.

B. *The Evidence of Possible Third Party Involvement*

46 Evidence of the potential involvement of a third party in the commission of an offence is admissible. In *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), aff'd [1977] 2 S.C.R. 824, Martin J.A. stated the simple underlying premise to be:

[I]t [is] self-evident that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X. [p. 757]

However, as he explained, the evidence must be relevant and probative:

Evidence directed to prove that the crime was committed by a third person, rather than the accused, must, of course, meet the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value. [p. 757]

47 The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.

48 The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence: *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 70. If there is an insufficient connection, the

defence of third party involvement will lack the requisite air of reality: *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29.

49 The trial judge correctly formulated the legal test for admitting third party evidence:

The cases establish that an accused may adduce evidence tending to show that a third person committed the offence. The disposition of a third person to commit the offence is probative and admissible provided that there is other evidence tending to connect the third person with the commission of the offence.

(Ruling (*voir dire*), Appellant's Record, at p. 64)

The remaining question, therefore, is whether she correctly applied the test to the facts in holding that there was an insufficient connection between Rick Papin and the murder of Connie Grandinetti for the jury to hear the evidence.

50 The appellant argued that there was evidence tending to show that Rick Papin had motive, opportunity and the propensity to murder Connie Grandinetti.

51 With respect to motive, the appellant relied first on the March 21, 1996 threat incident. There is no doubt that threats can, under some circumstances, provide evidence of motive or disposition. But, there must be a sufficient connection between the threats and the crime before evidence of the threats is admissible. In this case, I agree with the trial judge that there is not a sufficient connection between the March 21, 1996 threat incident and the April 10, 1997 murder. The threats were made when Mr. Papin believed that Connie Grandinetti was selling cocaine from another supplier to his customers. However, Mr. Berlinguette gave uncontradicted evidence that Ms.

Grandinetti had stopped selling drugs eight months prior to her murder. Since the evidence showed that Ms. Grandinetti was no longer selling drugs to Mr. Papin's customers, that motive was extinguished.

52 Moreover, the threat incident occurred more than a year before the murder, and, according to Mr. Berlinguette, Ms. Grandinetti never saw Mr. Papin again. There was, in fact, no evidence that there was any contact between Rick Papin and Connie Grandinetti after March 21, 1996.

53 The appellant also argued that Mr. Papin might have known that Connie Grandinetti was a police informant and might have feared that she would inform on him. According to the appellant, Mr. Papin could have learned that Connie Grandinetti was a police informant in one of two ways: either from the police themselves, since Mr. Papin was also an informant, or from the fact that Mr. Papin was also part of the investigation that led to Connie Grandinetti's 1997 arrest for selling drugs in 1996.

54 I see no basis for interfering with the trial judge's conclusion that there was insufficient evidence reasonably to infer that Mr. Papin's motive for killing Ms. Grandinetti was either to punish her for, or prevent her from, informing on him. Constable Hartl, the officer who arrested Connie Grandinetti in January 1997 for selling drugs the previous March, never suggested in his evidence that anyone was told about Ms. Grandinetti's decision to become a police informant. He also testified that despite becoming an informant, Connie Grandinetti never informed on Rick Papin. It is nothing more than speculation to suggest that the police betrayed Ms. Grandinetti by telling Mr. Papin that she was a confidential informant. Further, there was

uncontradicted evidence that Mr. Papin blamed Ms. McGilvery, not Ms. Grandinetti, for his incarceration in early 1997.

55 There was, moreover, no evidence that Rick Papin knew of Connie Grandinetti's January 7, 1997 arrest. Although the appellant speculated that Mr. Papin might have been subject to arrest or interrogation as part of the same investigation that led to Ms. Grandinetti's arrest, there was no evidence that that ever happened.

56 The appellant argued in the alternative that Mr. Papin might have learned from Mr. Dominique that Connie Grandinetti was planning to provide information to Mr. Whitford exposing Mr. Papin as an informant. According to Mr. Whitford's evidence, he told Mr. Dominique about Connie Grandinetti's involvement in his plan. According to the appellant's submissions, this could lead to the inference that Mr. Dominique told Mr. Papin about it, especially since the two men had been close associates. According to the prison records, Mr. Dominique never visited Mr. Papin while he was incarcerated. There is no evidence as to whether the two ever spoke on the phone.

57 Mr. Dominique did not testify. Without his testimony, no direct evidence supports the theory advanced by the appellant. None of the evidence indicated that there was even any contact between Mr. Dominique and Mr. Papin while Mr. Papin was incarcerated at the Remand Centre in the months before Connie Grandinetti's death. There was also some evidence that Mr. Papin and Mr. Dominique had a falling out, namely the fact that Mr. Whitford was discussing exposing Mr. Papin's informant status with Mr. Dominique, something he was unlikely to do if Mr. Dominique was still Mr. Papin's "right-hand man".

58 The arguments amount to a chain of speculation joined by gossamer links. There was simply not enough evidence that Mr. Papin had a motive for killing Connie Grandinetti.

59 The opportunity evidence relied on by the appellant was that Mr. Papin was released from prison three days before Connie Grandinetti was killed. Standing alone, this evidence is palpably unprobative. As the trial judge found:

There is no evidence that Rick Papin had the opportunity to commit the murder. There is no evidence that he had access to or contact with Connie Grandinetti when she was killed. Although the evidence establishes that he was not in custody, that fact alone, in my view, is not evidence of opportunity as that factor has been considered by the courts.

(Ruling (*voir dire*), Appellant's Record, at p. 71)

The fact that Mr. Papin was released from the Remand Centre on April 7, 1997 is an insufficient link between him and the murder on April 10, 1997.

60 The appellant argues additionally that there is ample evidence of Rick Papin's bad character and propensity for violence. I agree. There was evidence that Rick Papin owned a gun, threatened his spouse verbally and physically, and had previously been jailed for assault. All of this evidence, however, is inadmissible in the absence of evidence connecting Mr. Papin and the murder.

61 I am therefore of the view that the trial judge made no error in excluding from the jury the theory that Rick Papin might have killed Ms. Grandinetti. The threat incident, which took place over a year before the murder, was not sufficiently

connected to the murder. The two other possible motives were based on speculation, not evidence. The opportunity evidence was insufficient, and the propensity evidence was, standing alone, deficient because it lacked a sufficient link to the murder.

62 Accordingly, I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Bascom, Fagan, Dunn, Calgary.

Solicitor for the respondent: Attorney General of Alberta, Calgary.

*Chapter 4 Admissions and
Confessions by The Honourable
Samuel Freedman*

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BUTTERWORTHS
TORONTO

1971

Chapter 4

ADMISSIONS AND CONFESSIONS

THE HONOURABLE SAMUEL FREEDMAN*

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A. INTRODUCTION

"I must acknowledge that I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject. . . ."
 Mr. Baron Hotham in *R. v. Jacob Thompson* (1783), 1 Leach 291, 168 E.R. 248, at p. 249.

" . . . I think there has been too much tenderness towards prisoners in this matter." Parke B. in *R. v. William Baldry* (1852), 2 Den. 430, 169 E.R. 568, at p. 574.

There are few aspects of the law which reveal so sharp a conflict in fundamental thinking and basic philosophy as the problem of the admissibility of confessions in a criminal case. Two schools of thought are here clearly discernible. On controversial questions honourable men may honourably differ; and the protagonists of both schools can, with some show of justification, seek support for their viewpoints in reason and in principle. For both sides seek the very worthy goal of the best interests of the state. But they differ

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in the nature of the state they would establish and in the means to be taken to establish it. One side sees peril to the state if an apparent law-breaker is allowed to go free by reason of the rejection of his confession. That the court found the confession to have been induced and involuntary often seems to them to be a very technical position, one that places an undue restraint on the agencies of law enforcement in the ongoing and ever-present war on crime. The public welfare is not served by such excessive tenderness towards accused persons. The other side, looking to history and experience, asserts that there is danger to the individual from unchecked police power. More than that. The improper invasion of the rights and freedom of an individual harms not only him but, in the long run, the state itself. Here, as in other areas, freedom may prove to be indivisible. Adherents of the second school, cherishing the concept of a free society as opposed to a police state, agree with Frankfurter J. that "The history of liberty has largely been the history of observance of procedural safeguards."¹

The governing rule on the subject may be simply stated. It received its classic expression in the case of *Ibrahim v. The King*,² where Lord Sumner spoke as follows:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."³

The implications of that statement will be analyzed below. For the present it is enough to point out that Lord Sumner's enunciation of the rule has received wide judicial endorsement in Canada, most significantly and authoritatively by the Supreme Court of Canada itself. In the landmark case of *Boudreau v. The King*,⁴ to which further reference will be made, the Supreme Court of Canada put to rest any doubt that may have existed on any aspect of the subject by specifically restating its acceptance of the rule in

¹ *McNabb v. U.S.* (1942), 318 U.S. 332, at p. 347, 63 S. Ct. 608, at p. 616.

² *Ibrahim v. The King*, [1914] A.C. 599.

³ *Ibid.*, at p. 609.

⁴ *Boudreau v. The King*, [1949] S.C.R. 262, 7 C.R. 427. For an earlier affirmation of the rule *vide e.g.*, *Prosko v. The King* (1922), 63 S.C.R. 225, 37 C.C.C. 199.

Lord Sumner's terms. It has done so more than once since, for example in *R. v. Fitton*.⁵

The statement contemplated by the rule may be either a confession or an admission. (Whether it embraces a denial as well, that is to say, an exculpatory assertion, was until recently a matter of doubt but is no longer, as is indicated below.) The difference between a confession and an admission lies in their internal content rather than in their effect. A confession, in the language of Wigmore, is "an acknowledgement in express words of the truth of the guilty fact charged or of some essential part of it".⁶ An admission is an acknowledgement of a material fact which may form a link in the chain of proof against the accused.⁷ It is apparent that Wigmore's definition of confession is broad enough to include an admission as well. A confession is clearly the more comprehensive term. It will embrace an admission. The reverse, however, is not true. If a distinction between the two terms is to be observed it consists in the fact that an admission stops short of being a plenary confession.

But for present purposes the distinction is more semantic than real. In the context of their admissibility as evidence both confessions and admissions are, under English law, subject to the same rule. This proposition was unequivocally asserted by the House of Lords in the case of *Commissioners of Customs and Excise v. Harz et al.*⁸ There Lord Reid, expressing a point of view which received the concurrence of the other members of the court, said:

"Then it was argued that there is a difference between confessions and admissions which fall short of a full confession. A difference of that kind appears to be recognized in some other countries. . . . But there appears to be no English case for more than a century in which an admission induced by a threat or promise has been admitted in evidence where a full confession would have been excluded. . . . I can see no justification in principle for the distinction."⁹

⁵ *R. v. Fitton*, [1956] S.C.R. 958, 24 C.R. 371.

⁶ *Wigmore on Evidence* (3rd ed., 1940), s. 821, at p. 238.

⁷ *Yemear's Annotated Criminal Code* (6th ed.), p. 747. *R. v. Benjamin* (1917), 53 Que. S.C. 160, 32 C.C.C. 191. *Kaufman's Admissibility of Confessions*, p. 6.

⁸ *Commissioners of Customs and Excise v. Harz*, [1967] 1 All E.R. 177. This case was cited by the Supreme Court of Canada in its recent judgment in *Piche v. The Queen* (*vide footnote 83, infra*).

⁹ *Ibid.*, at p. 182.

It remains only to add that in Canada too¹⁰ confessions and admissions are subject to the same rule of admissibility. Accordingly, where reference is here made to the law governing the admissibility of a confession it may be taken to apply to an admission as well—indeed to any statement of an accused.

B. THE BASIS OF THE RULE

Mankind has moved a long distance from concepts once entertained. In ancient Greece it was believed that torture was the only effective method of obtaining the truth from a slave. A distinguished judge of the Supreme Court of Israel has recently commented thus upon the subject:

"... the true reason for this extraordinary rule has been stated by some contemporary Greek orators to be the experience that evidence given under torture is always true, whereas evidence given freely is often false. Nevertheless, torture was not applied to freeborn citizens; but the evidence given by slaves under torture was held more reliable than evidence given by citizens without torture. The psychology underlying this remarkable proposition is that a man—and more particularly a slave—will tell all sorts of stories in order to avoid being tortured; but if he persists in his story under torture, it must surely be true."¹¹

A more enlightened philosophy is applied today. Involuntary confessions are excluded. Why? There is a vast literature on the subject. Upon one ground for such exclusion all are now agreed: an induced confession may not be true. "(N)ot all confessions following upon inducements are necessarily untrue, but since some confessions caused by an inducement may be false, all are excluded."¹² Wigmore, with many supporters, insists that this is the only ground. Rejecting any alternative ground he asserts the principle that induced confessions are excluded only because they are "testimonially untrustworthy."¹³ Such a principle flows directly from the concept of a criminal trial as a search for truth.

But just as a criminal trial is largely, but not entirely, a search

¹⁰ *Vide* the references in footnote 7.

¹¹ Justice Haim H. Cohn on "Tortures and Confessions", in *Scripta Hierosolymitana*, publications of the Hebrew University, Jerusalem, Vol. 21, *Studies in Criminology*.

¹² "Developments in the Law—Confessions" (1965-66), 79 *Harv. L. Rev.* 935, at p. 955.

¹³ Wigmore, *op. cit.*, § 822, p. 246.

for truth, so an induced confession is rejected largely, but not entirely, because it may not be true. Wigmore's thesis is fundamentally sound, but it does not tell the whole story.

The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from law's deliberate policy. The law says, for example, that a wife's evidence shall not be used against her husband. If truth and nothing more were the goal, there would be no place for such a rule. For in many cases the wife's testimony would add to the quota of truth. But the law has regard to other values also. The sanctity of the marriage relationship counts for something. It is shocking to our moral sense that a wife be required to testify against her husband. So, rather than this should happen, the law makes its choice between competing values and declares that it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost. "Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."¹⁴

It is justice then that we seek, and within its broad framework we may find the true reasons for the rule excluding induced confessions. Undoubtedly, as already stated, the main reason for excluding them is the danger that they may be untrue. But there are other reasons, stoutly disclaimed by some judges, openly professed by others, and silently acknowledged by still others—the last perhaps being an instance of an "inarticulate major premise" playing its role in decision-making. These reasons, all of them, are rooted in history. They are touched with memories of torture and the rack, they are bound up with the cause of individual freedom, and they reflect a deep concern for the integrity of the judicial process. They can be expressed in various forms. Perhaps they may conveniently be grouped under three main heads: (a) the criterion of truth; (b) fairness to the accused, including the right to keep silent and the related privilege against self-incrimination;

¹⁴ Knight-Bruce V.C., in *Pearse v. Pearse* (1846), 1 *De G. & S.* 12, at p. 28.

and (c) the due administration of justice. Each of these will be considered in turn.

1. The Criterion of Truth

Once admitted as evidence a confession is bound to play a persuasive role in the determination of the issue of guilt or innocence. By its very nature a confession is a declaration against interest. The accused knows that if convicted he will face a penalty of one kind or another. Yet he has admitted his guilt to the police. Experience and elementary knowledge of human nature tell us that, in obedience to an instinct of self-preservation, men will be slow to acknowledge their culpability of crime, with its penal consequences. When, therefore, they do confess, the persuasive effect of such an acknowledgement of guilt is likely to be proportionately all the greater. Indeed no member of the jury can be blamed if he regards such a confession as decisive of the question before him.

Why would the accused have confessed his guilt if it were not true? Obviously a confession which has been accepted in evidence will rank very high in probative value.

Deservedly so, one might add—provided the court has been satisfied that the confession was made voluntarily. The principle here involved has a long history. As far back as 1783 it received expression in the case of *R. v. Jane Warickshall*¹⁵ in the following terms:

"Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."

Voluntariness will be examined later. Here one may simply observe that truth is the widely accepted criterion. A confession is admitted because if voluntary it is likely to be true. A confession is rejected because if involuntary it may be untrue. In the words of

¹⁵ *R. v. Jane Warickshall* (1783), 1 Leach 263, 168 Eng. Rep. 234.

G. Arthur Martin, Q.C., "The policy of the law which excludes (such) statements . . . is that they may be untrue and, therefore, ought not to be received in evidence."¹⁶

One phase of this branch of the subject deserves a brief word. Sometimes a person will voluntarily confess to a crime which he did not commit. Instances of such bizarre conduct are admittedly rare, but they are not unknown. Their motivations are divers. Sometimes they are the product of stupidity, as in the 1964 case in New York City involving one Whitmore,¹⁷ a suspect of limited intelligence who confessed to two murders and a rape. Later the police established that one of the crimes was committed by another person. Sometimes a false confession will be made from a desire for notoriety. Some unstable individuals have a strange mania to confess to the most outrageous crimes, of which they are entirely innocent. The Nebraska case of *Shellenberger v. State*¹⁸ is an example of that type. In the view of the court *Shellenberger*, who had falsely confessed to a murder, was "an abnormal and defective individual, with a vivid imagination . . .".¹⁹ More than 300 years ago, in 1660, the strange case of *R. v. Perry*²⁰ occurred. Perry's master, William Harrison, had disappeared. Questioned about the matter by the authorities Perry told, with abundant detail, how in his presence his brother and his mother had murdered and robbed Harrison, he himself sharing to some extent in the spoils. The body could not be discovered. All three were hanged. Two years later Harrison returned, reporting that he had been kidnapped (not by the Perrys) and sold to the Turks.

Such strange and exceptional occurrences, disturbing though they may be, do not invalidate the main thesis here suggested. A voluntary confession is likely to be true; an induced confession may be untrue. So the former is admitted and the latter rejected.

¹⁶ "The Admissibility of Confessions and Statements", by G. Arthur Martin Q.C. (1962-63), 5 *Crim. L.Q.* 35. *Vide also* "The Admissibility of Confessions in Criminal Cases", by T. D. MacDonald and A. H. Hart (1947), 25 *Can. Bar Rev.* 823.

¹⁷ This and other cases of false confessions are referred to by Prof. Arthur E. Sutherland, Jr., in "Crime and Confession" (1965-66), 79 *Harv. L. Rev.* 21, at p. 38.

¹⁸ *Shellenberger v. State* (1914), 97 *Neb.* 498, 150 *N.W.* 643.

¹⁹ *Ibid.*, at p. 648.

²⁰ *R. v. Perry* (1660), 14 *State Tr.* 1312. *Vide also* Kaufman's *Admissibility of Confessions*, pp. 9, 10.

2. Fairness to the Accused: the Right to Keep Silent, and the Privilege against Self-Incrimination

Fairness to an accused person is a distinguishing feature of English law. It was not always so. Earlier English history bears the stain of compulsory interrogations enforced by the whip, the pillory and the rack. The activities of the Court of Star Chamber—perhaps the worst but not the sole offender—do not represent England's finest hour. The evolution of English law to its present salutary concern for the rights of an accused and for the protection of those rights against prosecutorial improprieties can only be fully understood against the dark background of earlier centuries.²¹

Today a leading criminologist could rightly observe that a "golden thread of fairness runs throughout the whole field of criminal trials . . ."²² One element of that golden thread, closely linked to the presumption of innocence, is the right of silence. An accused person is not bound to say anything. Allied to that right is the privilege against self-incrimination, embodied in the maxim *nemo tenetur seipsum accusare* (or *prodere*): no one is bound to incriminate (or betray) himself.

It has been frequently said that the maxim applies only to court proceedings and that it is unrelated to out-of-court confessions to the police. Wignore asserts specifically that "a confession is not rejected because of any connection with the *privilege against self-incrimination*".²³ The two have neither a common origin nor a common principle.²⁴ Phipson too limits the application of the maxim to witnesses in court proceedings. He says: "A witness . . . can only claim the privilege after he is sworn and the question put."²⁵

Strictly speaking, the confession rule and the privilege against self-incrimination are different in their nature and their origin. Again strictly speaking, the two are independent of each other. But judges have not always spoken strictly in these matters. What-

²¹ Lord MacDermott's *Protection from Power under English Law*, p. 21; Glanville Williams' *The Proof of Guilt*, p. 38 *et seq.*; Phipson on *Evidence* (10th ed.), s. 613, p. 264.

²² Prof. J. L. J. Edwards, "Conflicts and Controls in the Law Enforcement Field" (1966-67), 9 *Crim. L.Q.* 75, at p. 82.

²³ Wignore, *op. cit.*, s. 823, p. 249.

²⁴ *Ibid.*, p. 250, footnote 5.

²⁵ Phipson on *Evidence* (10th ed.), s. 617, p. 267.

ever may be the theory of the law, its actual expression in practice lends support to the view that judges have not infrequently had the maxim very much in mind when considering the admissibility of a confession. Thus Lord Reid in *Commissioners of Customs & Excise v. Harz et al.*²⁶ expressed the view of the House of Lords in the manner following:

"I do not think it is possible to reconcile all the very numerous judicial statements on rejection of confessions, but two lines of thought appear to underlie them: first, that a statement made in response to a threat or promise may be untrue or at least untrustworthy; and secondly, that *nemo tenetur seipsum prodere*."

In a similar vein Dixon J. (later C.J.) in the High Court of Australia case of *McDermott v. The King*,²⁷ referring to the admissibility of confessional statements, spoke as follows:

"It is apparent that a rule of practice has arisen, deriving almost certainly from the strong feeling for the wisdom and justice of the traditional English principle expressed in the precept *nemo tenetur seipsum accusare*."

In the United States the relationship between admissibility of confessions and the privilege against self-incrimination has received frequent judicial affirmation. The Supreme Court of the United States has dealt with the subject in several cases, most notably in *Miranda v. State of Arizona*.²⁸ Speaking for the majority in that case, Chief Justice Warren said on that point:

"The question . . . is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. . . . We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning."

Canadian jurisprudence has reflected a similar mode of thought. Illustrative of this approach to the problem is the case of *R. v. Dick*,²⁹ a decision of the Ontario Court of Appeal. There the court of five judges unanimously rejected statements in the nature

²⁶ *Vide* footnote 8, *supra*, p. 184.

²⁷ *McDermott v. The King* (1947-48), 78 C.L.R. 501, at p. 513.

²⁸ *Miranda v. State of Arizona* (1966), 384 U.S. 436, at p. 460, 86 S. Ct. 1602, at p. 1620. In the United States the privilege against self-incrimination has been constitutionally enshrined in the Fifth Amendment.

²⁹ *R. v. Dick* (1946-47), 2 C.R. 417.

of a confession which the accused had made to the police. The accused had been told that she was charged with vagrancy. On that basis she made her statements to the police. But the actual charge on which she was later tried was murder. Ruling the statements inadmissible Robertson C.J.O., for the court, spoke thus:

"It seems to me to be an abuse of the process of the criminal law to use the purely formal charge of a trifling offence, upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements, not in relation to the charge laid and made the subject of a caution, but in relation to a more serious and altogether different offence. . . . It is trifling with the long established maxim *nemo tenetur seipsum accusare*, and has more than the mere appearance—but, in the intended result, it has at times the effect—of a trial by the police *in camera* before even the charge has been laid."³⁰

Admittedly these observations, to the extent that they suggest the requirement of an appropriate or indeed any caution, must today be read in the light of the later *Boudreau*³¹ case. But the judgment is cited here as indicative of the relationship which the judges perceived between admissibility of confessions and the privilege against self-incrimination.³²

Finally on this theme it is appropriate to note that in *Cross on Evidence* the author explains the rationale of the present law in these terms:

"But cases . . . to which reference has just been made render it hard to treat the danger of unreliability as the sole ground of exclusion at the present day. Allowance must also be made for the dislike shared by English lawyers and laymen alike of the spectacle of a man being made to incriminate himself. There is also the desirability of doing everything possible to discourage improper police methods."³³

The last sentence of the quotation leads to a consideration of the third suggested basis of the exclusionary rule.

³⁰ *R. v. Dick* (1946-47), 2 C.R. 417, at p. 430. It should incidentally be remembered that in Canada the privilege against self-incrimination is subject to certain statutory restrictions, of which the most important is contained in s. 5 of the Canada Evidence Act, R.S.C. 1970, c. E-10.

³¹ *Yide* footnote 4, *supra*.

³² Carwright C.J.C. in the recent case of *Pitche v. The Queen* invokes the maxim against self-incrimination.

³³ *Cross on Evidence* (3rd ed., 1967), p. 447.

3. The Due Administration of Justice

An involuntary confession will sometimes be excluded simply because its rejection appears desirable for the due administration of justice. Let it be noted that in such cases the trustworthiness or otherwise of the particular confession ceases to be the dominant consideration in the mind of the court. It becomes subordinate to a larger question of general policy. That policy focuses attention upon the behaviour of officials in the law-enforcement process. Openly or tacitly it poses the question whether the means employed to secure the confession were such as to leave the administration of criminal justice itself sullied. This does not mean that police are bound to a sporting standard of fair play, as in a game or contest. The war on crime cannot safely be waged according to Marquis of Queensberry rules. Stratagems on the part of police are permitted, as will be seen below. But misconduct of a kind that shocks the moral sense and tramples upon values that are rightly held dear throws the administration of justice into disrepute. When that occurs it is the court, and the court alone, which can stand forth as the guardian and the vindicator of the integrity of our system of criminal justice. In the opinion of Professor Arthur E. Sutherland, Jr., "The most compelling reason for rejecting the involuntary confession is this depreciation of criminal justice."³⁴

Respect for the law and the legal process is an objective to be cherished. Official conduct that leads to disrespect for these values justly demands censure and repudiation by the court. Where such conduct has resulted in the making of a confession, an obvious and effective form of repudiation is the rejection of that confession as evidence. Illustrative of this kind of judicial action is the English case of *R. v. Barker*.³⁵ Officials of the Board of Inland Revenue were there investigating a suspected tax fraud. They read to the taxpayer an extract from Hansard's *Parliamentary Debates* to the effect that if a taxpayer disclosed his past frauds and facilitated the investigation thereof, the Board would not institute criminal proceedings but would accept a pecuniary settlement. Certain documents and records were produced by the taxpayer in response to this inducement. None the less a criminal prosecution followed. The documents and records were admitted in evidence by the trial

³⁴ *Yide* footnote 17, *supra*, p. 39.

³⁵ *R. v. Barker*, [1941] 2 K.B. 381, [1941] 3 All E.R. 33.

judge and the accused was convicted. On appeal it was held that these papers (which were treated precisely on the same footing as a confession) should not have been admitted, and the conviction was accordingly quashed. The significant thing to observe is that the appellate court did not for one moment suggest that the inducement had caused the taxpayer to create documents that were false. *Glanville Williams* comments on that point in these words:

"As a general matter, a confession made in consequence of an inducement is open to doubt because it may perhaps not be true. But when the taxpayer produces his fraudulent records which he compiled before the charge was made, there is no reason to suppose that he fabricated the records or would or could have done so for the purpose of being convicted. The records are obviously genuine, in the sense that they were actually kept in that way. . . . It follows that the rule of law excluding these records is not based on the possibility of untruth."³⁶

It is suggested that the true reason for the exclusion of the records was the court's allegiance to certain broader principles of fairness and propriety, and its sense that the violation of these principles at the hands of Crown representatives was clearly inimical to the due administration of justice. That reason is implicit in the judgment of the appellate court. In deciding the case as they did the judges were endorsing, *sub silentio* perhaps, the philosophy of *Holmes J.*, namely, to "think it a less evil that some criminals should escape than that the Government should play an ignoble part."³⁷

The phrase "disciplining the police" has been used. When the court appears to be imposing such discipline it is not acting from a desire to penalize the prosecution for the misconduct of its officials. Rather the court's actions are directed to the larger objective of the due administration of justice. It rejects a confession obtained by means that the law regards as improper. So the prosecution is not able to benefit from its impropriety. The deprivation of this benefit today is designed to secure more proper police conduct tomorrow, and thereby aid the due administration of justice. The matter has been aptly expressed thus:

³⁶ *Glanville Williams*, "Evidence Obtained by Illegal Means" (1955), *Crim. L.R.* 339, at p. 341.

³⁷ *Olmstead v. United States*, 277 U.S. 438, at p. 470, 48 S. Ct. 564.

"The concept illustrated here—disciplining the police—is apprehended to be an important one. . . . While not related to immediate probative value, i.e., the probative value of a statement that has actually come up for consideration, it nevertheless has long range probative value as its object, since the principle involved is to discourage future improprieties on the part of the police by making their past improprieties ineffectual."³⁸

The rationale of the rule excluding induced confessions has now been set forth. It is appropriate to move on to an examination of some of the implications of the rule.

C. VOLUNTARINESS

The fundamental requirement for the admissibility of an accused's statement is that it be voluntary. The determination of voluntariness is not always an easy thing. Some cases, of course, present no difficulty. An unsolicited spontaneous confession is readily classified as voluntary, and hence admissible. A confession extracted by the "third degree"—to go to the other extreme—is easily identified as involuntary, and hence inadmissible. It is the cases in between that are troublesome. They are of infinite variety, but they all pose the same problem to the judge, namely: on which side of the line do they fall?

In dealing with that question the judicial mind must enquire whether the statement was made by the accused either through fear of prejudice or hope of advantage exercised or held out by a person in authority. Expressed another way, the court must determine whether or not the statement was induced. That term is actually preferable to "involuntary". Impelled by the hope of advantage an accused may make a statement. In the ordinary sense of the word the statement may be thought of as voluntary, for the accused was willing to make it. But in the legal sense it is an induced statement, and therefore involuntary under the rule. The term "induced" (or "inducement") is broad enough to apply both to a statement made through fear of prejudice and to one made in hope of advantage. That is not to say that the term "involuntary" is not also employed, and indeed quite permissibly. But its use in this area of the law must be read and understood in the special legal sense rather than in the popular sense.

At what point can it be said that the accused was induced to

³⁸ *Id.* footnote 16, *supra*, *MacDonald and Hart*, at p. 826.

speak? It was once asserted by no less an authority than Duff J. (as he then was) that "The arrest and charge are in themselves a challenge to the accused to speak; an inducement within the rule."⁵⁹ That, however, cannot be regarded as a correct expression of the law today. There must be more than the arrest and charge, which for present purposes may be regarded as neutral, though unpleasant, factors. Something additional must be present to constitute an inducement. It may be a great deal or very little, a gross abuse or a minor infringement, but something there must be.

It was once thought that police silence in the form of an omission to give the customary warning to the accused that he was not bound to say anything but that anything he did say might be used as evidence at his trial,⁶⁰ would suffice to invalidate a statement thereafter made. Indeed to credulous minds it appeared that the Supreme Court of Canada in 1943 in the *Gach*⁶¹ case had enunciated that very proposition. But not so. We had all misread that case. Six years later, in *Boudreau v. The King*,⁶² the court clarified and ended all doubt on the matter. A warning or its absence was merely one factor among others entering into the determination of the issue of voluntariness. Kerwin J. (as he then was) expressed the matter in these words:

"The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one."⁶³

Reaching a similar conclusion that the giving of a warning was not an indispensable requirement, Rand J. put the matter thus:

"The underlying and controlling question then remains: is the statement freely and voluntarily made? . . . It would be a serious error to place the ordinary modes of investigation of crime in a strait

⁵⁹ *R. v. Key* (1904), 9 C.C.C. 403, at p. 404.

⁶⁰ This is not intended to be a full statement of the so-called "usual" warning.

⁶¹ *R. v. Gach* (1943), 79 C.C.C. 221.

⁶² *Ylde* footnote 4, *supra*.

⁶³ *Ibid.*, at p. 267 and p. 433.

jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the Court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice."⁶⁴

From that position the court has never departed. It may safely be taken that *Boudreau* represents the law of Canada on this subject.

Is police questioning permissible? What is the legal status of a confession elicited by such interrogation? The answer is that police interrogation, peacefully and properly conducted, is recognized as legitimate and a resulting confession will accordingly be admitted in evidence. But conduct smacking of oppression or intimidation will justly be regarded by the court as having imparted the taint of involuntariness to the accused's response. So too with questioning that holds out a promise of hope or advantage in return for a confession. And, although a warning is not indispensable, its absence in the context of police questioning may well prove fatal. The court will consider all the surrounding circumstances—what was said; how it was said, over what period of time the questioning occurred, the emotional, physical, and intellectual capacity of the accused, his age and experience, and anything else that in the specific situation appears to be relevant—for the purpose of determining whether the statement offered in evidence was indeed voluntary. Physical duress need not be present. An atmosphere of compulsion may be enough to render a statement inadmissible.⁶⁵

An older view of the law frowned entirely upon police questioning. An English judge once said: "A policeman should keep his mouth shut and his ears open. . . . It is no business of a policeman to put questions . . ."⁶⁶ Such a prohibition would today be regarded as too far-reaching and as an unwarranted limitation upon permissible police activity.⁶⁷ But in some jurisdictions the battle

⁶⁴ *Boudreau v. The King*, [1949] S.C.R. 262, at p. 270, 7 C.R. 427, at p. 435.

⁶⁵ *R. v. Condale* (1951), 12 C.R. 245 (Alta.) Egbert J.; *R. v. Howlett* (1950), 9 C.R. 196 (Ont. C.A.); *R. v. Starr* (1960), 33 C.R. 277 (Man.) Molloy C.C.J.

⁶⁶ *Cave J. in R. v. Male and Cooper* (1893), 17 Cox C.C. 689, at p. 690.

⁶⁷ But see a sharp criticism of some police interrogations in R. N. Gooderson's "The Interrogation of Suspects" (1970), 48 Can. Bar Rev. 270.

still continues, though it has shifted to other ground. In the United States a majority of the Supreme Court classified all police questioning as coercive. They spoke of "the compelling influence of the interrogation".⁴⁸ If this appears to be a bad generalization it has not gone without endorsement. Prof. Edwin D. Driver has written: "Despite the doubts of the dissenters (in *Miranda*) about the majority's methodology, the Court's finding of inherent coercion even in ethical interrogations seems completely justified by the literature of social psychology."⁴⁹ The dissenters, however, rejected the theory that all police questioning is inherently coercive, Harlan J. asserting the view that "peaceful interrogation is not one of the dark moments of the law".⁵⁰

Most Canadians would accept the proposition that "asking questions is a reasonable way to get answers".⁵¹ They would not deny that privilege to the policeman—provided always that in the process he adhered to standards of propriety. That in the main is the attitude of Canadian judges also, except that in their eyes standards of propriety are considered and approached from the special point of view of the law.

Thus, for example, an admonition to an accused that he had "better tell the truth" would seem to the average layman to be an innocuous remark. But such words, or words to a similar effect, carry with them the seed of danger. They may be construed by the court as an inducement, and indeed they have usually been so construed. A confession made by a person in response to such an inducement, minimal in character though it appears, will be rejected.⁵² But not invariably. Risky though it be for a policeman to use words like "better tell us everything"—and an experienced and conscientious officer will shun them like the plague—their consequences will not always be fatal. There have been some in-

⁴⁸ *Vide* footnote 28, *supra*, at p. 1629.

⁴⁹ "Confessions and the Social Psychology of Coercion" (1968-69), 82 *Harv. L. Rev.* 42, at p. 44.

⁵⁰ *Vide* footnote 28, *supra*, at p. 1650. Also "A Postscript on *Miranda*" by Judge Henry J. Friendly in his book *Benchmarks* (The University of Chicago Press, 1967), pp. 271, 272.

⁵¹ Justice Walter V. Schaefer of the Illinois Supreme Court, "Police Interrogation and the Privilege against Self-Incrimination" (1966), 61 *Nw. U.L. Rev.* 506, at p. 507.

⁵² *Vide*, e.g., *R. v. Lazure* (1960), 32 C.R. 194; *R. v. Richards*, [1967] 1 All E.R. 829.

stances where words of that type have been employed, and yet a confession following thereon has been admitted.⁵³ That may occur when the court is satisfied that the offending words, potentially perilous though they be, did not in fact induce the accused to speak. In other words, he would have confessed in any event, the court's enquiry on the point establishing that his statement was indeed voluntarily made. It is scarcely necessary to emphasize, however, that cases of the kind just mentioned will confront a prosecuting counsel with special difficulty. For words like "better tell the truth" carry the mark of an inducement on their very face, and a resultant confession may well find itself battling against the stream.

So it is a good general rule that such words be avoided, even if they be well intended. This is doubly the case if the manner or circumstance of their utterance might import a threat. In some situations an exhortation to tell the truth can be decidedly menacing—as when a police surgeon says it while examining the suspect's genitals.⁵⁴

The admissibility of a confession elicited by questioning will sometimes depend on capacity to understand and to respond. Instances of incapacity will vary. The case of the mentally unfit person presents no difficulty. An alleged confession made by such a person should not be admitted. Dullness of intellect falling short of mental incapacity may or may not result in the rejection of a confession. It will be a factor to be considered with all other circumstances in the court's determination of the issue of voluntariness. On this question of capacity two types of cases demanding special consideration are the confessions of juveniles and the confessions of persons who are intoxicated.

The law has always exhibited a proper concern for the protection of the interests of juveniles. That concern has manifested itself in many areas, confessions included. It is recognized that children of tender years are peculiarly susceptible to external influences—not least of all to influences associated with the trappings of the law. The official police uniform, the arrest, the transportation to a police station, the confinement in a cell or other police room away from parent or friend—all these are likely to have a very unsettling

⁵³ *R. v. Sykes* (1951-52), 13 C.R. 153, is an example.

⁵⁴ *Vide* footnote 12, *supra*, at p. 956, citing *Kier v. State* (1957), 213 Md. 556, 132 A. 2d 494.

effect on the mental state of a young child. A police warning in the usual terms will in these circumstances often be little more than an empty ritual whose implications are not fully apprehended. A resulting confession will have to fight hard for admission. Illustrative of the judicial attitude in such matters is the case of *R. v. Carsdale*,⁵⁵ where a confession made by a young girl (her age is not stated in the report) was rejected. To the same effect is the case of *R. v. Yensen*,⁵⁶ involving a 14-year-old boy charged with murder, and the case of *R. v. Jacques*,⁵⁷ which concerned a juvenile boy 15 years of age. The court in both these cases emphasized the desirability of a parent or relative of the juvenile being present during the taking of his statement.

Concerning the effect of intoxication it is well to bear in mind the comment of McRuer C.J.H.C. that "A voluntary statement means a statement made in a voluntary state of mind. . . .⁵⁸ The court there expressly refused to delegate to the medical doctor its task of ascertaining whether the accused, intoxicated to a degree, was in a proper condition to be questioned. Holding that the evidence raised doubt as to the accused's capacity to make a voluntary statement and to appreciate its consequences, the court in its discretion declined to admit the statement in evidence. But that was not McRuer C.J.H.C.'s final word on the subject. Some years later he had this to say of the *Washer* case:

"I want to make it perfectly clear that I had no intention, in what I said in that case, of laying down as a rule of law that because a man was in some degree under the influence of liquor he could not make a voluntary statement. Many men make very compelling speeches, both privately and publicly, when they are under the influence of liquor. But that was a circumstance to take into consideration . . ."⁵⁹

This gloss on the earlier case puts it into better perspective. It may be noted that the *Washer* case, with its later qualification (if it may be called that), has been the subject of consideration in sev-

⁵⁵ *Yide* footnote 45, *supra*.

⁵⁶ *R. v. Yensen* (1962), 36 C.R. 339 (Ont.) McRuer C.J.H.C.

⁵⁷ *R. v. Jacques* (1959), 29 C.R. 249 (Que.) Schreiber, Welfare Court Judge.

⁵⁸ *R. v. Washer*, [1948] O.W.N. 393, at p. 394.

⁵⁹ *Yide* footnote 56, *supra*, at p. 345.

eral more recent cases.⁶⁰ It poses for the court the question whether the accused, at the time he made his statement, was in full possession of his faculties; or, expressed another way, whether the words he used could in the circumstances truly be said to amount to his statement so as to be capable of being ruled voluntary. But, as the cases cited indicate, judicial opinion on the point is not unanimous, some judges holding the view that drunkenness is a matter affecting only the weight to be given a statement and not its admissibility.

Another aspect of voluntariness may now be considered. It arises from the regrettable practice—fortunately rare today but not yet extinct—of holding prisoners incommunicado and denying them access to counsel.

Some years ago in Toronto, at the conclusion of a football game between the Toronto Argonauts and the Montreal Alouettes, a demonstration occurred on the field. In the resultant mêlée a stadium guard collapsed and died—from a heart attack, as it was later determined. Two young men, Wright and Griffin, were arrested and taken into custody by the police. A short time later Wright's lawyer came to the police station to see him. He was denied access to his client. The father of the other young man also came to the police station to see his son. He too was denied access, the police taking the position that until their investigation was finished no person could see either of the young men. Holding these young men incommunicado was wrong and unjustifiable, and this conduct on the part of the police later became the subject of a judicial inquiry presided over by Mr. Justice Roach of the Supreme Court of Ontario. In his report Roach J.A., dealing with the question of holding a prisoner incommunicado, said:

⁶⁰ *R. v. Drewicki* (1964), 41 C.R. 265 (B.C.) Schultz C.C.J.—confession rejected; *R. v. Hartridge* (1966), 48 C.R. 389 (Sask. C.A.)—confession admitted; *R. v. Oldham* (1970), 74 W.W.R. 151 (B.C.C.A.)—confession held admissible without the necessity of a *voir dire*, the court holding that drunkenness may affect weight but not, generally speaking, admissibility. The latter case reversed the judgment of MacDonald J. (1970), 72 W.W.R. 639, and also overruled his earlier decision in *R. ex rel. Wickert v. Keen* (1967), 50 C.R. 228. In reaching its decision the Court of Appeal of British Columbia did not refer to the judgment of the Supreme Court of Canada in *McKenna v. The Queen*, [1961] S.C.R. 660, a case which suggests that a trial judge may in appropriate circumstances consider "that the words used by an accused did not, because of his condition, amount to his statement".

"We are told that such a practice exists behind the iron curtain. There is certainly no room for it under our system of freedom under the law."⁶¹

Concerning the denial of access to counsel, the learned judge commented thus:

"To prevent an officer of the court from conferring with the prisoner . . . violates a right of the prisoner which is fundamental to our system for the administration of justice."⁶²

There is a suggestion in the Roach report that the police were acting on the advice of Crown counsel. It may be doubted that any Crown counsel would give such advice today. Not long ago the Court of Appeal of Manitoba dealt with this very question of an accused's right of access to counsel. The case was *R. v. Balleger*.⁶³ There the accused, arrested at his place of employment, asked to be allowed to make a phone call to his lawyer. His request was refused. At an opportune moment he went into an adjoining office and called his lawyer. Immediately after, the constable came into this office, took the phone away from Balleger, spoke to the lawyer and expressly told him that he would not permit communication between the lawyer and Balleger until the police had obtained a statement. The appellate court looked upon this as an unlawful infringement of the right of an accused to retain and instruct counsel without delay. "This", it said, "is a right enshrined in English common law, vindicated by many judicial decisions of high authority, and clearly and unmistakably affirmed in the Canadian Bill of Rights."⁶⁴

What is the position if the police obtain a confession by trickery or deception? Generally speaking the court's attitude will be one of practical, even if reluctant, tolerance. That attitude derives from

⁶¹ Extracts from the Roach report are set forth in the 1963 *Special Lectures of the Law Society of Upper Canada* entitled "Arrest and Interrogation", commencing at p. 55. The quotation in question appears at p. 57. *See Ibid.*

⁶² *R. v. Balleger* (1969), 1 D.L.R. (3d) 74.

⁶³ *Ibid.*, at p. 76. The Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(e)(ii), declares that: "... no law of Canada shall be construed or applied so as to . . . (e) deprive a person who has been arrested or detained . . . (ii) of the right to retain and instruct counsel without delay . . ." Nor, of course, is this right satisfied by permitting an accused person to make one phone call and no more. This so-called rule, a police invention pure and simple, has no basis in law whatever.

a recognition that sometimes it is necessary to fight fire with fire. In their dealings with police, persons accused of crime from time to time depart from standards of truth and honour. Shall this then be a one-way street? Not so, the courts have said. The police too may indulge in some deception. But not too much, nor too blatantly; for there is a residual power in the court to reject a confession on broad grounds of public policy, and this power may be called into play by aggravated use of the police's right to deceive.

Lord MacDermott, the Chief Justice of Northern Ireland, outlined this police right aptly in these terms:

"Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plain clothes, and, regrettable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safely protected without occasional resort to it."⁶⁵

A recent example of the obtaining of a confession by police deception is found in the English case of *R. v. Stewart*.⁶⁶ The police lodged the accused Stewart in one cell and another accused, Walsh, in an adjoining cell. Then a detective, attired in the garb of a prisoner, was placed in a nearby cell, close enough to overhear any conversation that might pass between the two. By this manoeuvre he was able to hear statements which were "absolutely damning" to both accused. The detective's evidence concerning this "confession", voluntarily made although in ignorance of the fact that it was being heard by a police officer, was admitted at the trial. On appeal, Philimore L.J., for the court, pointed out that in a case of this kind there was a discretion in the trial court either to admit or to reject the confession. Conceivably it could have rejected it on the ground that "the court does not in general approve of a trap being laid for a man who is in custody".⁶⁷ Here, however, the confession had been admitted. The appellate court thought that in this case the discretion had been properly exercised. The police were rightly concerned about the large number of breakings into premises, and it was understandable that they should resort to the device they did in order to obtain information from the prisoner.

⁶⁵ *R. v. Murphy* (1965), N.I.L.R. 138.

⁶⁶ *R. v. Stewart*, [1970] 1 All E.R. 689. *See Ibid.*, at p. 690.

Police stratagems to elicit a confession have received some degree of judicial acceptance in Canada. Thus in the Ontario case of *R. v. White*⁶⁸ the accused had been charged with attempted murder and the victim's wife with aiding and abetting him. The police told White that the wife had "done some talking". This was utterly false, but it proved to be effective. Feeling perhaps that the game was up, the accused confessed to his father, and this confession was overheard by a police officer. The Court of Appeal held that a confession so obtained was admissible. Osler J.A. spoke as follows:

"Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made."⁶⁹

But the court is not powerless in the face of tactics which it regards as oppressive or improper. The Canadian record contains instances of rejection of confessions so obtained. In the British Columbia case of *R. v. McLean and McKinley*,⁷⁰ which involved a charge of rape, a police officer elicited a confession from one accused by falsely telling him that his co-accused had made a statement identical in terms to the story of the complainant. In fact the co-accused had made no statement whatever and was not even in custody. McInnes J., declining to follow the *White* case, rejected the confession.

A very recent decision of the Ontario Court of Appeal, dealing with the discretionary power of the court to reject admissible evidence, has just been reviewed by the Supreme Court of Canada. That court, differing with both the trial and the appellate court, directed a new trial. The case is *R. v. Wray*.⁷¹ It had long been recognized that evidence of relatively little weight could be excluded in circumstances where its admission would be unfairly or disproportionately prejudicial. But in *Wray* the Court of Appeal, affirming the trial judge, declared that the principle applied even to matters of substantial weight. Aylesworth J.A. spoke for the court thus:

⁶⁸ *R. v. White* (1908), 15 C.C.C. 30.
⁶⁹ *Ibid.*, at p. 33.
⁷⁰ *R. v. McLean and McKinley* (1960), 32 C.R. 205.
⁷¹ *R. v. Wray* (1970), 11 D.L.R. (3d) 673; revg. (1970), 9 C.R.N.S. 131.

"In our view, a trial judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, to depend upon the particular facts before him. Cases where to admit certain evidence would be calculated to bring the administration of justice into disrepute will be rare, but we think the discretion of a trial judge extends to such cases."⁷²

In that case the trial judge in his discretion had rejected the accused's confession because it had been "procured by trickery, duress and improper inducements".⁷³ He also rejected evidence, arising from the confession, of the accused's involvement in the discovery of the murder weapon. The Court of Appeal recognized that strictly as a matter of law the evidence relating to the murder weapon was admissible.⁷⁴ But the application of the law in a particular case must be governed by its special facts. Here the facts raised a question of the integrity of the administration of justice. Hence there was a discretion to reject the evidence, even though it was of substantial weight, and the Court of Appeal would not interfere.

But the Supreme Court of Canada, by a majority of six to three, expressly rejected this view of the law. Such a view was not based on any authority, they said. Accordingly the trial judge was wrong in rejecting evidence of the accused's involvement in the discovery of the murder weapon. The court directed that a new trial be held, on which evidence concerning the finding of the gun (and presumably evidence concerning that part of the confession which led to its finding) would be admissible.

D. PERSONS IN AUTHORITY

The inquiry into the admissibility of confessions requires consideration not only of voluntariness but also of the matter of "persons in authority". Proof of an inducement will not by itself cause the exclusion of a confession. It must be shown that the inducement proceeded from a person in authority. Who then is a person in authority?

The usual case presents little difficulty. The vast majority of

⁷² *R. v. Wray* (1970), 9 C.R.N.S. 131, at p. 133.
⁷³ *Ibid.*
⁷⁴ Citing *R. v. St. Lawrence*, [1949] O.R. 215; 7 C.R. 464.

confessions are made to a police officer or officers, known to the accused to be such. Invariably those confessions are treated as having been made to a person in authority. Their voluntariness must accordingly be established as part of the burden of the Crown.

But some cases present more difficulty. Suppose the policeman is garbed as a prisoner and is in fact thought by the accused to be a fellow prisoner. He is then not a person in authority. The test is apparently a subjective one. The court considers the effect of the inducement on the mind of the accused in the known circumstances. Based on the knowledge of the accused, was it reasonable for him to think that the person holding out the inducement had the power to implement his promise or carry out his threat, as the case might be? If the answer is in the affirmative—as it is likely to be where he is manifestly dealing with the police—the inducement will be deemed to have come from a person in authority. If the answer is in the negative—as in the case where the accused confesses to another prisoner, not knowing him to be a policeman—the inducement will be treated as not having come from a person in authority.

A recent British Columbia case, *R. v. Towler*,⁷⁵ furnishes a good illustration of the rule in action. The accused had been convicted of non-capital murder. One of the grounds on which he based an appeal was the admission in evidence of certain inculpatory statements made by him to two fellow prisoners while in custody at Prince George. These two men were in fact not prisoners at all, one being an experienced R.C.M.P. officer and the other an "undercover" police agent. Concerning the point here in question McFarlane J.A. spoke for the Court of Appeal thus:

"It was submitted also that the learned Judge should have held that the two witnesses were persons in authority, and that it was immaterial that the appellant did not know that they were in fact a police officer and a police agent respectively. I think it clear in reason and common sense that the matter must be considered subjectively from the point of view of the effect on the mind of the appellant. It cannot be said that his mind was affected by inducements held out by persons in authority when he does not think that the persons who make the inducements are persons in authority."⁷⁶

⁷⁵ *R. v. Towler* (1968-69), 5 C.R.N.S. 55.
⁷⁶ *Ibid.*, at p. 59.

Further difficulty is encountered when it is sought to apply the rule to persons who, although not themselves police, are in some way associated with the police. A good example is a doctor who has been called in by the police to examine an accused. Suppose that in the course of his examination or treatment he wins the confidence of the accused and induces him to make a statement that is inculpatory in character. On the issue whether a doctor in that position is a person in authority, Canadian and English courts are likely to give an answer different from that of Scottish courts. The latter appear to look upon such a person as a police agent.⁷⁷ English and Canadian courts are disposed to regard him as an independent medical expert and hence not a person in authority within the rule.⁷⁸ There may be instances, it must be said, where the Canadian approach will operate dubiously. If the accused, knowing the doctor to have been called in by the police, genuinely looks upon him as part of the prosecutorial apparatus, there is at least an argument for saying that he should be classified as a person in authority; the more so if he habitually functions as a police doctor.

Turning away from the police one may find other examples of persons in authority. Typical of this category is an employer *vis-à-vis* his employee. "The cases are numerous, and leave no doubt that masters were at all times considered persons in authority *quoad* their servants, particularly where the offence was one against a person or property under the master's care."⁷⁹ The principle is based on the view that a servant is likely to regard his master as a person able to make good his promise or enforce his threat; hence, a person in authority.

Not long ago the British Columbia Court of Appeal examined this question in the case of *Rimmer v. The Queen*.⁸⁰ The accused in that case, a woman, was engaged on a part-time basis by one Simpson, an uneducated trucker, to do his paper work. There was a dispute concerning the basis of her remuneration, Simpson claiming it was \$8.5 per month, and the accused contending it was \$2.75

⁷⁷ *Vide Reid v. Nixon and Dumigan v. Brown* (1948), Sess. Notes 17.

⁷⁸ *Vide R. v. Nowell* (1948), 32 C.J. App. Rep. 173; *R. v. McNamara* (1951), 11 C.R.N.S. 157; *Létourneau v. The Queen*, [1965] Que. Q.B. 77n (C.A.); and Kaufman (footnote 7, *supra*), at p. 45.

⁷⁹ Kaufman (footnote 7, *supra*), at p. 43.

⁸⁰ *Rimmer v. The Queen* (1969), 7 C.R.N.S. 361.

per hour worked. It was alleged that she had wrongfully overpaid herself about \$1,800. She was charged with theft and was convicted. Upon her trial the presiding judge had admitted in evidence an alleged conversation between Simpson and the accused which was highly incriminatory in character. There were grounds for holding that this conversation, assuming it took place, had been induced by threats on the part of Simpson. But the trial judge did not hold a *voir dire*, because, as he said, "I did not consider that a *voir dire* was necessary having regard to the obvious ignorance of Simpson so as to make him an employer of a class that would require a *voir dire*." The Court of Appeal had no hesitation in rejecting the test which the trial judge had employed—one that seemingly would make classification of an employer as a person in authority contingent upon his particular I.Q. In the result the trial judge had failed to direct himself to the question before him. For if Simpson qualified as a person in authority, then the trial judge on a *voir dire* would have been required to determine whether the conversation was voluntary and admissible, or whether it had been induced by a threat and was therefore inadmissible. One judge on appeal was prepared to hold that Simpson was a person in authority. The other two judges preferred to leave that question open, to be determined in the first instance by the trial judge on a *voir dire* dealing with the admissibility of the conversation. All three, however, concurred in setting aside the conviction and ordering a new trial.

It is not suggested that the categories here dealt with are exhaustive of the persons who might qualify as persons in authority. There are others.⁸¹ One word of caution is merely added. In the language of The Harvard Law Review, "A confession obtained by threats and beatings is, of course, inadmissible without reference to the 'authority' of the assailant."⁸² Although an American source is here cited, it is not unlikely that a similar conclusion would be reached in a Canadian court. But the rejection of a confession in such a case would proceed not from reference to the rules relating to persons in authority but rather from the discretionary power to consider the broad question of public policy in the administration of criminal justice.

⁸¹ *Vide* Kaufman (footnote 7, *supra*), Chapter IV.

⁸² *Vide* footnote 12, *supra*, at p. 958, citing *People v. Berve* (1958), 51 Cal. 2d 286, 332 P. 2d 97.

E. INCULPATORY OR EXCULPATORY

It sometimes happens that an induced or coerced statement, instead of being in the nature of a confession, turns out to be the very opposite, namely, a complete denial of guilt. Is it then outside the rules governing the admission of confessions or is it still subject to those rules? Here is an area of the law which desperately needed an authoritative pronouncement from the Supreme Court of Canada. The voice of that court has now been heard, in the case of *Piche v. The Queen*.⁸³ Its landmark judgment declared that all statements made by an accused to persons in authority, whether inculpatory or exculpatory, were subject to the selfsame rule of admissibility. The case is an important one, and an examination of it must now be made.

It arose in Manitoba on a trial before Hunt J. and a jury. The accused, a 21-year-old girl, was charged with the non-capital murder of her common-law husband, Leslie Harrison Pascoe. The jury acquitted her and the Crown appealed. The central point of the appeal revolved around the exclusion by the trial judge, after a *voir dire*, of a certain statement which the accused girl had made to the police. Upon the *voir dire* the trial judge had found that the statement was not voluntary but had been induced by the police. The Crown, however, contended that the statement was exculpatory and should have been admitted as of right, without being made the subject of a *voir dire*. In her statement the accused had said that Pascoe was alive and asleep when she last saw him. Later at the trial she stated she had shot him, but by accident. The matter was expressed thus by Hall J. in the Supreme Court of Canada:

"In her testimony at the trial the appellant told a totally different story, claiming that the killing of Pascoe was accidental, that following a series of fights and unpleasant incidents between the deceased and herself she had made up her mind to commit suicide; that in furtherance of this state of mind she took a rifle from a weapon rack in the bathroom and upon seeing the deceased asleep on the living room couch decided to go and kiss him once more; that upon proceeding to do this the weapon accidentally discharged."⁸⁴

⁸³ *Piche v. The Queen* (1970), 11 D.L.R. (3d) 700, 74 W.W.R. 674; *revg. R. v. Piche* (1969), 69 W.W.R. 336, (1970), 9 C.R.N.S. 311.

⁸⁴ *Ibid.*, from the judgment of the Supreme Court of Canada, at p. 708.

The jury never heard the accused's statement to the police, because it had been ruled involuntary and hence inadmissible. The Crown, relying on Wigmore's view (which had been followed in several cases both in the United States and Canada) that exculpatory statements are not confessions and are not subject to the same rules, contended that the statements should have been admitted. This contention was upheld in the Manitoba Court of Appeal which, on a four to one division, set aside the jury's verdict of acquittal and directed a new trial. The dissenting judge noted that in recent years in the United States there had been a movement away from the view enunciated by Wigmore on this subject. In that connection it should be mentioned that perhaps the most significant American pronouncement on the question is contained in the *Miranda* case of 1966. There Chief Justice Warren, speaking for the majority, said:

"No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'. If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statements."⁸⁵

No less forthright proved to be the declaration of the Supreme Court of Canada in the *Piche* case. Allowing the accused's appeal and restoring the jury's verdict of acquittal, the court by a majority of seven to two dealt with the matter in these unequivocal words:

"Hall J:

In my view the time is opportune for this Court to say that the admission in evidence of all statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule and thus put to an end the continuing controversy

⁸⁵ *Miranda v. State of Arizona* (vide footnote 28, *supra*), at p. 1629.

F. THE VOIR DIRE

and necessary evaluation by trial Judges of every such statement which the Crown proposes to use in chief or on cross-examination as either being inculpatory or exculpatory. The rule respecting the admission of statements is a Judge-made rule and does not depend upon any legislative foundation and I see no impediment to making the rule clear and beyond dispute."⁸⁶

The judgment must be regarded as a milestone in the development of the criminal law.

F. THE VOIR DIRE

It is well known that the admission of a confession in evidence is hedged around by a special procedural safeguard. Its voluntariness must first be established on a *voir dire*. That term, as Wharton points out,⁸⁷ is the French equivalent of *veritatem dicere* ("to tell the truth"), *voir* being the Norman-French for *vrai*. It derives from the oath which a witness took to inform the court truthfully on all questions arising upon a special preliminary examination conducted by the judge to determine the competency of the witness and his evidence. Today the *voir dire* is conventionally used to indicate not an oath but a proceeding, usually one in which the judge, in the absence of the jury, hears testimony for the purpose of determining whether a confession was voluntary and therefore admissible, or involuntary and therefore inadmissible.

On such a proceeding the onus of proof of voluntariness rests wholly on the Crown.⁸⁸ It is only upon satisfaction of this onus that the Crown will be entitled to tender, and that the court will admit, the confession as evidence before the jury. If the onus is not satisfied the court will rule the accused's statement inadmissible, in which event "nothing more ought to be heard of it".⁸⁹ It is not available, for example, for cross-examination of the accused if he should later take the witness stand. It may happen, on the other hand, that the prosecution will succeed in establishing the voluntariness of a confession on a *voir dire* only to refrain from tender-

⁸⁶ *Piche v. The Queen* (footnote 83, *supra*). Hall J., concurred in by Carwright C.J.C. (who wrote a concurring judgment), Abbott, Martland, Ritchie, Spence and Pigeon JJ. Dissenting were Fauteux (now C.J.C.) and Judson J.

⁸⁷ Wharton's *Law Lexicon* (13th ed.), p. 897.

⁸⁸ *Sankey v. The King* (1927), 48 C.C.C. 97, among numerous other cases.

⁸⁹ *R. v. Treacy* (1944), 30 Cr. App. Rep. 93, at p. 96.

ing it as evidence before the jury. Its purpose in such a case, usually so declared, is to qualify the statement as one properly available for use in cross-examination if the accused takes the stand. Such treatment of a confession has been acknowledged as legitimate.⁸⁰

For some time it was thought that even if, on the *voir dire*, the judge reached a conclusion in favour of voluntariness he was still bound to direct the jury that if they were not satisfied that the statement had been made voluntarily, they should give it no weight at all and disregard it. That view of the law flowed from the decision of the Court of Criminal Appeal in *R. v. Bass*.⁸¹ It is safe to say that *Bass* created an anomalous situation. Voluntariness is for the judge to determine. Yet such a determination, solemnly and formally made, could, on the *Bass* formula, be negated at the will of the jury. Here surely was a confusion of functions, with the jury being allowed to override a decision of the judge which was his alone. Conversely, the judge would usurp the function of a jury in telling them to reject evidence that had been ruled to be relevant and admissible. Six years after the *Bass* case—years in which trial judges, under its influence, dutifully charged countless juries to reject a statement if they did not regard it as voluntary—the Court of Appeal of Ontario⁸² freed itself from its shackles. Voluntariness as applied to the admissibility of a confession, it said, was indeed a matter for the trial judge alone. Once admitted its weight was a matter for the jury. It was for them to determine whether the confession was true and reliable. In determining that issue the jury could and should take into account the circumstances under which the statement was made. But it was not their function to decide whether it was voluntary. Indeed the court thought it would be better practice for the trial judge not to refer to a statement as being voluntary or not voluntary in his charge to the jury.

The result of the Ontario Court of Appeal pronouncement in *McAloon* was to confront Canadian trial judges with two conflicting precedents, one English, the other Canadian. It would be comforting to national pride to believe that the Canadian guide

⁸⁰ *R. v. Adams* (1956), 117 C.C.C. 93, 25 C.R. 80 (N.S.S.C., *in banco*).

⁸¹ *R. v. Bass*, [1953] 1 Q.B. 681, [1953] 1 All E.R. 1064.

⁸² *Vide R. v. McAloon* (1959), 30 C.R. 305.

was the one that invariably lighted the way. Comforting perhaps, but not true. The influence of the *Bass* case still kept some Canadian judges within its grip. But resolution of the lingering conflict came in a later English case. The Privy Council, in *Chan Wai-Keung v. The Queen*,⁸³ expressed its disagreement with the views enunciated in *Bass*. It cited the *McAloon* decision with approval. It made it plain that the issue of voluntariness of a confession was within the prerogative of the judge alone. Once admitted, the statement's probative value and effect were for the jury. In dealing with those aspects of the matter the jury might be required to go over some of the testimony that the judge had heard on the *voir dire* when deciding whether the statement was voluntary. But the jury would hear this evidence for a different purpose entirely. Its concern would be with weight rather than with voluntariness. Any evidence touching on the latter issue would be considered only so far as it bore upon the former. But the judge was not obliged to direct the jury that they should reject the statement if they were not satisfied of its voluntariness. Indeed such a direction would be wrong. Thus endeth *Bass*.

If the trial is proceeding before a judge alone, where the same person functions as judge and jury, a *voir dire* is still required to determine the admissibility of a confession. But if the judge on the *voir dire* declares the statement to be voluntary must he then hear the same evidence a second time in his capacity as jury? Not so. Such ritualistic formalism would serve no purpose, although at least one judge has thought otherwise.⁸⁴ The Court of Appeal of British Columbia in the recent case of *R. v. Milner*,⁸⁵ disapproving of the decision to the contrary, held that in a case before a judge alone the evidence taken on the *voir dire* forms part of the evidence at the trial and that it need not be repeated.

A question has arisen concerning the proper role of a judge or

⁸³ *Chan Wai-Keung v. The Queen*, [1967] 2 W.L.R. 552; [1967] 1 All E.R. 948. *Vide* also the article by Sir Bernard MacKenna, "The Voir Dire Revisited" (1967), *Crim. L.R.* 336.

⁸⁴ *R. v. Shepherd*, [1951] O.W.N. 311, 100 C.C.C. 95.

⁸⁵ *R. v. Milner* (1970), 72 W.W.R. 572. To the same effect was the decision of the Manitoba Court of Appeal in *R. v. Bannerman* (1966), 48 C.R. 110, affirmed by the Supreme Court of Canada, *Bannerman v. The Queen* (1967), 50 C.R. 76.

magistrate in dealing with a confession on a preliminary inquiry.⁹⁶ That he should submit a tendered confession to the process of a *voir dire* seems to be, if not universally at least widely, recognized and accepted. But does the ordinary rule on *onus of proof* apply? Is the burden of proving voluntariness on the Crown? It is submitted that these questions require an affirmative answer. That view of the law accords directly with the decision of the Alberta Court of Appeal in *R. v. Pearson*,⁹⁷ in which it was stated that "at a preliminary inquiry the same principles govern the admissibility of a confession or a statement, as would apply at trial". In an earlier case, *R. v. Thibodeau*, the Chief Justice of the Queen's Bench Division of New Brunswick indicated a different view. He said:

"It is not the function of magistrates carrying on preliminary inquiries or investigations to rule upon the admissibility of confessions. The practice is usually to note the fact in the record that there is such a confession or admission tendered, and if it is in writing, to add it to the record, and thus bring it to the attention of the Attorney-General or prosecution officer and accused's counsel."⁹⁸

The short-cut in procedure here referred to may perhaps represent the usual practice in New Brunswick. But it does not reflect the practice generally followed in the other provinces. Thus in a recent annotation a writer comments thus:

"To the extent that Canadian authority is available, the decisions have supported the application of the rules of evidence at preliminary inquiry. It has never been suggested, for example, that statements of an accused in the nature of a confession can be admitted at preliminary inquiry without application of the ordinary principles applicable thereto."⁹⁹

"Never" in the last sentence overlooks *Thibodeau*. At least the use of that term points up the fact that on the issue here discussed *Thibodeau* cannot safely be regarded as representative of Canadian practice in general.

⁹⁶ *Vide* s. 470 of the Criminal Code, reading in part as follows: "Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him."

⁹⁷ *R. v. Pearson* (1957), 25 C.R. 342, at p. 352. Appeal to Supreme Court of Canada dismissed on jurisdictional grounds: (1959), 30 C.R. 14.

⁹⁸ *R. v. Thibodeau* (1956), 23 C.R. 285, at p. 293.

⁹⁹ Annotation on "Preliminary Hearings—The Problem of Evidence", by Bruce Haines in (1970), 10 C.R.N.S. 69.

One may venture a twofold explanation for the continuing doubt about the proper rule to be observed at a preliminary inquiry. In the first place, there have been several legal pronouncements calling attention to the very real difference in nature and purpose between a preliminary inquiry and a trial. Most recently and most authoritatively there was the comment by the Supreme Court of Canada (dealing with a matter other than a confession, it may be noted) as follows:

"The purpose of a preliminary inquiry is clearly defined by the Criminal Code—to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial."¹⁰⁰

This comment expresses an undeniable truth; but it does not settle the question whether a confession should be handled differently at a preliminary inquiry than at a trial. It does not settle that question because it did not deal with it. Then again, because the preliminary is usually regarded as merely a kind of "first round", there is often a disposition on the part of counsel not to resist too strenuously the admission of evidence to the record, in the knowledge that the vital and effective ruling thereon will later be made by the trial judge. Sometimes this approach will be aided and encouraged by the magistrate himself. The result may be to give to the preliminary inquiry an illusive appearance of greater formality than in fact it does possess. In that setting, strictness in the observance of the rules of evidence may fail to receive the same emphasis as at a trial.

One writer,¹⁰¹ recognizing the special nature and function of the preliminary inquiry, has proposed what he describes as a "practical solution" of the problem under discussion. On a preliminary inquiry any reasonable doubt must be resolved by the magistrate in favour of a committal for trial. Applying that rule to a tendered confession on which the evidence is conflicting, he would have the magistrate rule for committal. He justifies such a course on the view that at a preliminary inquiry it is not the function of a magistrate to weigh the evidence or determine the credibility of

¹⁰⁰ Judson J. (Abbott, Marland, Ritchie and Pigeon JJ. concurring) in *Patterson v. The Queen* (1970), 10 C.R.N.S. 55, at p. 57.

¹⁰¹ C. C. Savage, "Admissions in Criminal Cases" (1962-63), 5 Crim. L.Q. 49, at p. 55.

witnesses. Accordingly if there is any evidence at all that the statement is voluntary it should be admitted at the preliminary inquiry, leaving the final question of its admissibility at trial to the determination of the trial judge.

The solution here proposed may merit the adjective "practical" in the sense that it doubtless accords with actual practice occasionally encountered in preliminary inquiries. But it should be recognized for what it is—namely, a subversion of the normal rule that the onus of proof of voluntariness rests upon the Crown.

One former area of cloudiness in relation to the *voir dire* has now been cleared away. There had been conflicting decisions¹⁰² on the right to ask the accused, when testifying on a *voir dire*, whether his statement was true. The Supreme Court of Canada has now declared, in *De Clercq v. The Queen*,¹⁰³ that such a question may indeed be put to the accused. There the question had been put by the trial judge, but the same considerations would apply if the question had been asked by Crown counsel. Five of the nine judges reached their conclusion without any qualification. One judge regarded the question as legally admissible but felt that the trial judge, in the exercise of his discretion, should have refrained from putting it. The remaining three judges regarded the question as improper and as a wrongful curtailment of the right of an accused. The judgment is an important one and the conflicting viewpoints on both sides of the case are stated with clarity and directness. It is of interest to observe that when the case was before the Ontario Court of Appeal, Laskin J.A. was the sole dissenter, stating:

"... the question whether a confession is true, even if relevant to the issue of its voluntariness (and hence admissibility), involves resort to a line of inquiry that goes so much beyond the issue for which it is invoked as to make it improper either to initiate it or pursue it."¹⁰⁴

¹⁰² *Vide R. v. Hammond*, [1941] 3 All E.R. 318, 28 Cr. App. Rep. 84, and *R. v. La Plante*, [1958] O.W.N. 80, in favour of the right to ask the question; and *R. v. Hnedish* (1958), 29 C.R. 347, 26 W.W.R. 685, *contra*. Also *R. v. Weighill*, [1945] 1 W.W.R. 561, 61 B.C.R. 140, 83 C.C.C. 387, which questioned the *Hammond* decision.

¹⁰³ *De Clercq v. The Queen* (1968), 4 C.R.N.S. 205, [1968] S.C.R. 902, [1969] 1 C.C.C. 197.

¹⁰⁴ *R. v. De Clercq*, [1966] 1 O.R. 674, at p. 679, [1966] 2 C.C.C. 190, at p. 195.

That learned judge has since become a member of the Supreme Court of Canada. There are accordingly now four judges on that court who hold the view that on a *voir dire* the accused may not be asked if his statement is true. Further changes in personnel will come. Perhaps we have not yet heard the Supreme Court's last word on this subject.

G. RECENT AMERICAN EXPERIENCE

The subject of the admissibility of confessions in criminal cases was very much to the forefront in the United States during the last decade. Certain historic decisions of the Warren court significantly changed the complexion of the criminal law in that country. The philosophical motivation for those decisions was altogether praiseworthy. It derived from a genuine respect for human dignity and a deep concern for individual rights. Followers of the liberal tradition believe, with justification, that in the history of the Supreme Court of the United States the record and leadership of Chief Justice Warren will always hold an honoured place. Without in any way disputing that assessment one may still legitimately wonder whether, on the subject of confessions, the Warren court in certain instances did not go too far.

Two cases are here selected for consideration. Their names are now well known. They are *Escobedo v. State of Illinois*,¹⁰⁵ and *Miranda v. State of Arizona*.¹⁰⁶

The *Escobedo* rejection of the accused's confession rested on two grounds. One was denial of access to counsel. When his lawyer came to the police station to see Escobedo he was given the complete brush-off by police officers, with the deliberate object of preventing him from having access to his client until the latter's interrogation was completed. This ground for excluding the confession accords with Canadian law, of which the *Ballegeer*¹⁰⁷ case is a good example. But a second ground was also relied on by the court. *Escobedo* declared that when the investigation has begun to focus on a particular suspect the police must give an effective warning to that suspect of his right to remain silent. The insistence of a warning as an absolute precondition to the admissibility of a

¹⁰⁵ *Escobedo v. State of Illinois* (1964), 378 U.S. 478, 84 S. Ct. 1758.

¹⁰⁶ *Miranda v. State of Arizona* (vide footnote 28, *supra*).

¹⁰⁷ *R. v. Ballegeer* (vide footnote 63, *supra*).

confession differs from the Canadian law. The *Boudreau*¹⁰⁸ case regards a warning as one of the factors, indeed a very important factor, in the determination of voluntariness. But conceivably a statement can be made voluntarily before any warning has been given.

The *Miranda* case laid down four propositions:

1. That the accused person being interrogated must be warned that he has the right to remain silent;
2. That he must be warned that anything he says can and will be used as evidence in court;
3. That he must be warned that he has a right to consult with a lawyer before deciding whether to answer any question and to have a lawyer present during any interrogation;
4. That, if he is indigent, a lawyer will be appointed for him prior to any interrogation.

The first two propositions simply affirm the *Escobedo* decision. The third and fourth propositions, however, represent a further extension of the law. It is one thing to deny an accused access to counsel. It is quite another thing to require, as a condition to the admissibility of any statement, that the police warn the accused of a right to consult a lawyer and to have him at his elbow during interrogation. In contrast, the path of Canadian jurisprudence seeks to avoid "a strait jacket of artificial rules".¹⁰⁹ It prefers to rest on voluntariness as the test of admissibility, leaving the determination of that question to the court. If trial judges will be firm in the requirement that a statement be not admitted in evidence unless the Crown has discharged the burden of proving it to have been made voluntarily, there will be no need in Canada even to toy with the idea of adopting the so-called *Miranda* warning.

This treatment of the subject of admissions and confessions has attempted simply to highlight some of its most important aspects. There are many omissions, some of them important. There is nothing on the Judges' Rules¹¹⁰ of England. Nor has there been any

¹⁰⁸ *Boudreau v. The King* (vide footnote 4, *supra*).

¹⁰⁹ *Ibid.*, per the judgment of Rand J.

¹¹⁰ Vide Tremear's Supplement, pp. 122 *et seq.*

examination of the so-called "fruit of the poisonous tree".¹¹¹ But the chapter is already long enough.

There are some who believe that in this area of the law too much solicitude has been shown to accused persons. Lord MacDermott has furnished the effective answer to this attitude, in words with which this chapter will close:

"Further, I think we may say with confidence that the history of this branch of our law shows that the manner and extent of the protection which it gives against the power of the prosecution have sprung, not from extraneous causes or sentimental considerations, but rather from a persistent body of public opinion which, throughout the centuries, has in some instinctive way realised that the abuse of power is a contagious disease and that the liberties of all must suffer by the oppression of some."¹¹²

¹¹¹ The phrase is Frankfurter's, used in *Nardone v. United States* (1939), 308 U.S. 338, at p. 341. It deals with real evidence, such as a gun, found as the result of an inadmissible confession. Vide *R. v. St. Lawrence* (footnote 74, *supra*), and *R. v. Wray* (footnote 71, *supra*).

¹¹² Vide footnote 21, *supra*, at p. 24.

R. v. FRENCH, 161 W.A.C. 265

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Volume 161

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Regina (respondent) v. Delmar French (appellant) (CA VQ2734)

R. v. Hebert, [1990] 2 S.C.R. 151; 110 N.R. 1; 77 C.R.(3d) 145; 57 C.C.C.(3d) 1; [1990] 5 W.W.R. 1; 47 B.C.L.R.(2d) 1, rehd to: [para. 9].

Indexed As: R. v. French (D.)

British Columbia Court of Appeal Macfarlane, Ryan and Donald, J.J.A. October 29, 1997.

Counsel:

Gary N. Botting, for the appellant; Robert A. Mulligan, for the respondent.

This appeal was heard in Victoria, British Columbia, on October 29, 1997, before Macfarlane, Ryan and Donald, J.J.A., of the British Columbia Court of Appeal.

Summary:

The accused appealed his conviction for first degree murder.

The following judgment was delivered orally by Macfarlane, J.A., for the court.

The British Columbia Court of Appeal dismissed the appeal.

Civil Rights - Topic 3604

Detention and imprisonment - Detention - What constitutes - The British Columbia Court of Appeal affirmed that an accused was not detained when he confessed to murder to two undercover police officers - See paragraph 9.

[1] Macfarlane, J.A. [orally]: This is an appeal against a conviction for first degree murder.

Criminal Law - Topic 5353

Evidence - Witnesses - Confessions and voluntary statements - Who is person in authority - The British Columbia Court of Appeal affirmed that undercover police officers, to whom the accused confessed, were not persons in authority - See paragraphs 3 to 8.

[2] At a trial before Mr. Justice Shabbits and a jury, the appellant was convicted of the first degree murder in the March, 1993, strangulation death of his 79 year old neighbour, Helen Dunlop. There was forensic evidence indicating that the deceased had been sexually assaulted.

Cases Noticed:

- R. v. McIntyre (M.), [1994] 2 S.C.R. 480; 168 N.R. 308; 153 N.B.R.(2d) 161; 392 A.P.R. 161, rehd to. [para. 8].
R. v. Roberts (D.C.) (1997), 90 B.C.A.C. 213; 147 W.A.C. 213 (C.A.), rehd to. [para. 8].
United States of America v. Burns and Rafev (No. 1) (1997), 94 B.C.A.C. 47; 152 W.A.C. 47 (C.A.), rehd to. [para. 8].
R. v. Moore (C.A.) (1997), 94 B.C.A.C. 281; 152 W.A.C. 281 (C.A.), rehd to. [para. 8].

[3] The main issue at trial was identity. The Crown's case included evidence of alleged admissions by the appellant to undercover police officers posing as criminals. In his testimony, the appellant denied being the killer and said he had made false statements to the undercover officers.

[4] The first issue on appeal is whether the trial judge erred in ruling that the undercover officers were not persons in authority.

[5] The facts relevant to this issue are that two police officers, suspecting that the appellant might be the killer, made themselves known to the appellant as persons involved in a crime organization. They impressed the

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appellant with proposals to make money as a result of joining their criminal organization. In order to gain their confidence, to impress them and to persuade them to accept him as a member of what he perceived as profitable criminal ventures, he told them about killing Mrs. Dunlop and how he had done it. When the appellant gave evidence at trial, he told the jury that his story about Mrs. Dunlop's murder was false.

[6] The appellant submits that there were inducements made by the undercover officers, which were sufficient to render the confession inadmissible. But the question is whether the trial judge erred in holding that the undercover officers were not persons in authority. In this case the fact that the accused was induced, or tempted, to speak about his involvement with Mrs. Dunlop is more a question of reliability of the statement, which was a matter for the jury to decide.

[7] The trial judge, in ruling on the admissibility of the confession, said this:

"Mr. French when speaking to Constable Lemay and Corporal Stenhouse did not consider that either could in any way have affected the course of a prosecution of him in respect of the death of Helen Dunlop. He believed that they were criminals. Objectively, both Lemay and Stenhouse were persons in authority. Both were police officers and both were actively involved in the investigations of the circumstances surrounding the death of Helen Dunlop. The primary definition of a person in authority for the purpose of the confession rule is someone engaged in the arrest, detention, examination or prosecution of the accused. This rule is set out in *R. v. Roadhouse* (1993), 61 C.C.C. 191, a decision of the British Columbia Court of Appeal, and *R. v. Paonessa and Paquette*

(1986), 66 C.C.C.(2d) 300, a decision of the Ontario Court of Appeal.

"The test however is two-fold. Not only must the persons to whom the statements are made be persons in authority objectively, but the statements must be made to persons in authority viewed subjectively, that is to say, from the point of view of the accused person who made the statement:

"This is the test that is borne out by *R. v. A.B.*, as well as in *Kaufman, Admissibility of Confessions in Criminal Matters* (3d) 1979, at p. 81. I will refer also to *R. v. Rothman*, [1981] 1 S.C.R. 640, and *R. v. Unger* (1993), 83 C.C.C.(3d) 228.

"Even though Lemay and Stenhouse posing as Neil and Jake had power or authority over Mr. French because of his inferior position in the criminal organization and associations in which Mr. French believed he was involving himself, I find that Constable Lemay and Corporal Stenhouse were not persons in authority for the purpose of the confession rule.

"In the result the confession rule does not have application. This same result was reached by Mr. Justice Stewart in the *Roberts* decision to which I have referred. If statements are made by an accused to persons not in authority, it is for the jury to assess and weigh such evidence unless the statements are ruled inadmissible for some other reason. I note that statements made to undercover officers were admitted into evidence in a case with a similar fact pattern, that being *R. v. McIntyre* (1993), 135 N.B.R.(2d) 266, a decision of the New Brunswick Court of Appeal. An appeal from that decision to the Supreme Court of Canada was dismissed."

[8] I think the burden of following of evidence cover on this case. 2 S.C.R. 161; 392 (1997), 5 (C.A.); *U and Rafi* 152 W.A (C.A.) (1 281 (C.A

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R. v. French (D.)

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[8] I think the trial judge was correct. The burden of authority supports that ruling. The following cases have approved the admission of evidence obtained by the type of undercover operation and the tactics employed in this case. See *R. v. McIntyre (M.)*, [1994] 2 S.C.R. 480; 168 N.R. 308; 153 N.B.R.(2d) 161; 392 A.P.R. 161; *R. v. Roberts (D.C.)* (1997), 90 B.C.A.C. 213; 147 W.A.C. 213 (C.A.); *United States of America v. Burns and Rafey (No. 1)* (1997), 94 B.C.A.C. 47; 152 W.A.C. 47 (C.A.); and *R. v. Moore (C.A.)* (1997), 94 B.C.A.C. 281; 152 W.A.C. 281 (C.A.).

[9] The appellant further submits that he had a constitutional right to silence in the circumstances. The question whether a constitutional right to silence is afforded to an accused before detention or arrest was the subject of discussion in *R. v. Hebert*, [1990] 2 S.C.R. 151; 110 N.R. 1; 77 C.R.(3d) 145; 57 C.C.C.(3d) 1; [1990] 5 W.W.R. 1; 47 B.C.L.R.(2d) 1, particularly at p. 182. It was held that the right applies only after detention. The appellant in this case was not detained at the time he made his confession.

[10] Two further grounds of appeal were raised by the appellant in his factum, which were expressed as follows:

"The Crown failed to disclose that a Crown witness (Kerri French) intended to change her evidence from that given under oath at the preliminary hearing. The Crown also failed to disclose the results of the second DNA test. This constituted a failure to disclose, contrary to *R. v. Stinchcombe*.

"The appellant seeks leave for the inclusion of new DNA evidence at the appeal of this matter and/or at a new trial of this matter."

These grounds have now been abandoned. In

my view, they are completely without merit.

[11] The appellant also submits, although it was not a ground of appeal raised in the factum, that the trial judge erred in his charge to the jury with respect to the evidence which was relevant to the question of reliability of the confession. The trial judge gave careful and detailed instructions to the jury. I think those instructions were sufficient to enable the jury to decide whether the Crown had proven beyond a reasonable doubt that the appellant was speaking the truth when he told the undercover officers he had killed Mrs. Dunlop.

[12] I would dismiss the appeal.

Appeal dismissed.

Editor: Debra F. MacCausland/saf

Heilwig Von Koenigsloew
(plaintiff/respondent) v.
Elsie Kelly (defendant/appellant)
(CA022612)

Indexed As: Von Koenigsloew v. Kelly

British Columbia Court of Appeal
Lambert, Cumming and Proudfoot, J.J.A.
October 29, 1997.

Summary:

A homeowner sued her guest for fire damage caused to the property. The trial judge allowed the action, finding the guest negligent and totally at fault. The guest appealed.

The British Columbia Court of Appeal allowed the appeal and apportioned liability.

Practice - Topic 5266

Trials - General - Trial of preliminary

R. v. Rothman, 42 C.C.C. (2d)

REGINA v. ROTHMAN

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REGINA v. ROTHMAN

Ontario Court of Appeal, Jessup, Dubin and Weatherston, J.J.A.

September 18, 1978.

Evidence — Confessions and admissions — Statement obtained by trick — Accused cautioned and refusing to make statement — Undercover officer then placed in cell with accused — Officer convincing accused that not with police — Accused then making inculpatory statement — Whether confession admissible — Whether officer person in authority — Whether Judge has discretion to exclude confession although no threats or inducements by person in authority.

Civil rights — Self-incrimination — Confessions — Accused cautioned and refusing to make statement — Undercover officer then placed in cell with accused — Officer convincing accused that not with police — Accused then making inculpatory statement — Whether confession admissible — Whether Judge has discretion to exclude confession although no threats or inducements by person in authority.

The accused was arrested on a charge of possession of narcotics for the purpose of trafficking and cautioned but he refused to give a statement. The accused was then put in a cell in the police station. A short time later a police officer dressed in old clothes was put in the cell. The accused told the officer he thought he was a "nark" but the officer told him he was a fisherman who had been arrested for failure to pay a traffic ticket. The accused then engaged in conversation with the officer and made several inculpatory statements. At trial the Judge found that the officer was a person in authority and he excluded the statements since the use of the disguise was an improper way of eliciting the statements. The accused was then acquitted, the Crown offering no further evidence. On appeal by the Crown from the accused's acquittal, *held*, Dubin, J.A., dissenting, the appeal should be allowed and a new trial ordered.

Per Jessup, J.A., Weatherston, J.A. concurring: While the out-of-Court statements of an accused to persons in authority are only admissible if special conditions exist, the officer in this case was not a person in authority since he was not regarded as such by the accused. The test of whether a person is a person in authority is a purely subjective one. Even if the undercover officer in this case had been regarded by the accused as a person in authority the statement was still admissible since there was no suggestion of any fear of prejudice exercised by the officer or hope of favour held out by him and these are the only conditions which render a statement inadmissible. The fact that the statement was obtained by a trick did not render it inadmissible.

Per Dubin, J.A., dissenting: In this case the accused having been given the caution exercised his right to remain silent. However, the police officer, by lying to the accused, was able to subvert the caution and deprive the accused of his right to remain silent to police questioning after arrest. In such circumstances the trial Judge had a discretion to refuse to admit the confession and he properly exercised that discretion. The rule that a confession is inadmissible where it is shown that it was obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority is not exhaustive as to the circumstances when a confession may be excluded. That rule is itself only a Judge-made rule founded on policy. Even where the statement can be proved to be true, if obtained by force it will be excluded as a matter of policy and this would be the case whether or not on a subjective basis the person using the force is a person in authority. The philosophical basis for the rule has not been resolved but whatever the basis the rule is not exhaustive. The rules respecting confessions and the privilege against self-incrimination, in the sense of the right to remain silent in response to police questioning, are related. That right is a fundamental principle in the administration of justice, but it would

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23 C.C.C. (34)

Revised Report (Jesse, J.A.)

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4. On November 10, 1975, at approximately 1:00 p.m., Constable McKnight, a member of the Ottawa City Police Force acting in an undercover capacity, was placed in an 8' x 8' cell at the Ottawa City Police Station occupied by the Respondent alone. Constable McKnight was placed in the cell on the instructions of Constable Gervais, the investigating officer, in order to obtain information from the Respondent concerning the charge against him. During the trial, a voir dire was conducted on the question of whether Constable Earl McKnight was a person in authority. At that time, Constable McKnight was unarmed, wore blue jeans, a blue jacket and brown boots, and had a four or five day growth of beard. Constable McKnight testified on the voir dire that the Respondent appeared to be normal and not under the influence of alcohol. No other persons or police officers were visible from the cell. Constable McKnight did not identify himself to the Respondent as a member of the Ottawa City Police Force and the Respondent did not appear to recognize him as such.

5. Upon entering the cell, the Respondent spoke first to Constable McKnight by saying that Constable McKnight "looked like a nark". Constable McKnight just laughed and the Respondent continued that he looked like a nark because of the way he was dressed. Constable McKnight explained that he was dressed like that because he had been fishing. The Respondent then asked Constable McKnight why he was in jail and he replied that it was because of a traffic ticket. Constable McKnight asked the Respondent why he was in jail and the Respondent stated that it was for possession of hashish. While in the cell, Constable McKnight sat beside the Respondent on the only bench. The Respondent then told Constable McKnight that he sold hashish for \$25.00 for 3 grams, that the hash that he had been caught with had been "fronted" to him and that he would have to pay the people back \$1,000 because he had been "busted". The Respondent stated that he would have made \$1,000 on the drugs that he had. Constable McKnight asked if there were many drugs in the city and the Respondent replied that there were approximately 40 pounds. The Respondent also stated that he was arrested at his apartment along with his buddy who was in the next cell. During the conversation, Constable McKnight informed the Respondent that he was a truck driver from the Pembroke area and had been fishing so the Respondent would have the impression that he was not a nark and that he did not know much about drugs. Constable McKnight indicated that people in the Pembroke area were interested in drugs and that he would be interested in getting drugs; however, no deal was set up. The Respondent asked Constable McKnight when he would be getting out and he replied that a buddy would be coming down to pay the fine. The Respondent stated that he had to go to court the next morning because he was on parole respecting other charges. Constable McKnight was released from the cell at 1:07 a.m. and made his notes concerning the conversation shortly thereafter.

6. After Constable McKnight testified on the voir dire the Respondent called no evidence on the issue of whether Constable McKnight was a person in authority.

7. After argument by counsel, His Honour Judge Matheson ruled that in all the circumstances, Constable McKnight was a person in authority.

8. No further evidence was called by the Crown on the voir dire on the issue of whether the statements made by the Respondent to Constable McKnight were voluntary. The Respondent did not request any other Crown witnesses to be produced for cross-examination on the voir dire and did not call any evidence on this issue.

9. After argument by counsel, His Honour Judge Matheson ruled that the "continuation of the intent to obtain a statement by this disguise puts into doubt whether the incriminatory statement had properly been effected and was therefore inadmissible."

10. The Crown called no farther evidence at trial and at the request of Crown Counsel and the direction of His Honour Judge Matheson, the jury returned a verdict of "not guilty" of possession.

While the out of Court statements of an accused are admissible if relevant, those made to a person in authority are only admissible if special conditions exist. Those conditions were stated by Lord Summer in *Ibrahim v. The King*, [1914] A.C. 599, authoritatively approved by the Supreme Court of Canada in *Boudreau v. The King* (1949), 94 C.C.C. 1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262, and reaffirmed in *R. v. Fitten* (1956), 116 C.C.C. 1, 6 D.L.R. (2d) 529, [1956] S.C.R. 988.

In my opinion, the police officer in the present case was not a person in authority because he was not regarded as such by the respondent. As Kaufman, J.A., says in *Admissibility of Confessions in Criminal Matters*, 2nd. ed. (1974), at p. 54:

The true test, it is submitted, is highly subjective: Did the accused truly believe, at the time he made the declaration, that the person he dealt with had some degree of power over him? In other words, did the accused think that the person to whom he confessed (or as a result of whose intervention he confessed) could either make good his promise or parry out his threats? If so, such person should be treated as a person in authority and if not, the rules which attach to persons in authority need not be applied, even though the person, from a purely objective point of view, was in a position of undoubted authority.

A similar view is expressed by Freedman, C.J.M., in *Studies in Canadian Criminal Evidence* (1972), at p. 118:

Suppose the policeman is garbed as a prisoner and is in fact thought by the accused to be a fellow prisoner. He is then not a person in authority. The test is apparently a subjective one. The court considers the effect of the inducement on the mind of the accused in the known circumstances. Based on the knowledge of the accused, was it reasonable for him to think that the person holding out the inducement had the power to implement his promise or carry out his threat, as the case may be? If the answer is in the affirmative — as it is likely to be where he is manifestly dealing with the police — the inducement will be deemed to have come from a person in authority. If the answer is in the negative — as in the case where the accused confesses to another prisoner, not knowing him to be a policeman — the inducement will be treated as not having come from a person in authority.

The weight of Canadian authority supports such a subjective test: *R. v. Todd* (1901), 4 C.C.C. 514, *R. v. Towler*, [1969] 2 C.C.C. 335, 5 C.R.N.S. 55, 65 W.W.R. 549; *R. v. Pettipiece* (1972), 7 C.C.C. (2d) 133, 18 C.R.N.S. 236, [1972] 5 W.W.R. 129, and the judgment of Spence, J., concurred in by Laskin, J., as he then was, in *Perras v. The Queen* (1973), 11 C.C.C. (2d) 449, 35 D.L.R. (3d) 596, 22 C.R.N.S. 160; *R. v. McKenzie*, [1965] 3 C.C.C. 6, 45 C.R. 153, 51 W.W.R. 641, is to be distinguished for the reason given by Spence, J., in *Perras*. It is to be noted that in *Towler* a statement made to an undercover police officer was held admissible by the British Columbia Court of Appeal.

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Even if the undercover officer in this case had been regarded by the accused as a person in authority, the conditions laid down in *Abraham* as to the voluntariness of the accused's statements had been met. There is no suggestion in the agreed facts of a fear of prejudice exercised by Officer McKnight or a hope of favour held out by him.

Some authors and commentators have suggested that the conditions in *Abraham* are too narrowly stated. However, in *Fitton* the Supreme Court of Canada in reversing the majority of this Court and upholding the dissent of Roach, J.A., [115 C.C.C. 225, [1956] O.R. 696, 24 C.R. 125], rejected an appeal for a broader statement of these conditions. In my opinion, it is not open to a lower Court to give a broader statement of the principle of *Abraham* unless and until the Supreme Court again speaks differently on the subject.

The question of the voluntariness of a statement made by an accused to a person in authority is generally a matter of pure fact: *R. v. Howlett* (1950), 96 C.C.C. 190, [1950] 2 D.L.R. 143, 9 C.R. 353. I think that explains the apparent conflict in many of the cases. Facts are infinite in variety and as Martin, J.A., of this Court said, while at the Bar, in 5 *Crim. L. Q.*, p. 40 (1962-3):

The prosecution in a given case may, notwithstanding affirmative evidence that no threat was made and no promise of advantage was held out to the accused to induce him to make a statement, fail to satisfy the trial judge in the light of all the circumstances surrounding the statement that it was voluntary. The total circumstances may be such that the trial judge is not satisfied that the compulsive atmosphere surrounding the making of the statement did not create a fear of prejudice or hope of advantage in the mind of the accused which induced him to make it. Lawyers tend to equate fear of prejudice and hope of advantage with threats and promises employed by those in authority but much more subtle means may be used to inspire fear or hope.

That is reminiscent of what was said by Rand, J., in *Fitton* at p. 5 C.C.C., p. 962 S.C.R.:

The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreau v. The King*, 94 Can. C.O. 1, [1949] 3 D.L.R. 81, S.C.R. 262, at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.

Thus, *R. v. McLeod* (1968), 5 C.R.N.S. 101, was a decision of this Court on a pure question of fact. In all the circumstances including the emotional impact on the accused of the lies told her by the officer which put her in fear, the Court held the Crown had not satisfied the onus on it proving the accused's statement was voluntary. In that case Laskin, J.A., as he then was, said at p. 104:

I hold in the present case, contrary to the ruling of the trial Judge, that the Crown has not discharged the burden of proof resting upon it in the matter at issue.

In so holding, I do not rule out as a matter of law all stratagems that the police or persons in authority may employ in questioning a person under arrest. The issue in every case, under the governing law, must be whether they operate or are calculated to operate upon the person to rouse hope of advantage or fear of prejudice, or by their oppressiveness (the latter a term from the English Judges' Rules) put in doubt at least whether any ensuing incriminatory statement has been properly elicited. In my view, reinforced by a reading of the whole record, the lies and associated incidents in this case had the forbidden effect in inducing the incriminating statement.

I was a member of that Court and, in my opinion, the word "oppressiveness" was used synonymously and inclusively for the two conditions to admissibility laid down in *Brahim* and reiterated by Laskin, J.A.

In any event, the agreed statement of facts contains no suggestion of oppressiveness by the police in this case.

It is true the statement of the accused in this case was obtained by what might be called a trick but as Osler, J.A., said in delivering the judgment of this Court in *R. v. White* (1908), 15 C.C.C. 30 at p. 33, 18 O.L.R. 640:

Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a "trick" or artifice practised upon him by the officer or other person to whom it was made.

The learned trial Judge purported to follow *McLeod* but as has been noted, that was a case of a deliberate lie by a police officer that had such an effect on the accused that an inference of a fear of prejudice could be made. I have already noted that in *Towler* a statement made to an undercover officer was held admissible. So also one was held admissible in *Pettipiece* where Branca, J.A. said at pp. 145-6:

It has been held repeatedly that where police officers or others in the employ of the police pretend to be criminals or assume a character other than their own, which is unknown to the accused and such persons gain the confidence of the accused as a result of which the accused makes incriminating statements, the statements are perfectly admissible as the pretending officer or other person can not be classed as one in authority and hence no confession in the true sense of the word is involved and there is no need to hold *vis a vis* *see R. v. Towler*, [1969] 2 C.C.C. 335; 5 C.R.M.S. 35; 66 W.W.R. 545; and also *R. v. Stewart*, unreported, given on March 9, 1972, both the decisions of this Court.

In the result I would allow the appeal, quash the verdict of acquittal and order a new trial.

Dunn, J.A. dissenting.—The issue in this appeal is whether the trial Judge had a discretion to exclude a confession made by the accused after his arrest and while in custody to a police officer who obtained the confession by tricking the accused into believing that he was not a police officer. With respect to the contrary view of the majority, I think the trial Judge had such a discretion and it was properly exercised.

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A singular feature in this case is that after arrest the accused was given a police warning and was asked if he was willing to give a statement. He declined to do so. At that stage, therefore, he had been advised not only that he need not make a statement to a police officer, but also that whatever he said would be taken down in writing and could be used in evidence against him at his trial. In refusing to make such a statement, he exercised his legal right.

Subsequently, a police officer was placed in the cell for the sole purpose of obtaining a confession. The accused was suspicious as to whether the person placed in his cell was a policeman. The officer lied to him and convinced him that he was not. The officer then engaged the accused in conversation with respect to the offence for which the accused had been arrested as well as discussing the possibility of future transactions in the trafficking of drugs. In that way, the officer had subverted the police warning which had previously been given and deprived the accused of his right to remain silent to police questioning after arrest.

Under such circumstances, in my opinion, the trial Judge had a discretion to rule the confession inadmissible.

I agree with my brother Jessup that there is no evidence which could form a basis for excluding the confession if the following test from *Ibrahim v. The King* [1914] A.C. 599 at pp. 609-10, is exhaustive:

It had long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

However, I do not agree that the rule above set forth is exhaustive, and that a confession can only be excluded if it were obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority.

In *Ibrahim v. The King*, *supra*, the Privy Council recognized the long-standing rule, and approved it. That they did not intend to make the rule exhaustive appears to me clear from what was stated in the following passage from the same judgment which appears at p. 614:

The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a "probable

opinion" of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal:

(Emphasis added.)

The issue in *Ibrahim v. The King, supra*, was whether a person in authority had a right to ask a question of an accused after his arrest. In dealing with that contention, Lord Sumner, at pp. 610-1, stated as follows:

The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.

It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeaser, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it." *Rez v. Warwickshall* (1783), 1 Leach, 263. It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice. *Reg. v. Baldry* (1852), 2 Den. Cr. C. 430, at p. 445. Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.

(Emphasis added.)

It is to be observed that Lord Sumner was of the view that the admissibility of a confession made by a person in authority was a matter of judicial discretion and that the rule adopted by him was a rule of policy.

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It would appear that a similar approach was considered by Chief Justice Cartwright in *R. v. Wray*, [1970] 1 C.C.C. 1, 11 D.L.R. (3d) 678, [1971] S.C.R. 272, where he stated at pp. 6-7 C.C.C., pp. 679-80 D.L.R.:

"The great weight of authority indicates that the underlying reason for the rule that an involuntary confession shall not be admitted is the supposed danger that it may be untrue. If this is the only reason for the rule it is logical that so much of an involuntary confession as is shown by subsequently discovered evidence to be true should be admitted, but why, if it may be asked, should an involuntary statement which the accused subsequently admits in his oath to be true be excluded? The anomaly of so holding is pointed out in the dictum of Robertson, C.J.O., giving the unanimous judgment of the Court of Appeal for Ontario in *R. v. Mazerall*, [1946] 4 D.L.R. 791 at p. 804, 86 C.C.C. 321 at p. 336, [1946] O.R. 762:

"It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true."

While in my view this observation was *obiter*, it is difficult to reject its reasoning if the only ground for excluding an involuntary confession is the danger of its being untrue. If, on the other hand, the exclusion of an involuntary confession is based also on the maxim *nemo tenetur seipsum accusare*, the truth or falsity of the confession does become logically irrelevant. It would indeed be a strange result if, in being the law that no accused is bound to incriminate himself and that he is to be protected from having to testify at an inquest, a preliminary hearing or a trial, he could none the less be forced by the police or others in authority to make a statement which could then be given in evidence against him. The result which would seem to follow if the exclusion is based on the maxim would be that the involuntary confession even if verified by subsequently discovered evidence could not be referred to in any way.

(Emphasis added.)

In the same case Mr. Justice Spence made the following observation at p. 27 C.C.C., p. 699 D.L.R.:

I am of the opinion that were the trial Judge to have, as he very properly did, excluded as inadmissible the statement of the accused and yet have permitted the Crown to have adduced all the evidence as to the accused's accompanying the police officers and pointing out to them the place where the weapon had been thrown away, in accordance with the information which he had given to them in the excluding statement, it would not only have brought the administration of justice into disrepute but it would have been a startling disregard of the principle of British criminal law, *nemo tenetur seipsum accusare*. Surely no authority need be stated to establish that as the most basic principle in our criminal law.

I am mindful that the judgments that I have referred to in *R. v. DeGerg*, *supra*, and *R. v. Wray*, *supra*, were dissenting judgments. I refer to them only because of the analysis therein made of the basis for the rule which will exclude confessions in certain cases.

I am also mindful of what was stated by Mr. Justice Dickson in *Marcoux and Solomon v. The Queen* (1975), 24 C.C.C. (2d) 1 at p. 4, 60 D.L.R. (3d) 119, [1976] 1 S.C.R. 763, as follows:

The fruit of the privilege against self-incrimination is clear. The privilege is the privilege of a witness not to answer a question which may incriminate him.

That is all that is meant by the Latin maxim, *nemo tenetur seipsum accusare*, often incorrectly advanced in support of a much broader proposition.

And at p. 5: "In short, the privilege extends to the accused *qua* witness and not *qua* accused, it is concerned with testimonial compulsion specifically and not with compulsion generally."

As I have already observed, I use the term "privilege against self-incrimination" as a description of the right of an accused to remain silent in response to police questioning and not in the testimonial sense. I take it that is the way that the term was being considered in the passages from the judgments in *DeClerq* and *Wray* that I have reproduced above.

The following passage from the judgment of Osler, J.A., in the case of *R. v. White* (1908), 15 C.C.C. 30 at p. 33, 18 O.L.R. 640, is relied upon in support of the admissibility of the confession tendered in this case:

Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made.

What is often overlooked, however, is what was stated by Osler, J.A., following the observation which I have set forth above, when he added at p. 34:

The authorities are cited in the text-books referred to. The latter writer adds: "Recent decisions, however, shew an increasing tendency to exclude evidence obtained by the police by unfair or irregular means;" and I have no doubt that in some circumstances it may appear that a confession so obtained ought to be regarded as not having been freely and voluntarily made, and as open, on principle, to the objection on which the rejection of evidence of that class is founded. The case of *Regina v. Histed* (1898), 19 Cox C.C. 16, is an illustration of what I refer to. Nothing in the present case, however, invites its application.

(Emphasis added.)

In the case of *R. v. Histed* (1898), 19 Cox C.C. 16, referred to by Osler, J.A., Hawkins, J., stated at p. 17:

I shall not allow this question to be put. It is a matter on which I hold a strong opinion. No one, either policeman or anyone else, has a right to put questions to a prisoner for the purpose of entrapping him into making admissions. A prisoner must be fairly dealt with.

(Emphasis added.)

With respect to the contrary view, I still hold to the view that I expressed in *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 at p. 404, 29 C.R.N.S. 141 at p. 163, when I stated:

I regard a statement by a person in authority to an accused as to his legal rights, as being quite different than the type of a trick or artifice referred to by Osler, J.A., in the *R. v. White* case, *supra*, when he made the general observation at p. 34:

... it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made.

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The public can hardly be expected to have respect for the law when those entrusted with its law enforcement do not scrupulously adhere to it.

In the article by Chief Justice Freedman already referred to, the following additional comments made by him are, in my opinion, very apt to the issue here being considered:

It is justice then that we seek, and within its broad framework we may find the true reasons for the rule excluding induced confessions. *Undoubtedly, as already stated, the main reason for excluding them is the danger that they may be untrue. But there are other reasons, stoutly disclaimed by some judges, openly professed by others, and silently acknowledged by still others — the last perhaps being an instance of an "inarticulate major premise" playing its role in decision-making. These reasons, all of them, are rooted in history. They are touched with memories of torture and the rack, they are bound up with the cause of individual freedom, and they reflect a deep concern for the integrity of the judicial process.*

(Emphasis added.)

In the case of *Escobedo v. Illinois* (1964), 378 U.S. 478, Justice Goldberg, speaking for the majority of the Supreme Court of the United States, wrote in a similar vein when he stated at pp. 488-9:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

"Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." 8 Wigmore, Evidence (3d ed. 1940) 309. (Emphasis in original.)

[Additional emphasis added.] And at p. 490: "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

I do not comment on the actual issue in the *Escobedo* case nor its relevancy to our judicial system, but nevertheless I am of the view that the observations from that judgment above set forth are persuasive on the issue here.

Although the right to remain silent after arrest in response to police questioning about the subject-matter of the offence alleged is not a constitutional right, as was the matter in issue in the *Escobedo* case, it is nevertheless a fundamental principle in the ad-

ministration of justice. It would, indeed, be a hollow right if one could be deprived of it by the simple device of being falsely persuaded that the questioner was not a police officer.

It is not without significance that the only evidence tendered in this case was that of the verbal statement given to the police officer in the circumstances that I have already outlined. The implicit danger of such a practice must be apparent.

In my opinion, this case is quite distinguishable from those many cases which have held that evidence obtained by police stratagems in the course of investigation of crime and even after arrest have been held to be admissible.

I do not read the judgment in the case of *R. v. Wray, supra*, as holding that in the instant case the learned trial Judge had no discretion and was compelled by law to admit the proffered evidence. It is to be observed that in the *Wray* case the confession of the accused had been held to be inadmissible and that ruling was not in issue on the appeal. The issue was whether, notwithstanding that the confession was inadmissible, the Crown was, nevertheless, entitled to prove not only the finding of the rifle but also the fact that its location was pointed out to the police by the respondent, and to give in evidence so much of the confession as was verified by the fact of the finding. In my respectful opinion the case did not touch on the issue as to whether there was a judicial discretion as to the admissibility of the confession as such.

That such a discretion exists is to be found in the *Ibrahim* case itself. The rules embodying the admissibility of confessions have always been viewed as somewhat special to that issue.

Since I am of the view that it was open to the trial Judge to take into consideration the manner in which the confession was obtained and that he was correct in excluding it, it is unnecessary for me to determine whether the finding could be viewed as a finding of fact only, with respect to which there would be no right of appeal by the Crown.

In the result therefore, I would have dismissed this Crown appeal.

WEATHERSTON, J.A. concurs with JESSUP, J.A.

Appeal allowed; new trial ordered.

REGINA v. LUCKETT

British Columbia Court of Appeal, Paras. C.J.B.C., Teggart, Carstairs, Harrison and Greig, J.J.A. June 29, 1978.

Included offences — Robbery and attempt to commit — Indictment charging that Leave to appeal to the Supreme Court of Canada granted (Hartman, Spence and Beetz, J.J.) December 5, 1978.

R. v. TOWLER, 2 C.C.C. 335

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REGINA v. TOWLER

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REGINA v. TOWLER

*British Columbia Court of Appeal, McFarlane, Robertson and Nemetz, JJ.A.
July 19, 1968.*

Evidence - Admissions - Accused while in custody making inculpatory statements to R.C.M.P. officer and police agent believing them to be criminals - Whether persons in authority.

Evidence - Opinion evidence - Inculpatory statements made while in custody to persons believed to be criminals - Psychiatrist testifying on voir dire that little credence be placed on such statements in view of accused's personality - Whether evidence should be considered on voir dire.

The accused while in custody following his arrest on a charge of non-capital murder made certain inculpatory statements to two persons, one of whom was a sergeant attached to the R.C.M.P. and the other, a police agent. The two men had concealed their true identity and succeeded in making the accused believe that they were criminals. On the *voir dire*, to determine the admissibility of the statements, the defence called a psychiatrist, who testified that little credence ought to be placed on the statements made by the accused in the circumstances having regard to his personality. The trial Judge ruled the statements admissible on the ground that they had not been obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority. He further stated that he did not find it necessary to rule upon the admissibility of the psychiatric evidence. The accused was convicted and he appealed, *inter alia*, on the ground that the statements had been improperly admitted. *Held*, the appeal should be dismissed. The evidence of the psychiatrist was not relevant to the issue on the *voir dire*, namely whether the statements were voluntary. The evidence related to the truth or falsity of the statements which was not a matter for proper consideration. The trial Judge had properly directed himself as to whether the statements were obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority in accordance with the rule laid down in *Boudreau v. The King*, 94 C.C.C.1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262. His finding that the statements were voluntary was supported by the evidence and should not be disturbed. In any event, the persons to whom the statements were made were not persons in authority vis-a-vis the accused. The question whether a person is one in authority must be considered subjectively from the point of view of the effect on the mind of the accused. It cannot be said that the mind of an accused might be affected by inducements held out by persons in authority where the accused does not himself think that the persons who made the inducements were persons in authority.

[*Boudreau v. The King*, 94 C.C.C.1, [1949] 3 D.L.R. 81, 7 C.R. 427, [1949] S.C.R. 262, apld; *Ibrahim v. The King*, [1914] A.C. 598; *R. v. Fitton*, 116 C.C.C.1, 6 D.L.R. (2d) 529, 24 C.R. 371, [1956] S.C.R. 958; *Chan Wei Keung v. The Queen*, [1967] 2 A.C. 160; *Commissioners of Customs and Excise v. Harz*, [1967] 1 A.C. 760; *R. v. Tadd* (1901), 13 Man. R. 384; *R. v. Barrs*, 86 C.C.C.9, [1946] 2 D.L.R. 655, 1 C.R. 301, [1946] 1 W.W.R. 328; *R. v. Demenoff*, [1964] 1 C.C.C. 118, 43 W.W.R. 610, folld]

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Order accordingly.

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CANADIAN CRIMINAL CASES 1969 VOL. 2

REGINA

APPEAL by the accused from his conviction on a charge of non-capital murder, following a trial before Gould, J., and a jury.

J.D. McAlpine and *H. McLaughlin*, for accused, appellant.
T.G. Bowen-Colthurst, for the Crown, respondent.

The judgment of the Court was delivered by

McFARLANE, J.A.:—The appellant appeals against his conviction of non-capital murder at his trial before Gould, J., and a jury. The case for the Crown was that the appellant shot and killed the deceased (*Criminal Code*, s. 201), and that he did so while committing the offence of robbery at her grocery store, having on his person and using a gun (*Code*, s. 202). It was not denied that the appellant was in the grocery store at the relevant time, that he had a gun in his hand and that the deceased was killed by a bullet fired from that gun. The defences were: First, that the appellant was incapable, through the effects of heroin and alcohol upon his particular personality, of forming either of the intents described in s. 201, or of forming the intent to rob; and secondly, that he was insane at the time of the killing.

The evidence for the Crown included inculpatory statements made by the appellant to three witnesses who were not police or other persons in authority. No error was suggested by the appellant's counsel relating to the admissibility of those statements nor to the learned Judge's charge to the jury respecting them. I add that I can find no such error. The Crown called two other witnesses who testified that the appellant made inculpatory statements to them while he, the appellant, was in custody at Prince George about 10 to 12 days after the killing. One of these witnesses was an experienced sergeant of the R.C.M.P. The other was a man with an unsavory record of crime who was working "undercover" as a police agent. These two men, of course, concealed their true identities from the appellant and apparently succeeded in making him believe that they were criminals of experience and interested in having the appellant join them, when they should all be released from gaol, in future criminal activities if they could be persuaded that he could be relied upon to participate with them. The result according to the evidence of these two witnesses was that the appellant boasted to them of the manner in which he had effected a robbery at the grocery store and had shot and killed the Chinese woman named in the indictment.

On the *voir dire*, following the ruling of the trial judge that the evidence of these witnesses was admissible, the learned Judge called a psychiatrist, to whose evidence the appellant objected. The learned Judge ruled the evidence of these witnesses was admissible, and that in his opinion little credit should be given to the statements made by the appellant in the environment which I have described. The learned Judge found the appellant's type of personality such that his evidence was admissible, and that it was not necessary to decide whether the psychiatrist's evidence on this point was admissible.

The appellant's first submission was that the inculpatory statements made by the appellant were admitted on a broad basis, and that the *ratio* of decisions which have been made on this point is not the real basis for excluding the evidence. In other words, it was argued that the voluntariness of confessions made by the appellant provides the real basis for their admissibility, and that the fact that the appellant is an accused person protects an accused person from the admission of such evidence. Much support for this view can be found in the cases, but has, however, been developed in the cases which constitute an exception to the rule that confessions against interest are admissible. It is the rule of the Courts rather than an attempt to be the reason for the rule. As expressed by Rand, J., in *A.-G. v. Oakes* [1956] S.C.R. 819, where in determining the voluntariness of a confession by the Courts (for determining the voluntariness of a confession) he said at p. 455:

"The trial Judge and the Appeal Judge [1955] 5 D.L.R. 211, considered the elements which are considered pertinent to the voluntariness of a confession embraced within it nor can they supply a want of what the appellant was in that condition."

The relevant rule as it is stated in the *Code* in Canada was stated clearly in the *Code* of Canada in *Boudreau* [1949] 3 D.L.R. 81, [1949] S.C.R. 211, where it was held that a confession must be voluntary, but that the word "voluntary" is given

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On the *voir dire*, following which the learned trial Judge ruled the evidence of these two witnesses admissible, the defence called a psychiatrist, the effect of whose evidence was that in his opinion little credence ought to be placed on statements made by the appellant in the circumstances and environment which I have described briefly, having regard to the appellant's type of personality. In giving his decision that the evidence was admissible the learned Judge stated that he did not find it necessary to decide or rule upon the admissibility of the psychiatrist's evidence on the *voir dire*.

The appellant's first submission in support of his ground of appeal that the inculpatory statements should not have been admitted was put on a broad basis. It was argued that the true *ratio* of decisions which have held such statements inadmissible and the real basis for exclusion is the danger that they may be untrue. In other words, it was argued, it is the untrustworthiness of confessions made as a result of inducements which provides the real basis or reason for the rule of law which protects an accused person from their being used against him. Much support for this view can be found in authority. The rule has, however, been developed and formulated by the Courts and constitutes an exception to the general rule that statements against interest are admissible in evidence against the persons who make them. It is the rule so formulated which must guide the Courts rather than an attempt to apply what may be thought to be the reason for the rule. I respectfully adopt the view expressed by Rand, J., in *A.-G. B.C. v. Neilson*, 5 D.L.R. (2d) 449, [1956] S.C.R. 819, where in discussing another rule formulated by the Courts (for determining the boundaries of accreted land), he said at p. 455:

"The trial Judge and O'Halloran J.A. in the Court of Appeal [[1955] 5 D.L.R. 56] introduced into the idea of accretion elements which, while they may have been considered pertinent to the formulation of the rule, are not embraced within it nor can they be taken into account to supply a want of what the rule calls for as its necessary condition."

The relevant rule as it is to be applied in criminal trials in Canada was stated clearly and authoritatively by the Supreme Court of Canada in *Boudreau v. The King*, 94 C.C.C.1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262. To be admissible the statement must be voluntary, but for the purposes of the rule the word "voluntary" is given a special legal meaning. In the

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Boudreau case the Supreme Court adopted the statement of Viscount Sumner in *Ibrahim v. The King*, [1914] A.C. 599, at pp. 609-10, as follows:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

The rule was restated and applied in *R. v. Fitton*, 116 C.C.C. 1, 6 D.L.R. (2d) 529, [1956] S.C.R. 958. The onus was upon the Crown to prove beyond a reasonable doubt that the statements were made voluntarily in the sense so explained. The decision whether the Crown satisfied that onus was for the trial Judge. He having ruled the statements admissible as voluntary in that sense it became the function of the jury to decide what weight, if any, should be given to them, having regard to all of the circumstances under which they were made and the evidence regarding the nature of the person who made them, *vide Chan Wei Keung v. The Queen*, [1967] 2 A.C. 160 (P.C.).

Appellant's counsel submitted also that the learned trial Judge erred in holding that no inducements to speak were made to the appellant by the two witnesses. The question for determination by the trial Judge was whether the statements were obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority. This was a matter of fact or of mixed law and fact to be decided by the trial Judge in deciding which he applied his mind to the proper guiding principle and there is evidence to support his finding.

The learned trial Judge in his reasons for admitting the evidence of the statements said, *inter alia*:

"In my view there was no inducement to speak of this alleged crime, none at all."

and pointed out that a charge of murder although contemplated, had not been made at that time. Appellant's counsel submits that this constitutes error. He says the fear of prejudice or hope of advantage need not be related to the particular offence on the trial of which the Crown seeks to prove the inculpatory statements. In support of his position he cited *Commissioners of Customs and Excise v. Harz*, [1967] 1 A.C. 760, in which

this much debated point was reviewed. In the result the High Court's counsel's submission and the learned Judge's decision were of persuasive value. I can not say the learned Judge's decision was wrong because of the High Court's statement that the inducement to the charge of murder was an additional reason for a conclusion that the confession was definitely and made on an entirely different evidence was not excluded in *The King, supra*. Moreover, the High Court were not vis-a-vis the appellant's meaning of that rule.

Appellant's counsel submitted also that the admissibility of the statements should have depended on the *voir dire* of the psychiatrist. I can not agree. As I have said, the truth or falsity of the statements is to the question whether they were made in a sense of being induced by pressure.

It was submitted also that the learned trial Judge held that the two witnesses were not in authority. It was immaterial that the appellant was in fact a police officer and that it was clear in reason and common sense that he considered subjectively from the mind of the appellant. If he was affected by inducements held out by the witnesses he does not think that the witnesses are persons in authority. Followed by this Court and other appeals in *Todd* (1901), 13 Man. R. 364 to detectives posing as criminals. Appeal for Manitoba that the appellant, whom the confession was made in authority could not know or be influenced by the fact that the witnesses were in authority. Bain, J., said at

"Now it is expressly stated that the prisoner made the admission in the knowledge of any facts

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REGINA v. TOWLER

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this much debated point was considered and the authorities reviewed. In the result the House of Lords decided in favour of counsel's submission and the judgment has of course highly persuasive value. I can not, however, accept the argument that the learned Judge's decision to admit the statements in this case was wrong because of this consideration. The learned Judge's statement that the inducements, if any, did not relate to the charge of murder then being tried was made as an additional reason for a conclusion otherwise stated clearly and definitely and made on entirely proper grounds, *i.e.*, that the evidence was not excluded by the rule adopted in *Boudreau v. The King*, *supra*. Moreover, as will appear, the two witnesses were not vis-a-vis the appellant persons in authority within the meaning of that rule.

Appellant's counsel submitted further that before ruling on the admissibility of the statements the learned trial Judge should have decided on the admissibility of the evidence on the *voir dire* of the psychiatrist and should have given effect to it. I can not agree. As I have stated that evidence related to the truth or falsity of the statements, a matter for the jury, and not to the question whether they were made voluntarily in the legal sense of being induced by persons in authority.

It was submitted also that the learned Judge should have held that the two witnesses were persons in authority, and that it was immaterial that the appellant did not know that they were in fact a police officer and a police agent, respectively. I think it clear in reason and common sense that the matter must be considered subjectively from the point of view of the effect on the mind of the appellant. It can not be said that his mind was affected by inducements held out by persons in authority when he does not think that the persons who make the inducements are persons in authority. Further, the point has been considered by this Court and other appellate Courts in Canada. In *R. v. Todd* (1901), 13 Man. R. 364, a confession of murder was made to detectives posing as criminals. It was held by the Court of Appeal for Manitoba that even if the detective (Yeddeau) to whom the confession was made could be considered a person in authority could not know or suspect it and could not therefore be influenced by the idea that Yeddeau was a person in authority. Bain, J., said at p. 376:

"Now it is expressly stated in the case that when the prisoner made the admissions he was without notice or knowledge of any facts that could constitute either of the

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two men persons in authority; and, this being so, it could not be contended that as to the prisoner they were persons in authority; and *cessante ratione, cessat lex.*"

R. v. Barrs, 86 C.C.C. 9, [1946] 2 D.L.R. 655, 1 C.R. 301, was a case in which the accused made an inculpatory statement to one Mitchell. In the course of delivering the judgment of the Appellate Division of the Supreme Court of Alberta, Harvey, C.J.A., said at p. 13:

"On the evidence that was before the Court, we see no justification for the view that Mitchell was a person in authority. It is stated that he had no authority from anyone to do anything but 'keep his ears open' and repeat what he heard, nor was there any reason for appellant to think he was a person in authority, and so be induced to say anything for fear or hope of favour. As far as could appear to appellant, Mitchell was merely a person serving a sentence."

In *R. v. Demenoff*, [1964] 1 C.C.C. 118, 43 W.W.R. 610, Wilson, J.A. (as he then was), dealing with a confession made as a consequence of the influence of one Lebedoff on the prisoner, said at p. 133:

"... there is no evidence that Lebedoff was a person in authority or a person whom the accused might reasonably believe to be a person in authority."

For these reasons I think this ground of objection fails.

Appellant's counsel submitted further that the learned trial Judge failed to direct the jury's attention sufficiently and adequately to all of the circumstances relevant to the truth or falsity of the statements and in particular the truth or falsity of those parts of the statements which bear directly on the issues of intent under ss. 201 and 202 and of sanity. These circumstances include the psychiatrist's evidence as to the appellant's personality and susceptibility, and the environment of custody and criminality in which the statements were made. I do not propose to quote extracts from the learned Judge's charge which relate to this ground of appeal. Taking extracts from a charge is not a proper or satisfactory method by which to support or attack a Judge's instructions to a jury. The charge in this case is recorded in some eighty pages of the appeal book. I have considered it as a whole with care, and in the light of the able addresses of counsel and of the statements

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[1952] 2 S.C.R. 495, as
105 C.C.C. 97, 16 C.R. 1
Workman, R. v. Huculak,
S.C.R. 266.

I would accordingly disr

RE:

Prince Edward Island Supreme

Appeal - Summary convic
Appeal under Cr. Code, s. 7
Jurisdiction of Court of App
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[*Vail v. The Queen ex re*
913, 33 W.W.R. 325, apld; :
Ltd., 114 C.C.C. 337, [195
rel. Scullion v. Canadian
Gallant (1947), 90 C.C.C. 8
Canadian Foundation (1960)

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REGINA v. PETRIE

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made by the appellant to three other witnesses mentioned earlier. I am satisfied that the members of the jury were made well aware of their responsibility and of the issues they were called upon to decide. The charge so far as discussion of evidence of assistance to the defence is concerned satisfies the test enunciated in *Azoulay v. The Queen*, 104 C.C.C. 97, 15 C.R. 181, [1952] 2 S.C.R. 495, as explained in *Kelsey v. The Queen*, 105 C.C.C. 97, 16 C.R. 119, [1953] 1 S.C.R. 220 and *R. v. Workman, R. v. Huculak*, [1963] 2 C.C.C. 1, 40 C.R. 1, [1963] S.C.R. 266.

I would accordingly dismiss the appeal.

Appeal dismissed.

REGINA v. PETRIE

Prince Edward Island Supreme Court, Campbell, C.J., Bell and Trainor, JJ.
July 25, 1968.

Appeal - Summary convictions - Stated case - Appeal to Court of Appeal under Cr. Code, s. 743(1) from decision of superior Court - Jurisdiction of Court of Appeal restricted to question of law alone - Provisions with respect to indictable offence appeals made applicable *mutatis mutandis* - Power of Court of Appeal to entertain appeal on questions of fact and mixed law and fact in indictable offence appeals - Whether Court of Appeal has same jurisdiction in appeals under s. 743(1) - Cr. Code, ss. 743(1)(2), 583(a)(ii).

The jurisdiction of the Court of Appeal in summary conviction appeals under s. 743(1) of the *Criminal Code* is restricted to grounds involving questions of law alone. The provisions of 743(2) (rep. & sub. 1960-61, c. 43, s. 45) which make ss. 581 to 595 (indictable offence appeals) applicable *mutatis mutandis* to an appeal under s. 743(1) do not enlarge the jurisdiction of the Court of Appeal so as to allow it to entertain appeals based on grounds involving questions of fact or mixed law and fact. Section 743(2) is limited in its effect to matters of procedure.

[*Vail v. The Queen ex rel. Dickson*, 129 C.C.C. 145, [1960] S.C.R. 913, 33 W.W.R. 325, apld; *Scullion v. Canadian Breweries Transport Ltd.*, 114 C.C.C. 337, [1956] S.C.R. 512, 24 C.R. 223 *sub nom. R. ex rel. Scullion v. Canadian Breweries Transport Ltd.*, *consd.*; *R. v. Gallant* (1947), 90 C.C.C. 37, 4 C.R. 417, 20 M.P.R. 105; *Re Donner Canadian Foundation* (1960), 26 D.L.R. (2d) 274, *reft to*]

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

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COURT OF APPEALS
STATE OF WASHINGTON
2009 FEB 20 PM 4:45

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 55217-1-I
)	
ATIF RAFAY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF FEBRUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ATIF RAFAY
DOC NO. 876362
MCC/WASHINGTON STATE REFORMATORY
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF FEBRUARY 2009.

x *Patrick Mayovsky*